

STATE OF CALIFORNIA

COMMISSION ON JUDICIAL PERFORMANCE



1987 ANNUAL REPORT

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COMMISSION ON JUDICIAL PERFORMANCE

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TABLE OF CONTENTS

COMMISSION MEMBERS	i
I. THE COMMISSION DEFINED	1
II. SUMMARY OF COMMISSION DISCIPLINARY ACTIVITY IN 1987	2
III. PUBLIC DISCIPLINE	3
IV. PRIVATE DISCIPLINE AND DISPOSITIONS	9
V. GENDER BIAS	11
VI. VOLUNTARY DISABILITY RETIREMENT	14
APPENDIX 1. Case Citations	
APPENDIX 2. Statistical Table: 1983 through 1987	
APPENDIX 3. Flow Chart - Commission Proceedings	
APPENDIX 4. Governing Provisions	
A. California Constitution, Article VI, Sections 8 and 18	
B. Rules for Censure, Removal, Retirement or Private Admonishment of Judges	
C. Commission Policy Declarations	
D. California Code of Judicial Conduct	
E. California Government Code Provisions	

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
Burlingame
Appointed January 1985
Present term expires December 1988



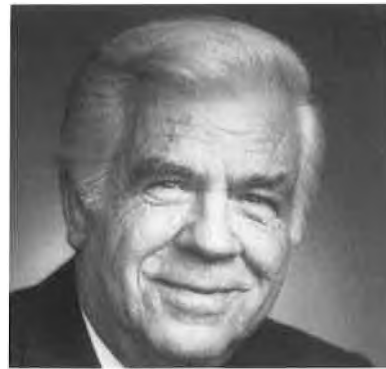
HONORABLE CHARLES E. GOFF
Judge of the Municipal Court
San Francisco
Appointed February 1981
Present term expires January 1988



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 1988



BEN NOBLE
 Public Member
 La Canada Flintridge
 Appointed March 1984
 Present term expires May 1991



HONORABLE CHRISTIAN E. MARKEY, JR.
 Judge of the Superior Court
 Los Angeles
 Appointed March 1987
 Present term expires March 1991



HONORABLE ARLEIGH WOODS
 Presiding Justice, Court of Appeal
 Second Appellate District, Division Four
 Los Angeles
 Appointed May 1986
 Present term expires March 1989

JACK E. FRANKEL
 Director-Chief Counsel

PETER GUBBINS
 Investigating Attorney

CYNTHIA DORFMAN
 Staff Counsel

HILARY WINSLOW
 Investigating Attorney

CAROL G. BABINGTON
 Staff Counsel

I

THE COMMISSION DEFINED

The Commission on Judicial Performance is a constitutionally created independent state agency that handles complaints and problems involving judicial performance. The Commission has been in existence since 1960.

There are nine members of the Commission: two judges of courts of appeal, two judges of superior courts, and one judge of a municipal court, each appointed by the Supreme Court; two members of the State Bar who have practiced law in California for ten years, appointed by the State Bar; and two citizens who are not judges, retired judges, or members of the State Bar, appointed by the Governor and approved by a majority of the Senate. All terms are four years. (California Constitution Article VI, Section 8.)

Under Article VI, section 18 of the California Constitution, the Commission is authorized to recommend to the Supreme Court that a judge be removed from office or publicly censured for action occurring not more than six 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 also recommend that the Supreme Court retire a judge for disability that seriously interferes with the performance of the judge's duties and is or is likely to become permanent. In addition, the Commission is authorized to privately admonish a judge found to have engaged in an improper action or a dereliction of duty.

A flow chart showing the progress of complaints through Commission proceedings is attached. While not a complete overview of the various courses of Commission proceedings, this illustrates some of the typical patterns. Note that a staff inquiry may or may not precede a preliminary investigation pursuant to Rule 904.

During its existence, the Commission has made eleven recommendations to the Supreme Court that judges be removed or involuntarily retired. Six judges were removed as the Commission recommended, and two were involuntarily retired as the Commission recommended. Two of the Commission's removal recommendations were not followed by the Court; in one case the charges against the judge were dismissed, and in the other the judge was publicly censured. Another removal recommendation is pending. An additional ninety judges have retired or resigned with Commission matters pending.

In addition to the constitutional provisions mentioned above, Commission disciplinary jurisdiction derives from 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), and California Rules of Court 901-922 (Rules for Censure, Removal, Retirement or Private Admonishment of Judges). These provisions are included in the attached appendix.

The appendix to this year's report includes for the first time the Commission's declarations of existing policy which reflect internal procedures consistent with and in implementation of the Commission's constitutional mandate, applicable statutes and Rules of Court 901 through 922.

II

SUMMARY OF COMMISSION DISCIPLINARY ACTIVITY IN 1987

At the close of 1987, there were 1446 judicial positions within the jurisdiction of the Commission:

Justices of the Supreme Court	7
Justices of the Courts of Appeal	77
Judges of Superior Courts	724
Judges of Municipal Courts	559
Judges of Justice Courts	79

These figures exclude the various judicial positions created but not operative during 1987.

Five hundred forty-seven complaints were filed with the Commission in 1987. Some of these named more than one judge. Four hundred twenty-two complaints or seventy-eight percent were closed following review and consideration by the staff and the Commission because no actionable allegations were presented. Many of these came from individuals dissatisfied with a judge's rulings on the merits of a particular case, frequently a small claims or domestic relations case involving the complainant.

Although these complaints do not warrant investigation beyond review and consideration of the complaint, they nevertheless require that staff spend substantial time writing and talking to the complainants about their difficulties and the reasons these problems are not grounds for Commission proceedings. While this process often does settle an issue for a complainant, many other times a troubled or frustrated or disgruntled person is as unhappy as ever, and repeated calls and letters are not infrequent. This facet of the Commission's work does provide individuals an opportunity to express their dissatisfactions to someone other than the judge or court complained about, and to become informed about the function of the judiciary.

In addition to handling complaints, the Commission responds to inquiries about judicial conduct and performance from citizens, government officials, practicing lawyers, and judges. As a result of these contacts, many questions and problems involving judges are discussed, reviewed, and often resolved.

Of the five hundred forty-seven complaints received in 1987, there was some investigation in one hundred twenty matters. Seventy-five of these investigations included writing to the judge for comment and explanation. Twenty cases went to the stage of an official preliminary investigation under Rule 904 of the California Rules of Court. Seven complaints were consolidated with other complaints, and nineteen were carried over into 1988.

Private disciplinary action or disposition was completed in thirty-eight cases in 1987. Five judges retired or resigned following institution of Commission proceedings; these included some disability cases. The majority of judicial retirements in the course of the year were totally unrelated to proceedings by the Commission. Formal proceedings were ordered in five cases. In four cases, two of which had been initiated in 1986, formal hearings were held. In one case, a recommendation for public discipline was made to the Supreme Court. (*In re Rasmussen* (1987) 43 Cal.3d 536 [severe censure].)

The Commission's workload reached record levels again this year. Two new attorneys were added to the Commission's staff, which formerly consisted of the Director/Chief Counsel and two other attorneys, reflecting the Commission's increased activity at all stages of proceedings.

Another significant event in 1987 was the Chief Justice's appointment of the Judicial Council Advisory Committee on Judicial Performance Procedures. This committee, comprised of active and retired judges and an attorney member of the Commission, was appointed in response to a request from the Commission for a more effective and expeditious mechanism for consideration of amendments and rule changes. The committee considered a wide range of subjects and has recommended a proposed constitutional amendment adding public reproof as a sanction between public censure and private admonishment, rules formalizing the Commission's use of advisory letters and periods of observation and review for matters not warranting formal disciplinary action, and rules clarifying the period within which a trial judge may decide a case. Other topics under consideration by the committee include the scope of confidentiality of Commission proceedings and procedural aspects of investigation and discipline.

Recent Commission annual reports have discussed the Commission's interest in informing the Bench and Bar about the work of the Commission. The staff and members of the Commission have been concerned about the lack of information and misinformation in the legal and governmental communities regarding the Commission's work. Since opportunities to communicate with appropriate groups are limited, the annual report has remained the chief vehicle for providing information. However, the Commission has always welcomed chances to explain and discuss its work.

A number of opportunities arose in 1987. These included participation in the 1987 Judicial College course on judicial conduct, providing a speaker for the August meeting of the Merced County Bar Association, the participation by the Chairperson in a program at the Annual Meeting of the California Judges Association in September, and attendance by the Director and Commissioner Dale Hanst at a meeting with Superior and Municipal Court judges of Ventura County. The Ventura meeting marked the first occasion in the Commission's twenty-seven-year history when judges of a county have invited Commission representatives to respond to questions about Commission procedures and discuss the Commission's work. The meeting proved valuable to both the judges and the Commission representatives. The Commission wishes to encourage exploration of such avenues for demystification of the operation of the Commission with the state's judges, and looks forward to additional opportunities for discussion of the Commission's work at other Bar and judicial gatherings.

III

PUBLIC DISCIPLINE

In 1987, the Supreme Court adopted the Commission's recommendation of removal in *Furey v. Commission on Judicial Performance* (1987) 43 Cal. 3d 1297; that recommendation had been filed in 1986. The Supreme Court also followed the Commission's recommendation of public censure filed in 1986 in *McCullough v. Commission on Judicial Performance* (1987) 43 Cal.3d 534. A recommendation for removal filed by the Commission in 1986 in *Ryan v. Commission on Judicial Performance* SF 25086, is pending in the Supreme Court.

The Commission filed one recommendation for public discipline in the Supreme Court in 1987. In that case, *In re Rasmussen* (1987) 43 Cal.3d 536, the Supreme Court imposed the sanction of severe public censure recommended by the Commission.

Furey v. Commission on Judicial Performance (1987) 43 Cal. 3d 1297

In *Furey v. Commission on Judicial Performance*, the Supreme Court adopted the Commission's recommendation that Judge Robert H. Furey, Jr., be removed from office. This marked the sixth time in the history of the Commission that the Court has followed the Commission's recommendation that a judge be removed.

The Court's determination was based on the record of an eleven-day hearing before three special masters, as well as the report of the special masters and the report and recommendation of the Commission.

In its lengthy opinion, the Court preliminarily noted that Judge Furey, who was elected to the Justice Court of the Santa Catalina Judicial District in 1983, spent one day each week presiding there and the remainder of the week sitting by assignment in various municipal courts on the mainland. The Court found that during his judicial tenure, Judge Furey engaged in various actions constituting eight counts of wilful misconduct and ten counts of conduct prejudicial to the administration of justice that brings the judiciary into disrepute, as follows:

1. In early 1983, Judge Furey interrupted and threatened with contempt a defendant appearing before him to account for completion of community service work imposed as a condition of probation by another judge. When the defendant said he felt the judge was "harassing him," the judge found him in contempt and ordered him immediately incarcerated, despite evidence that the defendant had a medical problem requiring attention.

The judge later presided at the defendant's probation violation hearing, which was held over defense counsel's objection that the defendant had never received written notice of the claimed violation. The judge chided the defendant for failing to bring in more than a "perfunctory" doctor's letter about his medical condition to explain why he had not completed the required community service work, and remanded him to serve one hundred eighty days in county jail. The appellate department of the superior court subsequently reversed the order revoking probation and the jail sentence, directing the municipal court to terminate all proceedings against the defendant.

The Supreme Court found that Judge Furey's display of impatience and hostility toward the defendant constituted prejudicial conduct. The Court also found the judge's abuse of the contempt power to be prejudicial conduct.

2. A defendant who had been ordered by another judge to pay \$300 or serve ten days in jail on a traffic matter appeared before Judge Furey to ask for more time to pay the fine. The judge refused, saying "it is \$300 or ten days today." When the defendant pointed out that others in court were obtaining continuances, the judge warned him to say nothing further and remanded him to serve the ten days. While being directed toward the lockup, the defendant muttered the word "tremendous" under his breath. Judge Furey immediately adjudged him to be in contempt and sentenced him to five days in jail. The defendant then made the sound "shhh," which the judge believed was followed by "it;" the judge again held the defendant in contempt and imposed another sentence of ten days. The defendant was released later that day, after a public defender interceded on his behalf.

The Court found that Judge Furey's abuse of the contempt power, as well as his impatience and hostility toward an unrepresented defendant, constituted prejudicial conduct.

3. A defendant appeared before Judge Furey on Catalina Island and filed a motion to disqualify him under Code of Civil Procedure section 170.6. Judge Furey ordered the case transferred to another court. He then wrote an unbidden note to the judge of that court, recommending that the defendant be given a sentence stiffer than the “standard” sentence for his offense because he had a bad attitude.

The Court adopted the conclusion of the masters and the Commission that this action, given Judge Furey’s inexperience and his admission soon afterwards that his action was wrong, constituted prejudicial conduct rather than wilful misconduct.

4. A defendant appeared before Judge Furey to discuss his inability to pay a fine for jaywalking. The judge, who had presided at his jaywalking trial, knew the defendant was indigent and possibly mentally unbalanced. He also believed he was potentially violent. He therefore ordered that the defendant’s bag, which was out of his reach, be searched. The bag contained a small paring knife, along with some food. Judge Furey immediately found the defendant in violation of a statute banning knives over four inches long from courtrooms, and had him remanded on \$10,000 bail.

Judge Furey arranged for a public defender to appear with the defendant that afternoon. He thereafter found the defendant in contempt for entering the courtroom with the knife and sentenced him to five days in jail. He also ordered a mental evaluation under Penal Code section 4011.6. When the deputy public defender objected to the examination, the judge imposed a \$500 fine, to be served at the rate of \$30 per day, while continuing to insist on a mental evaluation. The defendant then made several delusional remarks, which resulted in two more findings of contempt and fines of \$500 to be served at the rate of \$30 per day. The superior court subsequently granted a petition for writ of habeas corpus.

The Court adopted the conclusion of the masters and the Commission that Judge Furey engaged in prejudicial conduct by his display of impatience and hostility to the defendant and by his abuse of the contempt power. The Court stated: “We agree that the actions at the very least reflect conduct prejudicial to the administration of justice.” The Court found that the result of the judge’s actions was that “a mentally disturbed, indigent defendant — who had the misfortune to have a small paring knife in his bag while requesting an extension of time to pay a \$50 fine for jaywalking — was effectively sentenced...to approximately 65 days in jail.” The Court continued, “There is little doubt that [the defendant] may have been unstable and in need of treatment, but these punitive measures bear virtually no relation to his almost trivial offense and his obvious need for care.”

5. After taking the bench to hear traffic cases, Judge Furey told a group of defendants that if there was a discrepancy between their version of the facts and that of a police officer, he would always believe the officer because perjury was a felony and a police officer would not jeopardize his career over such an insignificant matter.

Judge Furey then heard a traffic trial. An officer testified for the prosecution. During his defense, the unrepresented defendant began reading from a Vehicle Code section. The judge cut him short and found him guilty. The appellate department of the superior court later reversed the judgment because the defendant had been denied the opportunity to cross-examine the police officer and to make a closing argument.

The Court adopted the conclusions of the masters and the Commission that Judge Furey committed wilful misconduct when he made his announcement to the assembled defendants and when he denied the defendant his right to be heard. After clarifying that a finding of “wilful misconduct” requires clear and convincing evidence of a “malicious or corrupt” purpose, the Court accepted the Commission’s view

that the judge's purpose was to coerce guilty pleas and thereby expedite the calendar. The Court therefore concluded that the judge was guilty of wilful misconduct.

6. In a number of incidents involving one individual, a woman described in the record as a "foulmouthed and intentionally disruptive spectator and litigant" who frequently appeared in the Catalina court, the Supreme Court concluded that Judge Furey engaged in wilful misconduct.

a. Judge Furey became aware of a letter the woman wrote to the Commission alleging that he had her evicted from the courtroom and directed his bailiff, in doing so, to punch her in the mouth. It appears that the woman had posted this letter at various public places in Avalon. Judge Furey wrote to the woman, directing her to appear before him. When she did, he asked her questions about her letter to the Commission. When she refused to answer, he ordered her to appear in Long Beach to show cause why she should not be held in contempt for language in her letter. He also said if she were found in contempt and remanded to custody he would order a mental evaluation. He also said he would hold her in contempt if she again appeared in his courtroom, unless she came as a party or a witness.

The Court found "fully justified" the Commission's findings that Judge Furey engaged in wilful misconduct by abusing the contempt power and by failing to conduct himself in a manner promoting public confidence in the judiciary. The Court found that the judge's conduct exhibited malice, stating, "It stretches credulity to claim that summoning someone into court and initiating a contempt proceeding for writing a letter to the Commission could be done for a proper judicial purpose."

b. About a month after the incident above, Judge Furey again wrote to the woman, directing her to appear in his courtroom. When she appeared, she attempted to disqualify him under Code of Civil Procedure section 170.6. He denied the motion as inappropriate in a contempt hearing. A peace officer then testified that he had seen the woman in line to board the ferry from the island to Long Beach about two hours after the time Judge Furey had ordered her to appear in Long Beach in connection with the incident described above. He sentenced her to five days in jail and a fine of \$500, which could be served at the rate of \$30 per day, and remanded her forthwith.

Later that afternoon, the judge had the woman brought back into court to ask her questions about whether her son might be living alone in a motel room in Avalon, in violation of a local ordinance. When the woman invoked her right to remain silent, the judge held her in contempt and sentenced her to an additional \$500 fine and five more days in jail.

Five days later, the superior court granted a writ of habeas corpus and subsequently overturned the contempt orders.

The Court adopted the Commission's conclusions that Judge Furey abused the contempt power, failed to conduct himself in a manner promoting public confidence in the integrity of the judiciary, and engaged in vindictive and punitive conduct. The Court found malice in Judge Furey's actions, noting that the facts supported a strong inference that his purpose was to punish the woman and perhaps drive her off the island.

In discussing the contempt proceedings, the Court noted that in such proceedings "the court is often the prosecutor, judge, and jury. The contempt power is virtually unique in our system of justice because it permits a single official to deprive a citizen of his fundamental liberty interest without all of the procedural safeguards normally accompanying such a deprivation." The Court suggested that Judge Furey would have done well to recall the words of an early Supreme Court opinion: "The power [of

contempt] is necessarily of an arbitrary nature and should be used with great prudence and caution. A Judge should bear in mind that he is engaged, not so much in vindicating his own character, as in promoting the respect due to the administration of the laws....” (*People v. Turner* (1850) 1 Cal. 152, 153.)

c. Later, the woman appeared as a defendant in Catalina and filed an affidavit of prejudice against Judge Furey. The case was transferred to another court.

Judge Furey then wrote a letter to a judge of that court, in which he stated: “any statements made by this defendant should be viewed with skepticism....[H]er ability to distort and/or lie can be most persuasive.”

The Court adopted the conclusion of the masters and the Commission that Judge Furey was guilty of wilful misconduct. The Court noted that the judge wrote the letter after admitting, in the incident previously described in 3, *supra*, that such conduct was improper.

d. Judge Furey later held the same woman in contempt and sentenced her to five days in jail and a \$500 fine for coming into the courtroom clad in shoes, jeans, and a sweatshirt that left one shoulder bare, revealing the strap of a piece of underclothing or a bathing suit; Judge Furey felt that she was in violation of a posted dress code which disallowed wearing swim suits in court. Judge Furey ordered the woman remanded, and ordered that she not be allowed to make a telephone call. The woman was released that day after she petitioned the superior court for a writ of habeas corpus; the writ was later granted and the contempt order vacated.

The Court found that the incidents were “part of a disturbing pattern of wilful misconduct toward a litigant and courtroom spectator.” The Court continued: “...[Judge Furey] was probably dealing with [the woman] in a manner applauded by those who believe her to be a controversial and difficult individual. But a judge’s prime responsibility is the evenhanded dispensation of justice, even for the controversial and difficult persons in society.” The Court therefore concluded that Judge Furey was guilty of wilful misconduct.

In considering the appropriate disposition, the Court reviewed those cases in which it has previously removed judges on the Commission’s recommendation. The Court then considered Judge Furey’s claim that the sanction of removal was too harsh, given his industriousness and inexperience. The Court pointed out that neither hard work nor inexperience can mitigate wilful misconduct. The Court also rejected Judge Furey’s suggestion that a temporary suspension be ordered, noting that the California Constitution specifically empowers the Court only to remove or publicly censure a judge. The Court concluded: “The purpose of these proceedings is not to punish errant judges but to protect the judicial system and those subject to the awesome power that judges wield. [Citation]...[T]hat purpose will best be served in this case by adopting the recommendation of the masters and of the Commission.”

In re Rasmussen (1987) 43 Cal.3d 536

In *Rasmussen*, the judge did not challenge the findings or recommendation of the Commission. He thereby consented to a determination on the merits based on the record filed by the Commission.

Upon reviewing the record, the Supreme Court found that during the period 1981 through 1984 Judge Rasmussen violated Canon 2 of the California Code of Judicial Conduct, which states that “A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.” The Court further found that during

that period Judge Rasmussen violated Canon 3A(3), which states: “A judge should be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom he deals in his official capacity...” and Canon 3C(1), which states: “A judge should disqualify himself in a proceeding in which his disqualification is required by law, or his impartiality might reasonably be questioned.”

The Court found that Judge Rasmussen's violations of Canon 2 included the following incidents: publicly calling a coach of a youth sports event a “pervert” based on the judge's knowledge that the coach had once been convicted of child molestation; initiating probation revocation proceedings against a probationer based on personal reasons other than the faithful discharge of his duties; communicating to a criminal defendant his likely sentence in the absence of counsel; engaging in intemperate, open-court criticism of a fellow judge; improperly suggesting that the State Bar investigate an attorney who had asserted the attorney-client privilege in response to overly inquisitive questioning in chambers; and displaying a lack of impartiality to, and petty harassment of, attorneys who filed affidavits of prejudice against him.

The Court further found that Judge Rasmussen's violations of Canon 3 included the following incidents: discouraging the exercise of peremptory disqualification rights by inappropriate means (including the making of intemperate remarks to counsel) and attempting to inconvenience counsel by withholding judgments in unrelated cases, refusing to disqualify himself from sentencing proceedings after having substantively communicated to the defendant his likely sentence in the absence of counsel, initiating probation revocation proceedings based on patently insufficient evidence, and displaying an intolerant and persistently abusive and sarcastic demeanor toward litigants, attorneys, and others in his courtroom.

The Court held that this misconduct represented “a disturbing, intolerable affront to the legal profession, and to the public.” 43 Cal.3d at p. 536. The Court noted that were it not for persuasive testimony from numerous attorneys that since 1984 the judge had engaged in continuous efforts to temper his courtroom behavior, a more severe sanction than severe public censure might be warranted.

McCullough v. Commission on Judicial Performance (1987) 43 Cal.3d 534

In the *McCullough* case, the judge also did not challenge the Commission's findings or recommendation of public censure. The Supreme Court agreed with the Commission's finding that between 1982 and 1985, despite three private admonishments and inquiries from the Commission and the attorneys involved, Judge McCullough failed to decide a submitted case for three years and nine months. The Court also agreed with the Commission's finding that during this period, the judge executed salary affidavits certifying that no case was pending and undecided which had been under submission for more than ninety days. The Court found that the protracted delay and failure to respond amounted to persistent failure to perform judicial duties. The Court also found that Judge McCullough's failure to decide the case along with his execution of salary affidavits and receipt of salary constituted conduct prejudicial to the administration of justice that brings the judicial office into disrepute. On this basis, the Court imposed the sanction of public censure recommended by the Commission.

IV

PRIVATE DISCIPLINE AND DISPOSITION

In 1987, thirty-eight cases warranted private disciplinary action or disposition.

In six of these, private admonishments were formally imposed pursuant to California Rule of Court 904(d). Evidence of an admonishment can be introduced at a later hearing to prove that conduct is persistent or to determine what action or recommendation should follow. (Rule 909(b).) The six cases resulting in admonishments are summarized below:

A judge frequently expressed impatience and anger toward attorneys, witnesses, and defendants. The records of cases examined by the Commission supported complaints that the judge was interrupting and chastising witnesses and threatening attorneys with contempt without justification.

A reviewing court found that a judge had demonstrated pre-judgment in a probation hearing. The judge also routinely set bail in a manner which prevented posting of ten percent bail, and exerted pressure on the Public Defender to transfer a deputy public defender with whom the judge was upset.

A judge's claimed abusiveness to attorneys was demonstrated by the judge telling them to "shut up," calling them "lady" or "fellow" and, in one instance, abusing the contempt power to restrict an attorney's cross-examination.

A judge failed to decide two matters for some twenty-seven months, during which period the judge regularly executed salary affidavits attesting the judge had no submitted cases pending longer than ninety days.

A judge delayed decision in several cases for over ninety days while regularly executing salary affidavits. The Commission accepted in mitigation that the delays were partially attributable to the judge's participation in an arduous settlement program.

A judge engaged in displays of temper towards attorneys who disqualified the judge under Section 170.6 of the Code of Civil Procedure providing for peremptory disqualification of a judge and appeared to act in disregard of that statute. The judge also ordered incarceration of indigent defendants unable to pay fines, without adequate consideration of alternatives or ability to pay.

In some cases, the Commission will determine that formal discipline is not warranted but will advise caution or express disapproval of a judge's conduct for educational purposes. Thirty-two complaints were so closed in 1987. These cases mostly involved perceived ethical violations or apparent impropriety of a minor degree.

Fifteen of the thirty-two judges were cautioned to bear in mind the requirements of Canon 3 of the California Code of Judicial Conduct regarding patience and courtesy based on the following reported conduct:

A judge left the bench while a defendant was addressing the court.

In two cases, a judge exhibited apparent impatience toward a litigant and made remarks perceived as sarcastic.

In two separate matters a judge made critical comments in the presence of jurors about attorneys appearing before the judge.

Two judges were warned regarding conflicts with each other.

Two judges denied indigent litigants court fee waivers to which the judges knew or should have known the litigants were entitled.

A judge questioned about reports of unsuitable temperament at first exhibited unwillingness to examine courtroom demeanor.

A judge sharply criticized an attorney and then cited the attorney for contempt without justification.

A judge was perceived as coming in physical contact with a litigant while attempting to calm him in a chambers conference.

A judge made harsh and intemperate comments to a victim at a hearing.

A judge made apparently intemperate comments to an attorney such as "I really don't have time to practice law for you," and made disparaging remarks about appellate decisions with which the judge disagreed.

A judge who dismissed a civil case was advised of the need for care and patience in dealing with pro per plaintiffs.

The balance of the judges were cautioned for a variety of actions, as follows:

A judge made gratuitous comments to a litigant that appeared to be disparaging.

A judge engaged in an inappropriate display of impatience and anger when the judge refused to let a defendant consult with counsel before entering a plea. When the defendant then declined to enter a plea, the judge revoked the defendant's own recognizance release and ordered him into custody.

A judge apparently failed to provide for continuous legal representation of a client when the judge was appointed to the bench and later, after appointment to the bench, used attorney letterhead in correspondence with the former client.

A judge's form letter, sent to defendants who had been assessed attorneys' fees for the services of the public defender, appeared as inappropriate judicial involvement in the county's efforts to collect fees.

A judge granted a continuance ex parte to a litigant employed by the county without notice to the opposing party, thereby appearing to show favoritism.

A judge was a featured speaker at a campaign function for a candidate for non-judicial office.

Another judge publicly endorsed candidates for non-judicial office and attempted to influence matters within the ambit of other officials.

A judge placed on the record jocular but inappropriate remarks about the appellate court.

A judge's address to a conference of court officials included jokes that some of the audience found offensive.

A judge forcibly restrained a citizen unnecessarily.

A judge was inappropriately and gratuitously publicly critical of the credibility of certain witnesses in a number of cases.

A judge made derogatory remarks about the credibility of a police officer who had been involved in a case against the judge.

A presiding judge appeared to ignore a citizen's complaint about a court-appointed official.

Two judges used official stationery in personal correspondence.

A judge's attendance to personal matters when the judge was scheduled in more than one court in the judge's judicial district on the same day fostered an impression of unavailability.

A presiding judge who appeared to ignore two letters of complaint about a court commissioner was reminded of his responsibility under Court Rule 532-5(18) to supervise court-appointed personnel.

A judge who had initiated contempt proceedings was reminded of the need for strict observance of the statutory requirements in those actions.

V

GENDER BIAS

During the past several years the issue of gender bias within our society has received increased public attention. The court system has not remained immune or unresponsive. A thirty-two-member Judicial Council Advisory Committee on Gender Bias in the Court System is now engaged in studying the topic.

In January of 1987, the Judicial Council added new provisions to the Standards of Judicial Administration specifically directed at preventing gender or other bias in the administration of the court system (see sections 1-1.3, *Standards of Judicial Administration Recommended by the Judicial Council*, Appendix, Cal. Rules of Ct.). Gender bias was a subject of significant judicial education efforts during the year. Several courses taught at the 1987 California Judicial College included the topic of gender bias. It has been a part of the curriculum in the Fairness course at the Continuing Judicial Studies Program for several years.

A related issue of invidious discrimination prompted the California Judges Association in September 1986 to add a new provision to Canon 2 of the Code of Judicial Conduct proscribing judicial membership in organizations that practice invidious discrimination on the basis of race, sex, religion, or national origin. The problem was deemed of such importance that the California Judges Association Committee on Judicial Ethics issued an opinion delineating the proscriptions intended by the new enactment.

Exhibitions of gender bias have been regarded as conduct prejudicial to the administration of justice that brings the judicial office into disrepute and therefore a basis for judicial discipline. The Commission on Judicial Performance has conducted investigations in cases which included allegations of gender bias. However, despite the fact that gender bias is perceived as a problem within the court system affecting the fair and impartial administration of justice, to date there has been comparatively limited reporting of such incidents to the Commission.

What is Gender Bias?

In its 1984 report the New Jersey Supreme Court Task Force on Women in the Courts defined gender bias as:

... the predisposition or tendency to think about and behave toward people mainly on the basis of their sex. It is reflected in attitudes and behavior based on stereotypical beliefs about the sexes' "true natures" and "proper roles" rather than independent evaluations of each individual's abilities, life experiences and aspirations.

Some of the more subtle expressions of gender bias identified with the judiciary included:

- The judge who in a courtroom setting compliments a female attorney on her appearance is presenting a non-professional image and detracts from her credibility.
- A judge who at conferences in chambers falls into camaraderie with male attorneys while excluding female counsel.
- The judge who expresses gender bias through his or her demeanor, such as leaning forward and giving full attention to a male expert witness while slumping and eyeing the clock when a female expert testifies.
- The judge who acts impatient with victims of domestic violence due to lack of understanding of the psychological and economic constraints on battered spouses.

In March of 1986 the New York Task Force on Women in the Courts stated that there still existed a widespread perception within the legal field that some judges, male attorneys, and court personnel do not treat female attorneys with the same dignity, respect, and professional acceptance as male attorneys, although there had been improvement in the way female attorneys were treated by the courts. Among the most commonly cited types of conduct considered inappropriate within the courtroom context were the following:

- 1) being addressed in familiar terms;
- 2) being subjected to comments about personal appearance;
- 3) being subjected to degrading remarks and conduct including verbal or physical sexual advances; and
- 4) being subjected to dismissive and less tolerant treatment.

Judicial Discipline for Gender Bias — California

Among the cases in California where judicial discipline has been imposed for conduct constituting gender bias are *In Re Robert S. Stevens* (1981) 28 Cal.3d 873, and *Geiler v. Commission on Judicial Qualifications* (1973) 10 Cal.3d 270. In *Stevens, supra*, a superior court judge was publicly censured for conduct including a pattern of unsolicited and protested telephone calls to a former secretary in which he used vulgar and offensive language of an explicitly sexual nature. In *Geiler, supra*, a municipal court judge was removed from judicial office for a number of acts of crude behavior and vulgar conduct which included habitually using vulgar and profane language in conversations with his female clerk and, on two occasions, making lustful references to her, once while in chambers in the presence of a group of professional associates. The judge was also found to have invited two female attorneys into his chambers where he discoursed on the salacious nature of the evidence adduced in criminal cases concerning homosexual acts and rape, punctuating his commentary with profane terms for bodily functions.

Two cases presently pending involve gender bias charges.

Judicial Discipline for Gender Bias — Other Jurisdictions

Out-of-state cases illustrate the increased concern over gender bias in the court system. Judicial discipline ranging from reprimand to removal from judicial office has been imposed for judicial misconduct constituting gender bias. New York reports more gender bias cases than any of the other states. Gender bias cases from other jurisdictions can be grouped into several categories (which are not intended to be exclusive or exhaustive): (1) demeaning and undignified remarks concerning the physical appearance and/or temperament of women; (2) conduct constituting sexual harassment, e.g., suggestive and/or off-color remarks including verbal and physical sexual advances; and (3) preferential and/or discriminatory treatment based on sexual identity.

Following is a sample of out-of-state cases in which judicial discipline has been imposed for acts of gender bias.

New York: A judge was publicly reprimanded for swatting at a female attorney's hand with some legal papers, and explaining that "I like to hit girls because they are soft." In another case a judge was disciplined for addressing a female attorney as "little girl" twice. In a third case, a judge was censured for making a public comment to a newspaper reporter regarding a possible sentence reduction in a pending rape case, and remarking that "maybe they ended up enjoying themselves." In still another case, a judge was admonished for conduct, over a four-year period, which included numerous improper comments to female attorneys referring to their appearance and physical size, suggesting that they could get whatever they were asking of the court because of their physical appearance.

Minnesota: A judge was reprimanded and placed on probation for impatient, undignified, discourteous, and publicly critical conduct toward female attorneys appearing before him. Admitted conduct included sexually harassing and embarrassing female court employees and female attorneys by making suggestive and off-color remarks to them in the presence of others, attempting to make dates with them, and touching them in offensive ways.

Illinois: A judge was publicly reprimanded for courtroom remarks to one female attorney to the effect that "ladies should not be lawyers," "do not belong in court," and "should be at home raising a family." In another instance he told a pregnant attorney that he "would never allow a pregnant woman to try a case with him," and in yet a third

instance he told a pregnant attorney that "if your husband had kept his hands in his pockets you would not be in the condition you are in."

Washington: A judge was censured for conduct which included the following: commenting about the size of one staff member's breasts; speculating about the type of lingerie she wore; requesting an employee to wear clothing that "looks sexy on her;" referring to a clerk as "young, tender flesh;" discussing with another clerk her "womanly odor;" and hugging and kissing another in an offensive and embarrassing manner.

California Outlook

In 1985 the State Bar Committee on Women in the Law surveyed women lawyers in small firms in California. Approximately forty percent of those responding reported experiencing gender bias in the courtroom. Indications are that gender bias exists, and that there may be unreported incidents of unacceptable conduct in this area as well as in other areas of judicial conduct. The Commission on Judicial Performance is committed to fulfilling its responsibilities, but can act only on the basis of reported incidents.

VI

VOLUNTARY DISABILITY RETIREMENT

Pursuant to Government Code section 75060, et seq., a judge in office for two or more years who is unable to discharge efficiently the duties of office by reason of a mental or physical disability that is or is likely to become permanent is eligible for disability retirement upon the approval of the Commission and the Chief Justice. These statutes, enacted by the Legislature in 1953 but involving the Commission since 1967, give the Commission an additional, non-disciplinary duty not included in the constitutional provisions setting forth the Commission's disciplinary function.

Since 1967, one hundred fifty-eight applications for disability retirement have been considered by the Commission. The Commission approved one hundred thirty-three of these requests and denied fourteen. Four applications were withdrawn prior to Commission action. Two applications are currently pending. In five cases in which the Commission initially denied requests, judges took legal action resulting in the requests being granted.

The disability retirement process involves several steps. First, a judge seeking a disability retirement 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 from the judge's physicians, 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, and/or arrange for the judge to submit to independent medical examination for report to the Commission. After thorough review and consideration of a disability application, the Commission votes its approval or denial. If the application is approved, it is sent to the Chief Justice for independent consideration. An application which is approved by both the Commission and the Chief Justice is implemented by the Public Employees Retirement System, which administers the Judges' Retirement Act.

The Commission wishes to call attention to Policy Declarations 4.1 and 4.2 regarding disability retirement. Under declaration 4.2, the filing of a disability application may be revealed upon receipt of an appropriate inquiry.

In discharging its responsibilities under Government Code section 75060, et seq., the Commission has frequently noted a number of problems inherent in the wording and content of the statutes. The Commission's attempts to bring these matters to the attention of the Legislature have thus far met with little success.

In March of 1987, Chairperson Racanelli sent to the appropriate legislative committee chairs a letter identifying some of the main problem areas. Listed first is the overbreadth of the key statutory language, which makes any mental or physical disability that renders the judge "unable to discharge efficiently the duties of his office" a potential basis for disability retirement. Chairperson Racanelli's letter then highlights inadequacies of the statutory scheme in relation to pre-existing, partial, and temporary disabilities; it also points out difficulties in provisions concerning recovery from disability and the grant of disability retirement at the close of a terminal illness. The letter suggests the formation of a committee or task force to revise the disability legislation for submission to the Legislature. However, there is apparently no active legislative consideration of these basic statutory problems.

The formation of the Judicial Council Advisory Committee on Judicial Performance Procedures, discussed in Section I, *supra*, provided another opportunity for review of these problem areas. That committee has not yet had an opportunity to grapple with these questions, but it is expected that it may do so in 1988. Although the Commission has not felt the Commission on Judicial Performance is the proper agency to draft and sponsor legislative changes affecting judges' retirement benefits, it will persist in its efforts to facilitate the long overdue revamping of the disability retirement statutes.

CASES COMING BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

Five-Year Summary - 1983-1987

Year	Complaints Filed	Inquiries (Some kind of Investigation)	Judges Contacted	Preliminary Investigations	Cautionary/ Educational Letters	Admonishments	Resignations or Retirements While Under Investigation	Public Discipline
1983	351	63	56	21	*	6	3	1 censure 1 severe censure 1 removal
1984	388	62	64	17	23	3	1	1 censure
1985	317	54	47	11	20	6	2	1 censure
1986	476	113	78	22	23	3	1	1 censure
1987	547	120	75	20	32	6	5	1 censure 1 severe censure 1 removal

January 1988

These figures do not include the number of cases carried over from one year to the next. Nineteen of the 547 complaints received by the Commission in 1987 were carried over into 1988. Also, some of the cases in which investigations were conducted and/or action taken in 1987 resulted from complaints received in 1986.

* Figures not available