

**COMMISSION ON JUDICIAL PERFORMANCE**  
**1988 ANNUAL REPORT**

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## INTRODUCTION

Judges, especially those who plan educational programs, often say to the commission: Can't you tell us more about judicial problems from the commission's perspective? A few years ago the commission in its annual report started describing private disciplinary actions without revealing names and particulars. The result has been so favorable that each year we have discussed this aspect of the work of the commission in greater detail.

In this current report we have attempted to discuss the problems and issues facing the commission in more detail than ever before. We expect this treatment will engender discussion. We hope the public, the legal profession and the judiciary will find it interesting and useful. If the end result is to assist the judiciary to meet its ethical obligations to the people of California, one objective of this report will have been fulfilled.

This report also contains the governing provisions of the commission. These have been kept up to date with the constitutional amendments approved by the voters in November, substantial changes in the Rules of Court made by the Judicial Council, and changes in the disability retirement law made by the legislature.

Four distinguished judges concluded their service on the commission during 1988:

Justice John Racanelli served on the commission for more than eleven years—longer than any member in its history. He was chair from 1981 to 1988, leading the commission in this period of unusual development. As a jurist of ability, integrity and vision, he served the commission with exceptional dedication.

After more than six years as a valuable member, Judge Richard Bancroft was elected chair of the commission in 1988. He was noted for his restraint and humanity. With a calm determination to maintain high judicial standards, Judge Bancroft often guided the commission through difficult decisions.

Judge Charles Goff served with distinction for more than seven years. He brought to the commission the highest standards of integrity and competence, serving with unflagging grace and humor.

Judge Christian Markey, although a member for only a year and a half, performed with keenness and insight. In that period, his participation was impressive. His early retirement from the bench is a loss to the commission as well as the Los Angeles Superior Court.

January 1989

Arleigh Woods  
Chairperson  
Commission on Judicial Performance

## COMMISSION MEMBERS



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



**DALE E. HANST**  
Vice Chairperson  
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



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



**JOSEPH W.  
COTCHETT**  
Attorney Member  
Burlingame  
Appointed January 1985  
Present term expires  
December 1988



**HONORABLE  
JAMES F. NELSON**  
Judge of the Municipal Court  
Los Angeles  
Appointed March 1988  
Present term expires  
January 1992



**HONORABLE  
INA LEVIN GYEMANT**  
Judge of the Superior Court  
San Francisco  
Appointed September 1988  
Present term expires  
November 1992

**VACANT:**  
1 Court of Appeal  
1 Superior Court

**INCOMING:**  
**P. TERRY ANDERLINI**  
Attorney Member, San Mateo  
**DENNIS A. CORNELL**  
Attorney Member, Merced

## OUTGOING MEMBERS



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



**HONORABLE  
RICHARD A. BANCROFT**  
Judge of the Superior Court, Retired  
Oakland  
Appointed August 1981  
Retired August 1988



**HONORABLE  
CHARLES E. GOFF**  
Judge of the Municipal Court  
San Francisco  
Appointed February 1981  
Term expired January 1988



**HONORABLE  
CHRISTIAN E. MARKEY, JR.**  
Judge of the Superior Court, Retired  
Los Angeles  
Appointed March 1987  
Retired November 1988

## COMMISSION STAFF

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

**PETER GUBBINS**  
Investigating Attorney

**CYNTHIA DORFMAN**  
Associate Counsel

**NANCY GILMORE**  
Senior Administrative  
Assistant

**CAROLYN KIELY**  
Supervising Judicial  
Secretary

**KHOI NGOC BUI**  
Data Processing Analyst

**HILARY WINSLOW**  
Investigating Attorney

**JOHN PLOTZ**  
Staff Counsel

**JENNIFER MACHLIN**  
Staff Counsel/Office  
Administrator

...

**BERNADETTE M.  
KEEVAMA**  
Judicial Secretary

**MARIA A. ZELAYA**  
Judicial Secretary

**ELAINE D. SWEET**  
Judicial Secretary/  
Administrative Assistant

## I

### THE COMMISSION DEFINED

The Commission on Judicial Performance is an independent state agency that handles complaints and problems involving judicial misconduct and disability. The commission was created in 1960 by additions to the state constitution (Article VI, sections 8 and 18). In November 1988, the voters of California amended the commission's constitutional charter in certain respects. These changes are explained in the next section of this report.

There are nine members of the commission: two judges of the courts of appeal, two judges of the superior courts, and one judge of a municipal court, all appointed by the Supreme Court; two attorneys appointed by the State Bar; and two lay citizens appointed by the Governor and approved by a majority of the Senate. Each member serves a term of four years; these terms are staggered. The commission meets approximately eight times a year, usually for a two-day meeting. It employs a staff of twelve.

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 willful 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 involuntary retirement of a judge because of serious disability. Effective November 9, 1988, the commission may, with the judge's consent, issue a public reproof. And the commission may privately admonish a judge found to have engaged in an improper action or dereliction of duty. Short of such formal discipline, the commission issues many advisory letters, also known as "stingers."

A case usually begins with a written complaint from a member of the public, most often a litigant or an attorney, but sometimes a concerned citizen. Occasionally another judge or a court employee brings a matter to the commission's attention. All complaints are presented to the commission. Many of the complaints do not state a case of judicial misconduct even if the facts alleged are true. For instance, a complaint might allege that the judge erroneously ruled against the complainant. These complaints are ordinarily closed by the commission. When a complaint does state a case, or even might state a case, the commission orders its staff to make an inquiry into the matter and to report further at the next meeting. Usually the staff inquiry includes contact with the judge. These inquiries are not intended as accusations, but only as requests for information.

After an inquiry, the commission has a range of options. Sometimes the allegations are found to be untrue, unprovable, or exaggerated, in which case the commission closes the case without any action against the judge. If questionable conduct did occur, but it was relatively minor or the judge has recognized the problem, the commission may close the case with an advisory letter—a "stinger." If serious issues remain after inquiry, the commission will order a "preliminary investigation" under Rule of Court 904. A preliminary investigation may also be ordered without a staff inquiry. A preliminary investigation may lead to a formal hearing and to discipline.

A flow chart showing the progress of complaints through the commission is

appended. While not a complete overview of the various courses of commission proceedings, this illustrates some of the typical patterns.

In 1988 the commission received 693 complaints. There was investigation of some sort in 199 cases. There were 114 official staff inquiries and 22 investigations under Rule 904. The commission instituted formal proceedings in two matters and there was one formal hearing. The commission issued 47 advisory letters and eight private admonishments. It recommended censure in one case and removal in three others. It recommended that one judge be suspended without pay after a jury found him guilty of conspiracy to obstruct justice.

Since its beginning, the commission has recommended to the Supreme Court that fourteen judges be removed or involuntarily retired. Seven judges were removed as the commission recommended, and two were involuntarily retired. Two of the commission's removal recommendations were not followed by the Court: in one case the charges were dismissed, and in the other the judge was publicly censured. Pending before the Supreme Court at the end of 1988 were three recommendations for removal and one recommendation for censure. During the 28 years of the commission's existence, many judges have retired or resigned with commission proceedings pending.

The commission also rules on applications for disability retirement by judges. This aspect of the commission's work is discussed in section VII of this report.

The commission is established and governed by Article VI, sections 8 and 18, of the California Constitution. It is also subject to Government Code sections 68701 through 68755 and Rules of Court 901-922. The commission issues its own declarations of existing policy which reflect internal procedures. These statutes, court rules and policy declarations are reprinted in the appendix.

## II

### RECENT CHANGES IN THE LAW

**The Constitution.** In November 1988, the people of California passed Proposition 92, which made various changes in the commission's constitutional charter. The full text of these changes may be found in the appendix at the end of this report.

The primary aim of the amendments was to open some commission proceedings to public scrutiny. When the Legislature proposed the amendments, it declared:

*WHEREAS, The Legislature finds and declares that maintaining public confidence in the integrity of the judicial system is essential to good government; and*

*WHEREAS, The Commission on Judicial Performance bears a great public trust which it must currently fulfill in total secrecy; and*

*WHEREAS, Because responsible public disclosure and accountability is proper, desirable, and consistent with the goal of public confidence, it is the intent of this measure that appropriate commission proceedings be open to public scrutiny, and that this measure be construed so as to accomplish this purpose which is hereby declared to be the public policy of this state . . .*

The amendments took several steps in the direction of openness:

- The new Article VI, section 18(f)(1) allows the judge to require that a formal hearing be public, unless the commission finds "good cause" for a confidential hearing.
- The new section 18(f)(3) allows the commission to hold a hearing in public if the charges involve moral turpitude, dishonesty or corruption.
- The new section 18(f)(2) allows the commission, with the judge's consent, to issue a "public reproof." This is a new level of discipline, more severe than a private admonishment (which the commission can issue by itself), but less severe than a public censure (which requires a formal hearing, argument before the commission, a recommendation by the commission to the Supreme Court, and full review in the Supreme Court).
- The new sections 18(f)(3) and 18(g) permit the commission to issue appropriate press releases in limited circumstances.

In addition to the changes in Article VI, section 18, Proposition 92 also amended Article VI, section 8, which defines the membership of the commission. The commission members still serve a four-year term, but each member may serve no more than two terms. The amendments also created staggered terms by dictating that, for once only, two members shall serve two-year terms. In order to reduce vacancies, a member is permitted to serve until a replacement is named.

**Government Code.** Various changes were made in Government Code sections relating to disability retirement. These are discussed in section VII of this report.

**Rules of Court.** In late 1988, the Judicial Council on recommendation of the Judicial Council Advisory Committee on Judicial Performance Procedures amended and adopted a number of rules affecting commission proceedings. These rules, effective January 1, 1989, do the following:

1. Codify the existing commission practice of issuing confidential advisory letters.
2. Clarify and modify procedures for the commencement and termination of commission proceedings and the issuance of private admonishments.
3. Provide for notification to the judge of complaints closed without investigation or action under certain circumstances.
4. Delete the requirement that the commission recommend no more serious penalty than private admonishment if the judge does not accept an intended admonishment and the matter proceeds to hearing.
5. Define "submission" of a cause in the trial courts and impose a duty upon presiding and sole judges of trial courts to monitor and supervise causes under submission.
6. Set forth standards for discovery in commission proceedings, including disclosure of information favorable to the judge and taking of depositions.
7. Provide for use of commission records, subject to certain limitations, and require the commission to adopt a records disposition program to dispose of records no longer needed.
8. Codify the use of the California Evidence Code in commission proceedings.
9. Amend the procedures for petitions for review of private admonishment to correct certain technical defects.

The full text of the new and amended rules is included in the appendix.

**Policy Declarations.** The commission approved various technical changes to the policy declarations. Many of these were necessary to bring the Policy Declarations in line with the newly amended Rules of Court.

Policy declarations affecting disability retirement are mentioned in Section VII of this Report.

### III

#### SUMMARY OF COMMISSION DISCIPLINARY ACTIVITY IN 1988

At the close of 1988, there were 1462 judicial positions within the commission's jurisdiction:

|   |     |
|---|-----|
| Justices of the Supreme Court . . . . .   | 7   |
| Justices of the Court of Appeal . . . . . | 88  |
| Judges of Superior Courts . . . . .       | 725 |
| Judges of Municipal Courts . . . . .      | 566 |
| Judges of Justice Courts . . . . .        | 76  |

*New complaints.* Six hundred ninety-three complaints concerning judges within the commission's jurisdiction (*i.e.*, active California judges) were filed in 1988, representing an increase of 26 percent over 1987. These complaints named a total of 815 judges, since some named more than one judge.

*Investigated cases.* Of the new complaints before the commission, a total of 199 warranted at least some investigation (an increase of 65 percent over 1987). The commission ordered an official staff inquiry in 114 cases. One hundred of these inquiries included contacting the judge and requesting comment and explanation concerning the allegations (an increase of 33 percent over 1987). The commission's 1988 investigation caseload also included 28 matters carried over from 1987. In 22 cases, including two held over from 1987, the commission ordered and conducted an official preliminary investigation under Rule 904 of the California Rules of Court, to determine whether formal proceedings should be instituted and a hearing held. Three of the complaints warranting investigation were closed because the judges retired or resigned after the investigation had commenced.

*Formal proceedings; public discipline.* Formal proceedings pursuant to Rule 905 of the California Rules of Court were ordered in two cases, including one held over from 1987. One formal hearing was held in a case held over from 1987. In this proceeding, the commission recommended removal to the Supreme Court (*Bernard McCullough*, No. S007641). The commission recommended public discipline in three cases which were formally heard in 1987 (*David M. Kennick*, No. S003813; *Kenneth Lynn Kloepfer*, No. S004893; *David Press*, No. S005227).

*Private discipline.* Private disciplinary action was taken in 57 of the cases investigated in 1988 (an increase of 52 percent over 1987). In eight of these cases, the commission issued a notice of private admonishment. Forty-seven of the investigated matters were closed with an advisory letter expressing disapproval of some aspect of the judge's performance or conduct or providing information intended to educate the judge concerning the ethical obligations of the judiciary. Two cases were closed with "educational" letters, a practice that has been discontinued. (More detail on these matters is provided in Section V of this Report.) Eighty-six of the investigated matters were closed without discipline.

*Disability retirement; restoration to capacity.* Seven judges filed applications for disability retirement in 1988. The commission granted five of these applications and two were still pending at the end of the year. In addition, the commission granted one and denied two disability retirement requests that were filed in 1987. Two judges on disability retirement applied for restoration to capacity for service in 1988, pursuant to Government Code section 75060.6. The commission granted these applications. As to one judge, the commission specified certain limitations on the scope and nature of the assignments that could be accepted.

*Complaints closed without discipline.* Five hundred thirty complaints before the commission in 1988, 76 percent of the total, were closed following initial review and consideration because no actionable allegations were presented (an increase of 25 percent over the number so closed in 1987). Many of these complaints were filed by individuals dissatisfied with a judge's rulings on the merits of a particular case, frequently a small claims or domestic relations matter involving the complainant.

In order to determine whether a complaint is actionable, however, staff often must review and analyze lengthy complaint letters and accompanying documents. Supplemental research may be necessary before making the threshold determination on whether an investigation is warranted. If a complaint is closed without additional investigation, staff sends a closing letter to the complainant, explaining why the stated problem does not warrant commission action. In many instances, staff also will discuss with complainants the commission's role and procedures and the disposition of their complaints. While this process sometimes settles an issue for a complainant, often a troubled or frustrated person is as unhappy as ever, and repeated calls and letters are not uncommon.

*Miscellaneous complaints and inquiries.* In addition to complaints about judges, actionable and otherwise, the commission also receives numerous complaints about matters and individuals not now within its jurisdiction, *e.g.*, pro tem judges and commissioners. Such matters—a total of approximately 200 letters in 1988—usually result in referring the complainant to the appropriate agency. Another area that demands attention involves responding to general inquiries about the judicial system and process from citizens, government officials, practicing lawyers, and judges. As a result of these contacts, many questions and problems involving judges are discussed, evaluated, and resolved.

The commission's workload reached record levels again this year. A sixth attorney was added to the commission's staff, reflecting the commission's increased activity at all stages of proceedings. The commission met nine times in 1988, in two one-day sessions and seven two-day sessions. Thirty matters were pending before the commission at the close of its final 1988 meeting (December 1-2); these matters were carried over into 1989.

## IV PUBLIC DISCIPLINE

On May 31, 1988, the Supreme Court followed the commission's recommendation that Municipal Court Judge Richard Ryan be removed. (*Ryan v. Commission on Judicial Performance* (1988) 45 Cal.3d 518, 247 Cal.Rptr. 378, 754 P.2d 724.)

In 1988, the commission also recommended the removal of Judges David Kenick (Los Angeles Municipal Court), Kenneth Kloepfer (San Bernardino Municipal Court), and Bernard McCullough (San Benito Justice Court) and the censure of Judge David Press (Crest Forest Justice Court—San Bernardino County). The commission recommended that Judge Charles D. Boags (Beverly Hills Municipal Court) be suspended without pay after a jury found him guilty of conspiracy to obstruct justice. (Cal. Const., Art. VI, Sect. 18(b)). These matters were still pending at the year's end.

### **The Ryan Case**

The Supreme Court first noted that commission procedures did not violate the judge's due process rights. It was proper for the commission, when investigating before formal charges were filed, to admonish witnesses that the proceedings were confidential and that they should not speak with anyone about the investigation. This served to protect the witnesses from intimidation.

The Court went on to review the definitions of willful misconduct and conduct prejudicial to the administration of justice. *Willful misconduct* is "unjudicial conduct which a judge acting in his judicial capacity commits in bad faith." In turn, "bad faith" means that the judge "(1) committed acts he knew or should have known to be beyond his power (2) for a purpose other than faithful discharge of his judicial duties." Both prongs of this test require an objective standard.

*Conduct prejudicial* is "conduct which the judge undertakes in good faith but which would nonetheless appear to an objective observer to be unjudicial and harmful to the public esteem of the judiciary. It also refers to unjudicial conduct committed in bad faith by a judge not acting in an official capacity."

The Supreme Court found four instances of willful misconduct by Judge Ryan:

1. Dissatisfied with a ruling of the judge, an attorney jokingly asked another attorney when the next judicial election was. This led to an argument between the clerk and the attorney about the judge's ruling. Court was not in session at the time. The clerk went into chambers and repeated the remark to the judge, who called in the attorney. After listening to unsworn accounts of the incident, the judge found the attorney in contempt and imposed a fine of \$200 or three days in jail. The finding was invalidated by the superior court because it was not direct contempt to criticize the judge when court was not in session (Code of Civ. Proc., section 1209(b)), and because there was no affidavit as required by law (*id.*, section 1211). Even before the superior court had ruled, the judge realized his error and dropped the matter. He did not, however, inform the attorney of this for two weeks.

The Supreme Court held that the substantive and procedural defects of the contempt finding were not excused by the judge's ignorance of the law.

*Judge Ryan should have known, or should have researched, the proper contempt procedures . . . His failure to do so constituted bad faith . . .*

(45 Cal.3d at 533.) It was also bad faith for the judge not to inform the attorney that he had dropped the contempt charge.

2. The judge ordered a civil litigant to pay a judgment. After the hearing, as the litigant was walking from the courtroom, she said, "You can't get blood out of a turnip." The judge heard the remark and ordered his bailiff to jail the woman immediately. There was no hearing. The woman was held for 24 hours. The Supreme Court called this "another inexcusable example of Judge Ryan's abuse of the contempt power." It was also misconduct for the judge to rely on his bailiff for advice on the appropriate code section to cite in the contempt order.

3. A defendant refused a no-jail-time disposition, insisting on a jury trial. The judge told the district attorney that he would give the man a harsh sentence to teach the defense attorney a lesson. He went on to say that he could justify the sentence by citing the defendant's perjury at trial. The man then had his trial and was convicted. The judge did impose a harsh sentence, refusing to give his reasons on the record. The next day he told the press that the purpose of the sentence was to discourage jury trials. But when the superior court remanded the case for the judge to supply a statement of reasons, the judge brought out his prefabricated perjury charge. The Supreme Court found this incident to be "misconduct of the worst kind, evidencing moral turpitude and dishonesty."

4. After a preliminary hearing, the district attorney decided to charge the defendant with a misdemeanor only. The judge felt that a felony charge was justified. He telephoned the prosecutor to urge the higher charge. The Supreme Court held that the judge had exceeded his authority and function and "deprived the defendant of an impartial magistrate." This was willful misconduct.

The Supreme Court also found numerous instances of conduct prejudicial to the administration of justice:

- The judge conducted an independent investigation in the midst of a criminal trial. He also interrupted the defense case to call his own witness.

- Although the judge knew he lacked authority to place a defendant in a work-release program, he did so anyway. When the county challenged his ruling through writ proceedings, the judge hired an attorney to defend the court, later billing the county for the same. The Supreme Court found bad faith here, but concluded in light of the judge's apparent concern for the welfare of the defendant that the misconduct was only prejudicial and not willful.

- A defendant failed to appear for sentencing and a bench warrant issued. When the defendant was arrested he was brought to Judge Ryan. Although the judge knew that the defendant was represented, he asked the defendant whether he wanted to proceed. When the defendant said yes, the judge sentenced him to jail. This would have been willful misconduct, but for the defendant's acquiescence.

- In a similar incident, a defendant was brought before the judge on a petition to revoke probation. The defendant requested an attorney and the request was granted. Before the attorney arrived, however, the judge asked the defendant if he had committed the charged acts. The defendant admitted them.

- In three instances the judge failed to provide a court reporter in a criminal proceeding. The judge knew that a court reporter had to be provided on request; but he failed to inform pro per defendants of their right to make the request, thereby "effectively den[ying] those defendants their constitutional right to have a reporter present." The judge asserted that he was trying to save money for the

county. The Supreme Court called his attitude “stubborn and obstructionist.”

- In one case, the judge told the parties he would mail them his decision. Before mailing it, however, he showed a draft opinion to a newspaper reporter and discussed the case with the reporter. In two other cases, the judge talked with reporters about pending matters. The judge also wrote a letter to the editor explaining a sentence. These acts violated Canon 3A(6), which forbids public comment by a judge about a pending matter.

- The judge told two offensive sexual jokes to attorneys in chambers.

- The judge regularly left the court at 2 o'clock, and earlier on Fridays. He was unavailable in the afternoon for warrant applications and other non-adjudicative purposes.

In summary, the Supreme Court held:

*The judge's conduct exhibits a pattern of personal embroilment in the cases assigned to him. He has lost his temperance and objectivity on several occasions, resulting in prejudice to the parties appearing before him or in abuse of his contempt power. He has attempted to defend his position in the courts and in the media with little regard for procedure or judicial decorum.*

## V

### PRIVATE DISCIPLINE AND DISPOSITION

In 1988, the commission issued eight private admonishments and 47 advisory letters.

#### *Private Admonishments*

Private admonishments are formally imposed pursuant to California Rule of Court 904.3. 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 private admonishments are summarized below. In order to maintain the privacy of these admonishments, it has been necessary to omit or alter certain details in these summaries. (In some cases, unfortunately, this omission of detail has made the summary quite uninformative.)

A. In one case, a judge delayed decision for nearly nine months, thereby violating Canon 3A(5) [“Judges should dispose promptly of the business of the court.”]. During this time the judge signed salary affidavits stating that no cases had been pending longer than 90 days. Three times before, the commission had sent letters of disapproval to the judge because of decisional delay.

B. A judge made rulings and statements that were so contrary to the law that they passed beyond legal error. They constituted an abandonment of the law and showed bias.

C. A judge repeatedly appeared late at the courthouse, took inordinately long breaks, and often worked well beyond normal court hours, requiring the presence of court personnel, attorneys and litigants. The same judge was sometimes altogether absent without notice.

D. While still practicing law, a judge accepted a grant deed to two clients' property as security for fees. In arranging for this transfer, the judge did not fully explain to the clients in writing the terms and significance of the transaction, thereby violating the Rules of Professional Conduct, rule 5-101. Later the judge sold the property without informing the clients.

E. A judge presided over proceedings in a criminal case in which the defendant was a social acquaintance. The judge made several rulings favorable to the defendant, such as modifying probation to delete a fine. The judge also wrote a personal recommendation for the defendant on court stationery and met in chambers with law enforcement officers to help the defendant.

F. A judge, who was standing for re-election, made speeches to jurors which could reasonably have been understood as electioneering. The judge also ran campaign advertisements which appeared to promise certain rulings.

G. Before appointment to the bench, a judge committed prosecutorial misconduct that tended to mislead the fact-finder. [Severe private admonishment.]

H. At a hearing in open court with a newspaper reporter present, a judge irresponsibly accused an attorney of unethical conduct.

#### *Advisory Letters*

In some cases, the commission will determine for various reasons that formal discipline is not warranted but will advise caution or express disapproval of a judge's conduct. These letters of advice are called advisory letters, or "stingers." The commission sometimes issues advisory letters when the misconduct is clear but the judge has demonstrated an understanding of the problem and a willingness to improve. They are also used when the impropriety is isolated or relatively minor.

Forty-seven complaints were closed with advisory letters in 1988.

#### **Demeanor**

As usual, the largest category of advisory letters related to demeanor problems, including unnecessary harshness, sarcasm, impatience, name-calling, and a variety of other inappropriate conduct on the bench:

1. A contentious citizen harangued a judge in the vicinity of the courtroom. The judge responded in vulgar language. When the citizen replied in a similar vein, the judge had the citizen arrested and brought to court, where the judge threatened to hold the citizen in contempt. The commission criticized the judge's choice of words, mentioned the limits on the contempt power (Code of Civil Procedure sections 1209(a)(1) and (b)), and reminded the judge that the duty to be patient, dignified and courteous extends to controversial and difficult individuals.

2. During trial, a judge sometimes leaned back with closed eyes, giving the appearance of slumber. The judge also made remarks intended "to lighten the atmosphere" which were often perceived as sarcastic. At least once the judge dressed down an attorney in front of the client, intending to cause a rift between the two. The commission was persuaded that the judge showed awareness of the problems and was actively taking steps to overcome them.

3. In dealing with a non-English-speaking defendant and with the defendant's proposed interpreter, a judge gave the impression of impatience and discourtesy. The commission reminded the judge that a patient tone is particularly important with non-English-speaking parties and witnesses.

4. During trial a judge made numerous remarks to an attorney that were rude or that interfered with the performance of the attorney's duties. The judge was sarcastic and unnecessarily impatient with the attorney.

5. A judge treated a victim-witness roughly. The witness was 17 years old and became emotional when testifying about serious injuries the victim suffered

when shot during a robbery. The judge admitted to the commission that the matter could have been handled better.

6. A judge yelled at an attorney in open court because of the attorney's repetitive questions.

7. In addressing a group of defendants, a judge used an expression which, though intended to be humorous, was at least condescending and could have been considered denigrating. During a hearing, the judge made an off-the-record indication to a police witness that the judge would rule against the defendant. Both of these incidents involved ill-advised attempts at humor.

8. Before the jury returned its verdict, a judge told two attorneys in chambers that the defendant was a cold-blooded killer. The remarks found their way into the newspapers.

9. At a routine pre-trial hearing, a judge referred to the defendant as "the killer." It was an isolated remark.

10. A judge was rude to pro per traffic defendants, rushing them, cutting them off, and intimidating them. The judge was also sarcastic and demeaning to attorneys.

11. In order to encourage settlement or arbitration of a case, a judge was deliberately rude and harsh to litigants in open court. The judge had twice before been sent advisory letters for discourteous behavior.

12. A judge shouted at an attorney in chambers for asking questions that were too long. Before the judge would sign an order, the attorney had to promise to join a local organization.

13. Addressing an obstreperous traffic court defendant, a judge made a remark which appeared to denigrate the defendant's national origin.

### **Abuse of Contempt Power**

Abuse of the contempt power was again a common problem. The commission also noted several complaints about misuse of the new sanction power contained in Code of Civil Procedure section 128.5, one of which resulted in a stinger:

14. A judge gave an obstreperous person a "choice" of five days in jail for contempt or the risk of prosecution under Penal Code section 148 (obstruction of a public officer). When the person chose the latter, the judge ordered the person taken into custody, claiming that it was a citizen's arrest. The judge expressed regret to the commission.

15. A judge found an attorney in contempt for appearing late. In the contempt order (which was overturned by a higher court) the judge failed to mention that the attorney had previously asked the court for a continuance because of a scheduling conflict and that the court had denied the request.

16. A judge threatened to find and did find attorneys in contempt on inadequate grounds. The threats were sometimes made in the jury's presence. The judge expressed regret to the commission and promised efforts to improve.

17. In imposing sanctions on a litigant, a judge failed to follow strictly the terms of Code of Civil Procedure section 128.5.

[See also Advisory Letters Nos. 1 and 43.]

### **Improper Use of Judicial Position to Denigrate Attorneys**

18. In denying an attorney's ordinary and legitimate request, a judge said in open court that the attorney was perpetrating a fraud. The judge was also rude and sarcastic.

19. When an attorney criticized a judge in the press, the judge required the attorney's presence at a public "hearing," the purpose of which was, in effect, to reprimand the attorney.

20. Without a sufficient basis, a judge told the other members of the local bench that an attorney had done something very improper.

21. An attorney whose firm advertises came before a judge on a motion to withdraw. The judge, in denying the motion, made statements the attorney perceived as hostile and derogatory to attorneys who advertise. The judge responded to the commission's inquiry letter only after a lengthy delay and after questioning the seriousness of the commission's inquiry.

[See also Admonishment H and Advisory Letters Nos. 2, 4, 6, 10, 12, 15 and 16.]

### **Improper Remarks to Juries**

A small number of judges failed to adhere to the Judicial Council's Standards of Judicial Administration, section 14, which forbids a judge to praise or criticize a jury's verdict.

22. After a jury acquitted the defendant, a judge told the defendant, in the jury's presence, that the defendant was lucky to get off and that next time the defendant would serve a long sentence because of a previous conviction. The jury had not known about the prior conviction. The judge promised the commission to refrain from such comments in the future.

23. Upset with a jury's verdict, a judge informed the jury of the judge's contrary opinion and revealed suppressed evidence. Later the judge telephoned one of the jurors to learn more of the deliberations. The judge expressed deep regret to the commission.

[See also Admonishment F.]

### ***Ex Parte* Communications**

A perennial problem.

24. A prosecutor showed some material, which had not been admitted into evidence, to a courtroom clerk who took the material into the judge's chambers. The judge looked at and considered the material, and reached a decision based on it. Only later did the prosecutor make the material available to the defendant.

25. One party made an *ex parte* motion for modification of an order. The judge telephoned the other party's attorney, discussed the matter *ex parte*, and incorporated into the order several changes suggested by the other attorney.

26. Before a court session began, a deputy prosecutor told a judge that the opposing attorney, who was unknown to the judge, was "weird." The judge chastised the opposing attorney in open court for stating the intention of challenging the judge under Code of Civil Procedure section 170.6.

### **Tardy Decision-Making**

The commission again issued advisory letters for failure to decide cases timely:

27. A judge did not rule on a submitted matter for more than a year. The commission did not accept the judge's use of "resubmission" orders as a legitimate method of handling the case.

28. A judge did not rule on habeas corpus petitions in a timely fashion. The judge had relegated all such petitions to a lower priority than set by the Rules of Court. The commission did not accept the press of business as an adequate excuse.

29. A judge did not decide a submitted matter for more than six months.

[See also Admonishment A.]

### **Miscellaneous**

And there was a variety of other cases:

30. A judge participated slightly in a case where one party was represented by a close family member of the judge.

31. At an order of examination, a judge ordered the judgment debtor to deliver his wallet to the court. The judge personally looked through the wallet, extracted

some cash, and divided it between the creditor and the debtor. The judge ignored the debtor's explanation that the money was not his personally. Though the debtor may have been "evasive" and the outcome fair, these procedural shortcuts were not well advised.

32. During a settlement conference, a judge made statements which appeared to threaten sanctions if the parties later settled the case. [See also Advisory Letter No. 11 above.]

33. In one case, a judge hinted to a pro per defendant that there would be a light sentence after a guilty plea. In fact, the judge imposed a harsh one. In two other cases, the judge sentenced misdemeanor defendants to jail, ordered them remanded forthwith, then hurried from the bench, refusing to hear their bail requests. The commission noted that the judge was making serious efforts to improve performance.

34. A judge made an absurd legal ruling as a means of drawing attention to a policy the judge disapproved of and as a means of venting personal frustration over the issue.

35. A judge responded to an inquiry from the commission in a manner that suggested unwillingness to cooperate reasonably. [See also Advisory Letter No. 21.]

36. A judge was perceived as giving favorable treatment to a defendant because the defendant was a law enforcement officer. The judge not only overturned a jury verdict of guilty, but ordered the record sealed, which was beyond the judge's statutory authority.

37. A judge engaged in acts leading to misdemeanor charges.

38-39. Two judges from the same court engaged in a semi-public feud. After speaking with both judges, the commission closed the case.

40. It was reported that a judge drank several martinis every lunch hour at a local restaurant, exhibited marked temperament changes after lunch, and joked about the judge's own blood alcohol level. There was a perception among local attorneys that the judge's own attitude toward alcohol made the judge lenient in DUI cases. The judge assured the commission that there would be no recurrence of the reported conduct and that the judge would take lunch at home or in chambers, without alcohol.

41. A judge, unaware that a litigant had properly given notice of his intention to tape record proceedings under a rule of court allowing such recording, ordered the litigant's tapes confiscated and erased. The judge admitted the error to the commission.

42. On a declaration of candidacy, a judge deliberately gave an incorrect and misleading home address.

43. An attorney missed an appearance in a traffic matter. At the next appearance, after dealing with the underlying infraction, the judge offered the attorney a choice between the client having a failure-to-appear on the client's driving record and the attorney paying a sum of money into the court's automation fund.

44. A presiding judge failed to supervise a court commissioner. The presiding judge failed to respond to a litigant's complaint that the commissioner had not decided a case for more than a year.

45. A judge removed a person from the courtroom for trying to intimidate a witness by glaring and shaking of the head, but provided no warning to the person before acting.

46. A judge failed to order restitution as a condition of probation in a case where it was required and where the judge was advised of this requirement.

47. A judge made a ruling based on the judge's fear of the defendant. Later the judge falsely insinuated that another judge was emotionally unable to hear the case.

## VI

### “SMALL POTATOES”

In May 1988, a retired Municipal Court judge pled guilty to the misdemeanor of falsifying court records. The plea concerned 15 instances in which the judge had fixed traffic tickets by arranging for the transfer of the cases to his own court and then dismissing them. A local newspaper article referred to the charge of ticket-fixing as “small potatoes.”

Some observers believe that ticket-fixing, if not acceptable, is no more than venial—a minor fault meriting no particular notice.

The commission, however, views ticket-fixing as willful misconduct in office (see *Spruance v. Commission on Judicial Qualifications* (1975) 13 Cal.3d 778, 798). There are, to be sure, more serious forms of judicial misconduct—such as bias or pre-judgment of cases—but ticket-fixing is serious enough. For most citizens, traffic and parking tickets are the only contact they have with the judicial system. Ticket-fixing subverts public confidence in the impartiality of the judiciary and leads to the suspicion that a judge willing to fix a small case would be willing to fix a large one. Where is the line on corruption to be drawn?

Given this apparent difference in perception, the commission would like to emphasize its view: Allegations of ticket-fixing will be vigorously investigated. If proven, the allegations will lead to appropriate action.

• • •

A number of other judicial activities are of current concern. The commission hopes in this discussion to encourage greater awareness of a few problem areas. By limiting ourselves to a small number of topics, we do not suggest that other topics are less important. In this annual report, however, it would be impossible to give an encyclopedic survey of judicial misconduct. It must also be remembered that the commission examines cases one by one, each situation being unique. We can therefore offer only general discussions in this report, not authoritative pronouncements.

#### **Favoritism**

Ticket-fixing is an example of a more general form of misconduct: use of judicial power for private purposes—in particular, use of judicial power for the benefit of friends, relatives, former associates, former clients, fellow judges and other individuals with some sort of private line to the judge. Such conduct violates Canon 2B:

*Judges should not allow their families, social or other relationships to influence their judicial conduct or judgment. Judges should not lend the prestige of their office to advance the private interests of others; nor should judges convey or permit others to convey the impression that they are in a special position to influence them.*

As a general rule, it would be contrary to the Canons for a judge to intervene on behalf of a friend. A judge should not order a particular case transferred to his or her own department in order to handle the case personally (*Spruance v. Com-*

*mission on Judicial Qualifications, supra*). “Putting in a good word” for a litigant with another judge or a prosecutor is also interference (*Gonzalez v. Commission on Judicial Performance* (1983) 33 Cal.3d 359, 366-369). Normally a judge should not dismiss a traffic citation unless the citation has been calendared to the judge’s department. A judge should not lower bail for a friend if another judge is scheduled for such duties. In short, a judge should not *interfere* in the normal process of the court.

It is usually no defense that the actual ruling in the case (e.g., the dismissal of the speeding ticket or the reduction of bail) was legally proper. The intervention itself was improper. The Code of Judicial Conduct, Canon 3(C)1(a) requires judges to disqualify themselves when “their impartiality *might reasonably be questioned* [because] the judge has a personal bias or prejudice concerning a party.” (Emphasis added.) (See also, Code of Civil Procedure, section 170.1(a)(6).) The impartiality of a judge who interferes with the routine functioning of the court on behalf of a friend might reasonably be questioned. Discipline would be considered even if there was nothing inappropriate in the actual disposition. If the ruling was favorable to the friend, that fact might be considered an aggravating circumstance.

Even when a case comes regularly before a judge — that is, when it happens that a friend’s case is calendared before the judge — the judge should adhere strictly to the disqualification provisions of the Code of Civil Procedure, section 170.1 and of Canon 3C. *Ex parte* rulings are not an exception to this rule. On the contrary, here the need for strict compliance is especially acute.

### ***Ex parte* communications**

Unless permitted by law, *ex parte* communications are improper (Canon 3A(4)). Few judges would listen to an attorney argue a client’s cause over the telephone or at a social function. Yet it seems that some judges may go over the day’s calendar alone with the local prosecutor (sometimes with the local defender) or have casual, friendly chats about pending cases with lawyers in chambers. The commission once received a complaint from an attorney about biased treatment from a judge. The judge gave the commission an explanation for the judge’s courtroom actions, but went on to remark that the prosecutor, during a pending proceeding, had warned the judge that this attorney was a troublemaker. Evidently the judge thought it was appropriate for a prosecutor to give such an off-the-record assessment of the opposition and for the judge to repeat it to the commission. The commission sent an advisory letter to the judge.

In some courts it appears to be the practice for an attorney to approach a judge *ex parte* to obtain an indicated sentence, or otherwise to discuss a plea bargain. Obviously there are some benefits to this practice—such as efficiency—but the potential for abuse and for the appearance of impropriety is great.

*Ex parte* communications are generally improper unless expressly allowed by law or expressly agreed to by the opposing party before the communication occurs.

### **Humor**

A sense of humor is a vital judicial asset. It enables judges to maintain a patient demeanor and adopt a balanced perspective with regard to the matters and individuals before them. *See generally* Canon 3(A), California Code of Judi-

cial Conduct. A judge may use humor, for example, to alleviate tension or tedium in a lengthy proceeding. *See, e.g., People v. Melton* (1988) 4 Cal.3d 713, 753 (“Well-conceived judicial humor can be a welcome relief during a long, tense trial.”). The appropriate use of judicial humor, however, entails a measure of self-control of the part of the judge. In court or in chambers, a seemingly innocuous joke by the judge may assume disproportionate significance in the eyes of parties, counsel, jurors, or others. Moreover, a captive attorney audience may feel compelled to laugh rather than risk an objection.

In general, the more serious the tenor of the matter, the more caution the judge should exercise with regard to humor. A murder trial, for example, is not to be taken lightly. *See, e.g., People v. Fatone* (1985) 165 Cal.App.3d 1164, 1173, 1176-81 (attempted murder conviction reversed in part for judge’s sarcasm toward defense counsel). As *Fatone* indicates, a remark that seems merely humorous to a trial judge may strike an appellate court as judicial hostility. *Cf. People v. Melton, supra*, 44 Cal.3d at p. 753 (although trial court “obviously” should “refrain from joking remarks which the jury might interpret as denigrating a particular party or his attorney,” a court’s “brief and mild” jokes at defense counsel’s expense did not warrant death penalty reversal).

Judicial humor is a dreadful thing. In the first place, the jokes are usually bad; I have seldom heard a judge utter a good one . . . In the second place, the bench is not an appropriate place for unseemly levity. The litigant has vital interests at stake. His entire future, or even his life, may be trembling in the balance, and the robed buffoon who makes merry at his expense should be choked with his own wig.

— Prosser, *The Judicial Humorist* (1952) p. vii

Ill-conceived humor may adversely impact a judge’s ability to command respect and the public’s perception of the judiciary at large. The risk that humor will trigger unfortunate repercussions escalates if it is pegged to any handicap or personal trait (race, gender, age, religion, national origin, ethnic background, and so on). It is axiomatic that judges should refrain from humor or observations that could be construed as impugning persons with that trait or handicap. Off-color jokes and those involving profanity also fall in this high-risk category. *See e.g., Ryan v. Commission on Judicial Performance* (1988) 45 Cal.3d 518, 537, 544-45; *Gonzalez v. Commission on Judicial Performance* (1983) 33 Cal.3d 359, 376-77; *Geiler v. Commission on Judicial Qualifications* (1973) 10 Cal.3d 270, 278-81 (Findings, Counts One-Three).

As *Ryan* and *Geiler* demonstrate, gender bias is a pervasive source of misplaced judicial humor. *Ryan*’s prejudicial conduct included “offensive jokes” directed to women attorneys; *Geiler*’s included “crude effort[s] at humor” directed to his woman clerk. The judiciary has begun to address the broad problem of gender bias, but demeaning jokes and vulgarities concerning women attorneys, litigants, witnesses, court employees, and jurors are scarcely a thing of the past.

See, e.g., Schafran, "Documenting Gender Bias in the Courts," 87-5 *L.A. Daily Journal Report* 25 (March 10, 1987) (discussing the National Judicial Education Program to Promote Equality for Women and Men in the Courts (NJEP)). NJEP uncovered thoughtless banter that reflects, for example, insensitivity toward rape victims (labeling a five-year-old "an unusually promiscuous young lady") and condescension toward women attorneys ("You get better looking every time I see you. How come I didn't hire you when you applied for that clerkship?"). *Id.* at 31 n. 17 and 35. See also Blodgett, "I Don't Think That Ladies Should Be Lawyers," 72 *ABA Journal* 48, 51, 52 (judicial mention of a woman lawyer's appearance subtly undermines her credibility). As New Jersey's Chief Judge acknowledged in response to the NJEP reports, "There's no room for gender bias in our system. . . . There's no room for the funny joke and the not-so-funny joke." Schafran, *supra*, at 38.

A judge who regularly indulges in gender-biased humor or other tasteless jokes may become a subject of media scrutiny. Objectionable humor harms the judiciary's public image even absent media attention, but such attention serves to aggravate the harm. The risk of press coverage extends, of course, to jokes at a public nonadjudicative gathering (e.g., a convention or seminar).

No bright line divides humor in good taste from that in poor taste. What makes one person laugh often makes another wince. The commission recommends, therefore, that judges take pains to second-guess themselves on whether a joke may be offensive before yielding to the impulse to tell it.

### **Short Hours**

Unless excused by illness or some unusual circumstance, a judge must appear regularly for work. The Code of Judicial Conduct, Canon 3, requires that judges perform their duties diligently and the commission has authority to discipline judges for "persistent failure or inability to perform the judge's duties" and for "dereliction of duty" (Art. VI, sec. 18). Other states also discipline judges for excessive tardiness and absence (e.g., *In re Haggarty* (La. 1970) 241 So.2d 469, 482; *In re Daley* (1983) 2 Ill.Cts.Com. 38).

The commission sometimes hears complaints about judges who complete their calendar early (or rush through it) and then leave the courthouse in mid-afternoon to pursue their private activities. It is not immediately clear that the judge's duties are (or are not) being discharged. (In *Ryan v. Commission on Judicial Performance* (1988) 45 Cal.3d 518, 545-546, the Supreme Court found it was prejudicial conduct for a judge regularly to leave the courthouse at 2 o'clock, ignoring his uncalendared obligations, such as ruling on warrant applications.) Other judges maintain unusual hours—starting and ending their calendars habitually late. Other judges take unduly extended breaks. And others refuse assignments from the calendar judge or deliberately fail to participate in administrative meetings. In all these cases, too, there might well be impropriety.

Attendance concerns, like most other problems involving judges, must be addressed case-by-case. Judges, particularly presiding judges, are welcome to approach the commission about a colleague's short hours or poor attendance. But they are most likely to get effective help from the commission if they have first established clear local rules concerning attendance and have attempted to deal

directly with the errant judge. Government Code section 68070 gives local courts ample authority to set rules for the conduct of business and Rules of Court 205 and 532.5 give presiding judges ample authority to supervise their colleagues. Presiding judges are also obliged to inform the commission of a colleague's substantial failure to perform duties (Rules of Court 205(17), 532.5(a)(19)). Plainly it is more difficult for the commission to identify or discipline a judge for failure to work diligently if the judge's colleagues tolerate that failure. Local toleration, however, will not bar commission action.

### **Duties of Presiding Judges**

In addition to their obligation to oversee the attendance of their colleagues, presiding judges have other duties laid out in the Rules of Court. These include the duty to resolve complaints against court commissioners and referees (Rules of Court, rules 205(16) and 532.5(a)(18); see Standards of Judicial Administration 16). The commission frequently receives complaints from members of the public about commissioners and referees. Since the commission does not now assert jurisdiction over them, these complaints are routinely forwarded to the local presiding judge. If the presiding judge fails to handle complaints against commissioners, the commission might consider that failure as the presiding judge's own neglect of duty.

(In 1988 the commission decided in principle that it was desirable to bring court commissioners within its jurisdiction. In the coming year, the commission will consider ways that this decision can be implemented, including coordination with the Judicial Council.)

### **Delay of Decision**

The Code of Judicial Conduct, Canon 3(A)(5) requires judges to dispose promptly of the business of the court. Here, too, the commission is faced with the problem of choosing appropriate standards. Over the years the commission has disciplined or warned many judges for holding decisions more than 90 days (Const., Art. VI, section 19). Except in extraordinary situations, a judge may not avoid the duty to rule promptly by "resubmitting" decisions every 90 days. (See *Mardikian v. Commission on Judicial Performance* (1985) 40 Cal.3d 473.) This year a judge was warned for failing to act on habeas corpus petitions within 30 days (Rules of Court, rule 260). When a statute sets an exact time it operates like a posted speed limit, giving both drivers and police a ready standard.

But the requirement of "promptness" is not entirely defined by statutory limits. The commission will not apply those limits mechanically. Just as there might be situations where a judge has a legitimate excuse for exceeding 90 days on a decision, so there might be cases where holding a decision for 30 or 60 days is an intolerable delay.

The commission was pleased that the Judicial Council this year adopted new Rules of Court 205.1 and 532.6, which help address the delay problem. These new rules were suggested by the commission. They require presiding judges to supervise and monitor the number of causes under submission to each of the judges in the court, and the length of those submissions, and to take various steps to deal with delay problems. Another new Rule of Court, rule 825, more clearly defines "submission," "pendency" and other important terms.

### **Failure to Cooperate with the Commission**

When the commission receives a complaint which states a *prima facie* case of misconduct, it will typically order a staff inquiry, including a letter to the judge asking for comment on the complaint. Most judges who receive such letters understand that the commission is legitimately concerned about what might be a problem, that the commission has not pre-judged the case, and that the commission is sincerely interested in what the judge has to say. These judges answer the inquiry with candor and completeness.

Occasionally, however, the commission encounters a judge who refuses to respond, or whose response does not deal with the facts. It may be appropriate for a judge to deny the facts alleged in a complaint. It may also be appropriate to state that the facts are true but, in the judge's view, do not constitute misconduct. The commission does not expect judges to respond to staff inquiries with cringing submission. But it does expect a response that addresses the issues raised and does so with a modicum of civility.

## VII

### VOLUNTARY DISABILITY RETIREMENT

In addition to its duties as an investigator of judicial misconduct, the commission reviews applications for disability retirement by judges. Government Code section 75060 reads:

*Any judge who is unable to discharge efficiently the duties of his or her office by reason of mental or physical disability that is or is likely to become permanent may, with his or her consent and with the approval of the Chief Justice . . . and the Commission on Judicial Performance, be retired from office.*

A judge on disability retirement receives 65 percent of full pay for the rest of his or her life. This is paid from the Judges' Retirement System.

To obtain a disability retirement pension, the judge first executes a disability retirement request and files one or more medical certificates with supporting medical reports. The commission frequently obtains additional reports and records and may require an independent medical examination. The commission is concerned, not only with the judge's present condition, but also with treatment and prognosis. The commission needs to be satisfied that the disability is or is likely to become *permanent*. The commission makes available to the applicant all reports and records which it receives, and will accept any further evidence which the applicant may wish to submit. After thorough review and consideration, the commission votes its approval or denial. If the application is approved, it is sent to the Chief Justice for independent evaluation. An application which is approved by both the commission and the Chief Justice is implemented by the Public Employees Retirement System. Even after the judge's retirement, the commission can require periodic re-examination and re-evaluation of the judge's disability. Recovery can lead to a restoration to capacity and eligibility for judicial assignment.

In 1988, the commission approved six disability applications and denied two others. Two were still pending at the end of the year. In March 1988, an unsuccessful applicant sought review in superior court. The court found, on the evidence before it, that the commission's denial was not an abuse of discretion (*Kennick v. Commission on Judicial Performance*, San Francisco Superior Court No. 887147).

Since 1967, the commission has considered 162 applications, approving 139 and denying 21. Five times the courts have reversed a commission denial. The most notable of these judicial reversals was *Willens v. Commission on Judicial Qualifications* (1973) 10 Cal.3d 451, 110 Cal.Rptr. 713, 516 P.2d 1. The commission had rejected Willens' disability application because (a) he had been convicted of bribery and (b) he had lost his last election. The Supreme Court held that, even though the applicant was ineligible to hold judicial office, he was still eligible for a lifetime pension. The commission has been obliged to follow *Willens*.

In 1988, the legislature amended the Government Code, making it more difficult for a judge who is the subject of disciplinary proceedings to obtain disability benefits. (The appendix to this report reprints all the relevant Government Code sections.) In sum, the amendments:

- require judges to have served four years before they are eligible for disability retirement, unless the disability was caused by judicial service.
- forbid payment of retirement benefits to a judge found guilty of certain felonies (but allowing return of the judge's accumulated contributions).
- permit periodic re-examination of judges retired because of disability, but no oftener than once every two years.
- impose additional requirements on judges who apply for disability when felony or disciplinary charges are pending, or an election has been lost. These burdens are:
  1. The judge is presumed not to be disabled.
  2. The judge can overcome this presumption only by presenting clear and convincing evidence sufficient to support the disability claim to a reasonable certainty.
  3. The judge must support the application with the written statements of two doctors or psychiatrists.

In the commission's view, these reforms are useful but do not go far enough to prevent abuse of the system. It would be more thorough (and easier to administer) if applications were simply deferred while criminal or disciplinary charges are pending and simply denied if the charges lead to removal or conviction of a felony. A judge who loses an election should be ineligible for a disability retirement, except in the extraordinary situation where the judge is physically injured in the line of duty.

It is also the commission's view that there is inadequate provision in the law for temporary and/or partial disabilities. There ought to be some sort of middle ground between a lifetime pension and complete rejection of the claim. An applicant might, for instance, have an orthopedic problem so severe that, for the time being, adequate performance on the bench is impossible—but it is difficult for the commission to determine whether the problem is permanent and how it might affect the applicant's ability to perform *some* work.

The recent amendments provide for periodic re-examination of disabled judges. (See also the new Policy Declaration 4.3, which spells out the commission's policy of requiring periodic re-examination when it grants certain disability applications.) Such re-examination is desirable but does not solve the overall problem of the recovered or partially recovered judge. Under present law, a judge who recovers continues to receive disability payments except when paid for temporary assignments under Government Code sections 75060.6 and 68543.5. If a judge refuses an assignment, the disability pension is automatically forfeited. Compulsory assignment is unsatisfactory. In some cases non-medical reasons prevent service, as in *Willens*. Also, a judge sitting by assignment under protest, simply to retain disability benefits, might perform judicial duties in a substandard manner. The commission therefore sees a need for other ways of dealing with recovered judges. For instance, it might be desirable to reduce or end a disability

pension if the judge is able to resume the practice of law or some other gainful employment.

The current law has arguably inadequate provisions for offsetting other income. There is no offset for unearned income or for workers' compensation or other financial recovery. Pension payments are offset by earned income, but only in a certain range (see Government Code section 75080(b)). The entire problem needs rethinking.

## 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

**Geller 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)  
220 Cal.Rptr. 833  
709 P.2d 852

**In re Frank J. Creede**

42 Cal.3d 1098 (1986)  
233 Cal.Rptr. 1  
729 P.2d 79

**McCullough v. Commission on  
Judicial Performance**

43 Cal.3d 534 (1987)  
236 Cal.Rptr. 151  
734 P.2d 987

**In re L. Eugene Rasmussen**

43 Cal.3d 536 (1987)  
236 Cal.Rptr. 152  
734 P.2d 988

**Furey v. Commission on  
Judicial Performance**

43 Cal.3d 1297 (1987)  
240 Cal.Rptr. 859  
743 P.2d 919

**Ryan v. Commission on  
Judicial Performance**

45 Cal.3d 518 (1988)  
247 Cal.Rptr. 378  
754 P.2d 724

## CASES COMING BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

### Ten-Year Summary - 1979-1988

| Year | Complaints Filed | Inquiries (Some kind of Investigation) | Judges Contacted | Preliminary Investigations | Advisory Letters | Admonishments | Resignations or Retirements While Under Investigation | Public Discipline                          |
|------|------------------|--|------------------|----------------------------|------------------|---------------|---|--|
| 1979 | 291              | 76                                     | 62               | 18                         | *                | 3             | 2   |  |
| 1980 | 260              | 65                                     | 54               | 12                         | *                | 8             | 1   |  |
| 1981 | 267              | 52                                     | 48               | 18                         | *                | 7             | 3   | 1 censure<br>1 removal                     |
| 1982 | 360              | 68                                     | 61               | 14                         | *                | 5             | 1   | 2 censures                                 |
| 1983 | 351              | 63                                     | 56               | 21                         | *                | 6             | 3   | 1 censure<br>1 severe censure<br>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<br>1 severe censure<br>1 removal |
| 1988 | 693              | 199                                    | 100              | 22                         | 49               | 8             | 3   | 1 removal                                  |

\* Figures not available

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