

**STATE OF CALIFORNIA**

**COMMISSION ON JUDICIAL PERFORMANCE**



**1985 ANNUAL REPORT**

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## TWENTY-FIFTH ANNUAL REPORT

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## TWENTY-FIFTH ANNUAL REPORT

### In Recognition of THE FIRST MEMBERS OF THE COMMISSION

Their vision in interpreting and executing their mission has had a lasting impact upon the administration of justice in California and throughout the nation.



*Back Row, left to right:*

Mr. Benjamin H. Swig; Judge Cecil E. Edgar; Mr. Hugh H. Evans;  
Edward W. Schramm, Esq.; Irving M. Walker, Esq.

*Front row, left to right:*

Judge Ben V. Curler; Judge Louis H. Burke; Justice A. F. Bray, Chairman,  
Justice Lloyd E. Griffin

## COMMISSION MEMBERS



**HONORABLE JOHN T. RACANELLI**, Chairperson  
Presiding Justice, Court of Appeal  
First Appellate District, Division One  
San Francisco  
Appointed June 1977  
Present term expires November 1988



**HONORABLE RICHARD A. BANCROFT**  
Vice Chairperson  
Judge of the Superior Court  
Oakland  
Appointed August 1981  
Present term expires November 1988



**JOSEPH W. COTCHETT**  
Attorney Member  
San Mateo  
Appointed January 1985  
Present term expires December 1989



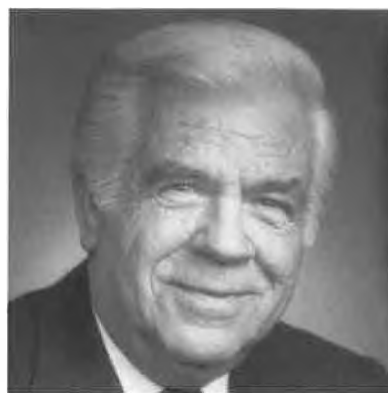
**HONORABLE CHARLES E. GOFF**  
Judge of the Municipal Court  
San Francisco  
Appointed February 1981  
Present term expires January 1988



**ANDY GUY**  
Public Member  
Lodi  
Appointed November 1985  
Present term expires October 1989



**DALE E. HANST**  
 Attorney Member  
 Santa Barbara  
 Appointed January 1985  
 Present term expires December 1989



**BEN NOBLE**  
 Public Member  
 La Canada Flintridge  
 Appointed March 1984  
 Present term expires May 1987



**HONORABLE SARA K. RADIN**  
 Judge of the Superior Court  
 Los Angeles  
 Appointed September 1985  
 Present term expires February 1987

★ ★ ★



**HONORABLE ROBERT O. STANIFORTH**  
 Associate Justice, Court of Appeal  
 Fourth Appellate District, Division One  
 San Diego  
 Appointed December 1979  
 Present term expires March 1989

★ ★ ★

**JACK E. FRANKEL**  
 Director-Chief Counsel

**PETER GUBBINS**  
 Investigating Attorney

**CYNTHIA DORFMAN**  
 Investigating Attorney

# I

## DEVELOPMENT OF THE COMMISSION ON JUDICIAL PERFORMANCE, 1960 – 1985

On November 8, 1960, California voters approved a Constitutional amendment which created this Commission and empowered the Supreme Court to retire a judge for permanent disability or to remove a judge for “wilful misconduct in office” on the Commission’s recommendation.

From the perspective of twenty-five years, the development of the California Commission can be sketched in three stages:

- 1961–1966 original charter to 1966 amendments;
- 1966–1976 amended charter to 1976 amendments;
- 1976–1985 1976 amendments to present.

During the Commission’s first five years, thirty-nine judges under investigation resigned or retired, but the first recommendation of removal was rejected by the Supreme Court. This case exposed a flaw in the fledgling process: because there was no discipline or any sanction short of removal, the Commission’s recommendation had presented the Court with the limited option of either imposing the sole disciplinary measure of removal for wilful misconduct, or dismissal of the proceedings.

To remedy this deficiency, broadening amendments were adopted in 1966 to add a lesser sanction, public censure, and to provide as an additional ground for discipline “conduct prejudicial to the administration of justice that brings the judicial office into disrepute.” Over the next ten years, the Court ordered three judges removed and imposed four public censures. The opinions in these cases elucidated clear legal precepts which established the substantive and procedural bases for imposition of judicial discipline, including:

- a definition of the ultimate standard for judicial conduct;
- definitions of wilful misconduct and conduct prejudicial;
- the requirement of an objective test for judicial misconduct;
- the applicable standard of evidence and burden of proof;
- application of the Canons of Judicial Ethics in misconduct cases;
- the requirements of procedural due process for judges;
- factors to be considered in mitigation;
- the requirements of confidentiality in Commission proceedings;
- judicial misconduct in applying or interpreting statutes.

During this same period (1966–76), additional limitations had become apparent: there was no adequate remedy for nonfeasance or gross incompetence, the failure or inability to perform judicial duties, and a category of lesser transgressions existed which warranted sanction short of censure or removal by some official, non-public action.

Amendments which addressed these deficiencies were adopted in 1976. In addition to wilful misconduct and conduct prejudicial, “persistent failure or inability to perform the judge’s duties” became a ground for censure or removal. In 1978, a public censure resulted from a judge’s lengthy delays in deciding cases; the Court accepted the Commission’s censure recommendation based on the judge’s “persistent failure to perform.”

The 1976 Amendments also added to the Commission’s Constitutional charter the power of “private admonishment” of a judge for an improper action or dereliction of duty. By Court Rule implementing this added language, a private admonishment imposed by the Commission may be introduced in a subsequent proceeding to prove that a judge’s conduct is persistent or habitual, or to determine what level of discipline should result.

Since 1981, the Supreme Court in six orders of censure and two of removal has extended, clarified and refined the high standards of judicial conduct defined in the early cases. The Court has reaffirmed its willingness to consider as grounds for discipline the full spectrum of judges’ conduct and character, from the failure of a judge to discharge official duties, to the wilful misinterpretation and misapplication of law, and its opinions have underscored the negative effect of a judge’s off-the-bench misconduct on the administration of justice.

In the last twenty-five years, each of the other 49 states and the District of Columbia have created similar agencies following, to varying degrees, the California model. A body of law on judicial discipline has developed, and cases are collected, indexed and reported on a national basis by the Center for Judicial Conduct Organizations, a clearinghouse sponsored by the American Judicature Society.

Commission disciplinary jurisdiction derives from California Constitution, Article VI, Section 18(c)<sup>1</sup>; California Government Code, Sections 68701 through 68704 (General Provisions), Sections 68725 and 68726 (Cooperation of Public Officers and Agencies) and Sections 68750 through 68755 (Investigations and Hearings); California Rules of Court 901–922 (Rules for Censure, Removal, Retirement or Private Admonishment of Judges).

When the Commission is asked about a particular judge or particular alleged complaint, the Constitution and the Rules of Court require that Commission proceedings remain confidential unless a record is filed in the Supreme Court. Article VI, Section 18(f), California Constitution, Rule 902(a), *Mosk v. Superior Court*, 25 Cal.3d 474, 159 Cal.Rptr. 494, 601 P.2d 1030.

Since 1967, a non-disciplinary function, approval of judges’ applications for voluntary disability retirement, has been exercised jointly by the Commission and the Chief Justice under the provisions of California Government Code, Section 75060, et seq.

Appendix 1. contains a chronological listing of reported Commission disciplinary cases.

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1 (c) On recommendation of the Commission on Judicial Performance the Supreme Court may (1) retire a judge for disability that seriously interferes with the performance of the judge’s duties and is likely to become permanent, and (2) censure or remove a judge for action occurring not more than 6 years prior to the commencement of the judge’s current term that constitutes wilful misconduct in office, persistent failure or inability to perform the judge’s duties, habitual intemperance in the use of intoxicants or drugs or conduct prejudicial to the administration of justice that brings the judicial office into disrepute. The commission may privately admonish a judge found to have engaged in an improper action or a dereliction of duty, subject to review in the Supreme Court in the manner provided for review of causes decided by a court of appeal.

## II

### SUMMARY OF COMMISSION DISCIPLINARY ACTIVITY IN 1985

At the close of 1985, there were 1356 California judicial positions:

Justices of the Supreme Court	7
Justices of Courts of Appeal	73
Judges of Superior Courts	679
Judges of Municipal Courts	515
Judges of Justice Courts	82

Three hundred seventeen complaints were filed with the Commission in 1985. Two hundred sixty-three of these, or eighty-three percent, were closed upon initial review because the complaints contained no actionable allegations of judicial misconduct or wrongdoing. Most of these were expressions of disagreement with legal rulings, orders or decisions, or dissatisfaction with judges' exercise of judicial discretion.

The Commission conducted some inquiry or investigation in fifty-four matters. The subject judges were contacted in forty-seven of these inquiries. Preliminary investigations pursuant to Rule 904 were initiated in eleven instances. The Commission issued Notices of Formal Proceedings following six of these investigations, and four hearings were conducted in 1985. Two judges resigned after initiation of formal proceedings.

Six formal proceedings were carried over into 1986. Eight other matters were pending at the close of the Commission's last meeting on November 21/22, 1985, and were carried forward into 1986. The Commission met eight times in 1985 in two one-day and six two-day meetings.

There is a statistical summary of Commission disciplinary action for the five-year period 1981-1985 in Appendix 2.

## III

### PUBLIC DISCIPLINE

The Commission filed one recommendation for public discipline in 1984 which was decided in 1985. Following a hearing before three Special Masters, the Commission recommended that the Supreme Court publicly censure a Fresno Superior Court Judge for "conduct prejudicial to the administration of justice that brings the judicial office into disrepute" based on extraordinary delay in the decision of fourteen cases, and execution of salary affidavits and receipt of salary during periods in which these cases had been under submission in excess of ninety days.<sup>2</sup> The Court adopted the Commission's recommendation in an unsigned, 18-page Opinion, *Mardikian v. Commission on Judicial Performance* (1985) 40 Cal.3d 473.

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<sup>2</sup> California Constitution, article VI, section 19, provides "... A Judge of a court of record may not receive the salary for the judicial office held by the judge while any cause before the judge remains pending and undetermined for 90 days after it has been submitted for decision." Government Code, section 68210 requires a judge of a court of record to state monthly by affidavit that no case is pending and undetermined for 90 days after submission in order to receive his or her salary. The Court pointed out that neither this constitutional provision nor Government code section 68210 mandates that cases be decided within 90 days of their submission. "Nonetheless, the 90-day provision which has been a part of the Constitution since its adoption in 1879, and section 68210 (which in 1966 replaced the affidavit requirement formerly in the Constitution) reflect the judgment of the Legislature and the electorate that this period affords a reasonable time within which to expect a trial judge to carry out the basic responsibility of a judge to decide cases under Code of Civil Procedure, section 170."



There was little dispute as to the facts: between December, 1980, and November, 1983, Judge Mardikian had failed to decide 14 cases within 90 days of their submission; the later seven of these cases had remained undecided for periods in excess of the statutory and constitutional time notwithstanding prior investigation by and communication from the Commission regarding the delays in deciding the first seven of the 14 cases. During the period in which the cases submitted to him for decision remained undecided in excess of 90 days, Judge Mardikian had made orders "resubmitting" some or all of the 14 cases without request by or consent of the parties or their counsel, and had executed salary affidavits and received his judicial salary.

The Commission had rejected proposed findings that the delays were the product of 'an intentional disregard of and refusal to perform judicial duties;' that many of the salary affidavits which petitioner executed were 'false and knowingly believed to be false;' and that petitioner 'deliberately and intentionally attempted to evade constitutional and statutory requirements by resubmitting undecided cases.' The Commission concluded, in part, that petitioner was *not* guilty of 'persistent failure or inability to perform his judicial duties.'

The Court focused on the Commission's findings that the resubmission orders which petitioner made in the 14 cases were made 'without good cause,' and on the Commission's and Masters' conclusion overall that petitioner was guilty of 'conduct prejudicial.' The Court expressed reservations about the findings in light of Petitioner's reputation for hard work and diligence, his health and family problems and the Fresno Court's high-volume case load and inadequate support staff, but agreed that there were factors present which supported the Commission's conclusion.

The following highlighted excerpts are presented as illustrative of the bases for the Court's imposition of discipline:

**1. Assigning Priorities Can Minimize Impact of Delay:**

A trial judge confronted with a workload which prevents him from deciding all cases promptly can at least minimize the impact of delay so far as possible, by assigning priorities which take into account the time necessary to decide, and the effect of delay upon the parties in, particular matters. This petitioner apparently did not do. As the Special Masters observed in their report to the Commission, eight of the fourteen cases in which decision was delayed involved the dissolution of a marriage with attendant questions, such as child custody, particularly demanding of prompt resolution.

**2. There Was No Explanation Why the Subject Cases Were Delayed:**

The evidence also supports a conclusion that many of the cases were not complex and might have been decided with relative ease and little expenditure of time shortly after submission. The examiners bear the burden of proving by 'clear and convincing evidence sufficient to sustain [the] charge to a reasonable certainty' the commission of conduct warranting censure or removal of a judge from office. [Case citation omitted.] The accused, however, has the burden of coming forth with evidence to explain or justify the conduct if he claims that it does not warrant discipline. (Cal. Rules for the Censure, etc. of Judges, rule 908(b).) Yet, the record does not contain evidence that petitioner gave any consideration to the interests of those litigants whose cases had been under submission for the longest periods, or that he made any effort to establish a schedule of priorities that would give precedence to resubmitted cases

over cases tried subsequent to the original submission of those long delayed cases. There is simply no explanation why these cases were not decided before other cases that were tried in the 18-month period during which the resubmissions occurred.

### **3. Routine Resubmissions Cannot Be Condoned:**

Under these circumstances, petitioner's practice of routinely resubmitting matters which have been long delayed cannot be condoned. We assume, as does the Commission in its findings, that there may be extraordinary circumstances which will justify resubmission of particular cases that have been pending for longer than 90 days. To permit routine utilization of resubmission orders, however, would make a mockery of the constitutional mandate.

### **4. Personal Difficulties Cannot Be Accepted as Justification Per Se:**

Finally, the physical and emotional difficulties that petitioner experienced during a portion of the period in question, while they certainly merit sympathy and may serve in mitigation of the sanction, cannot be accepted as justification per se. A judge who is disabled from performing his duties in timely fashion has an obligation to seek relief, even to the extent of withdrawing temporarily or permanently from the functions of his office if the circumstances require it. His conduct as a judge must be evaluated on the basis of objective criteria applicable to all judges similarly situated within the system.

### **5. Some Guidance to Trial Courts Offered in Footnote:**

Footnote 11: In the case of the Court of Appeal, rule 22.5(b) provides that a submission may be vacated and resubmitted by an order 'stating the reasons therefor.' No comparable rule exists for trial courts. There is a difference, obviously, between the collegial context of an appellate tribunal, in which the concurrence of more than one justice is required for the decision of a cause, and a trial court in which the decisional process is normally within the control of an individual judge. Nonetheless, the Commission concedes, and we agree, that a superior court has inherent power to order vacation of submission given a proper demonstration of cause.

The Commission suggests that proper cause would exist if the parties stipulate to vacation of the order, on the basis of a change of circumstances, or if there exist 'extraordinary circumstances' such as sudden illness which prevents the judge from attending to his duties for a protracted period of time, and where reassignment of the matter would cause a delay of equal or greater length. It would be unwise, we think, for this court to attempt an exhaustive definition of good cause absent preliminary guidance from the Judicial Council. Conformity with rule 22.5 by trial court judges in the interim, by stating the reasons for any order vacating and resubmitting a cause, with notice of the order to the parties, should avoid the abuse which the Commission seeks to prevent.

### **6. Dissent:**

Two Justices dissented because of the absence of rule or authority for trial courts in the areas of submissions and priorities.

## IV

### PRIVATE DISCIPLINE

Most of the actionable complaints received in 1985 did not warrant, and were resolved through means short of, formal and public discipline.

Seven intended private admonishments issued in 1985, two of which were denominated Severe. One of these intended admonishments was withdrawn following the Judge's appearance before the Commission under Rule 904.5, and another was withdrawn following a hearing. The five imposed admonishments were issued based on the Commission's findings that the following had occurred:

A judge's manner tended to deprive some defendants of their right to assistance of counsel; in one case, the judge appeared to adopt a vengeful and punitive attitude towards a defendant;

A judge abused the judicial power by issuing an order sua sponte in a matter not in litigation or otherwise before the judge, and the judge's initial response to a Commission letter of inquiry regarding this action was disingenuous;

A judge's abuse of defense counsel in a single case deprived defendant of a fair and impartial trial;

A judge failed to decide a case for almost a year following filing of post-trial briefs, and there were accompanying aggravating circumstances;

Two judges engaged in unacceptable off-bench conduct outside of and unrelated to the performance of their judicial duties.

Sixteen matters were closed without official discipline, but the Commission expressed its disapproval and advised caution regarding a particular aspect of judicial behavior. The Commission's criticism in most of these matters was directed at the appearance of wrongdoing based on conduct by a judge or judges, including:

- inappropriate public comment about a pending case;
- a Presiding Judge's failure to report under Rules of Court a judge's lengthy absence due to illness;
- poor judgment in the manner in which a judge expressed his difference of opinion with a court official;
- deciding a case in favor of an absent plaintiff in a way which appeared to show partiality;
- apparent impropriety in granting an attorney's motion to vacate a small claims judgment in the absence of the other party;
- apparent favoritism shown by a judge's impatient interrupting of defendant to enter judgment for plaintiff;
- granting an ex parte motion to vacate a misdemeanor's guilty plea entered before another judge;
- unauthorized, informal disposition of a criminal case;

- acceptance of travel expenses from a County vendor;
- exhibiting unseemly impatience with a prospective juror;
- apparent discriminatory exercise of discretion in application of Court Rules regarding tape-recording;
- unacceptable displays of temper.

An additional four communications to judges pointed out apparent disregard of particular ethical precepts:

- actions giving the appearance of “home-towning” (favoring local litigants and attorneys) contrary to Canon 3’s requirement that a judge be fair and impartial;
- soliciting funds for civic or charitable activities in apparent violation of Canon 5;
- lending the prestige of the judicial office in a way that appeared to advance others’ private interests in violation of Canon 2;
- correspondence with the Commission which misrepresented the judge’s conduct.

## V

### VOLUNTARY DISABILITY RETIREMENT

If a judge, after holding office for two or more years, becomes unable to discharge efficiently the duties of his office by reason of mental or physical disability that is or is likely to become permanent, the judge may be retired for disability upon approval of the Commission and the Chief Justice. This is not part of the Commission’s Constitutional functions but derives from the Judges’ Retirement Act regarding voluntary retirement for disability. (California Government Code, Sections 75060, et seq.)

Since 1967, one hundred forty-five applications for disability retirement have been considered by the Commission. The Commission granted one hundred twenty-two of these requests and denied fourteen. Four applications were withdrawn prior to Commission action. Five disability retirements were initially denied by the Commission and later granted following legal action.

A judge seeking a retirement for disability executes a disability retirement request and files a medical certificate under penalty of perjury with supporting medical reports. The Commission may examine other medical and hospital reports and records and request additional medical data, ask for an independent evaluation of the existing data under an arrangement entered into with the Deans of the four medical schools of the University of California or arrange for the judge to submit to an independent medical examination for report to the Commission.

Following appropriate review and consideration of an individual disability application, the Commission votes its acceptance or rejection. Since the approval of the Commission and the Chief Justice are both required, only those approved are sent to the Chief Justice for attention.

The responsibility for implementation once the disability request is approved is in the Public Employees Retirement System, which administers the Judges’ Retirement Act.

The Senate Committee on Public Employment and Retirement has recently held hearings to consider the law which governs judicial disability retirements.

## APPENDICES

## COMMISSION CASES TO THE SUPREME COURT

**Stevens v. Commission on Judicial Qualifications**

61 Cal.2d 886 (1964)  
39 Cal.Rptr. 397  
393 P.2d 709

**In re Gerald S. Chargin**

2 Cal.3d 617 (1970)  
87 Cal.Rptr. 709  
471 P.2d 29

**In re Bernard B. Glickfeld**

3 Cal.3d 891 (1971)  
92 Cal.Rptr. 278  
479 P.2d 638

**In re Leopoldo Sanchez**

9 Cal.3d 844 (1973)  
109 Cal.Rptr. 78  
512 P.2d 302

**In re Antonio E. Chavez**

9 Cal.3d 846 (1973)  
109 Cal.Rptr. 79  
512 P.2d 303

**Geiler v. Commission on Judicial Qualifications**

10 Cal.3d 270 (1973)  
110 Cal.Rptr 201  
515 P.2d 1  
cert.den. (1974) 417 U.S. 932  
41 L.Ed.2d 235, 94 S.Ct. 2643

**McCartney v. Commission on Judicial Qualifications**

12 Cal.3d 512 (1974)  
116 Cal.Rptr. 260  
526 P.2d 268

**Spruance v. Commission on Judicial Qualifications**

13 Cal.3d 778 (1975)  
119 Cal.Rptr. 841  
532 P.2d 1209

**Cannon v. Commission on Judicial Qualifications**

14 Cal.3d 678 (1975)  
122 Cal. Rptr. 778  
537 P.2d 898

**McComb v. Commission on Judicial Performance**

19 Cal.3d Spec.Trib.Supp. 1 (1977)  
138 Cal.Rptr. 459  
564 P.2d 1

**McComb v. Superior Court of San Francisco, et al.**

68 Cal.App.3d 89 (1977)  
137 Cal.Rptr. 233

**In re Arden T. Jensen**

24 Cal.3d 72 (1978)  
154 Cal.Rptr. 503  
593 P.2d 200

**In re Charles Robert Roick**

24 Cal.3d 74 (1978)  
154 Cal.Rptr. 413  
592 P.2d 1165

**In re Robert S. Stevens**

28 Cal.3d 873 (1981)  
172 Cal.Rptr. 676  
625 P.2d 219

**Wenger v. Commission on Judicial Performance**

29 Cal.3d 615 (1981)  
175 Cal. Rptr. 420  
630 P.2d 954

**In re Hugo M. Fisher**

31 Cal.3d 919 (1982)  
184 Cal.Rptr. 296  
647 P.2d 1075

**In re Charles S. Stevens**

31 Cal.3d 403 (1982)  
183 Cal.Rptr. 48  
645 P.2d 99

**Gonzalez v. Commission on Judicial Performance**

33 Cal.3d 359 (1983)  
188 Cal.Rptr. 880  
657 P.2d 372  
appeal dismissed, 104 S.Ct. 690 (1984)

**Roberts v. Commission on Judicial Performance**

33 Cal.3d 739 (1983)  
190 Cal. Rptr. 910  
661 P.2d 1064

**In re Bobby D. Youngblood**

33 Cal.3d 788 (1983)  
191 Cal.Rptr. 171  
662 P.2d 108

**Gubler v. Commission on Judicial Performance**

37 Cal.3d 27 (1984)  
207 Cal.Rptr. 171  
688 P.2d 551

**Mardikian v. Commission on Judicial Performance**

40 Cal.3d 473 (1985)

# CASES COMING BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

## Five-Year Summary — 1981–1985

Year	Complaints Filed	Inquiries* (Some kind of Investigation)	Judges* Contacted	Preliminary Investigations	Admonishments	Resignations or Retirements While Under Investigation	Public Discipline
1981	267	52	48	18	7	3	1 censure 1 removal
1982	360	68	61	14	5	1	2 censures
1983	351	63	56	21	6	3	2 censures 1 removal
1984	388	62	64	17	3	1	1 censure
1985	317	54	47	11	6	2	1 censure

\*Some Inquiries can involve more than one judge; more than one judge may be contacted in a single Inquiry.

January 1986