STATE OF CALIFORNIA

COMMISSION ON JUDICIAL PERFORMANCE

1990 ANNUAL REPORT

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INTRODUCTION

In 1961, when the Commission on Judicial Performance was established in California, a young man, Jack Frankel, then attorney-consultant to the Continuing Education of the Law Program, was selected as its Director and Chief Counsel.

California was the first state in the nation to create such a commission. The field of judicial discipline was uncharted, except for a small handful of impeachment cases. There were no precedents, no established procedures, no agreed-upon standards. Its new director had only the enabling language of the Constitution and some experience in handling disciplinary matters, during his seven-year tenure with the State Bar of California, to guide him in structuring the manner in which the commission would function. Jack was given a one room office in a corner of the state building and a part-time secretary to assist him. On this unpromising field, he built the commission.

In responding to the query "Why is a commission necessary?", Jack replied:

"The existence of such a [commission] is an effective element in the strengthening of the judicial system and in leading to a higher standard of judicial conduct. Not only is the independence of the judiciary protected, but we are convinced that the strength and capability of the judicial branch of the government is greatly enlarged."

Jack Frankel has become a national leader in the field of judicial discipline. Over the course of almost 30 years he has worked continuously to maintain the California commission as the national model. He is devoted to the ideal of a strong and honorable judiciary. In a real, not a rhetorical, sense, the commission was his creation. It has been his lifework -- a work in which he may justly take pride.

Jack was honored this year with a lifetime achievement award from the National Association of Judicial Disciplinary Counsel, which he co-founded.

As chair and a member of the commission for the past five years, I have worked closely with Jack on many issues and through many crises. I have found Jack to be unfailingly patient, courteous and reasonable. He is truly a person who can disagree without being disagreeable. It has been a privilege to work with him and to have this opportunity to thank him on behalf of the commission, the judiciary, and the citizens of the State of California.

Finding a successor to Jack was not an easy task, but the commission was pleased last October to appoint Victoria Henley as its new Executive Director and Chief Counsel. Ms. Henley is a graduate of the University of Pennsylvania and received her law degree from the University of San Francisco in 1978. She practiced civil litigation for 10 years with the San Francisco law firm of Long & Levit where she specialized in professional liability cases, including legal malpractice. The commission selected her after an arduous nationwide search. We have every expectation that she will be an outstanding Director.

We dedicate this 1990 Annual Report with great affection to Jack Frankel.

Arleigh Woods
Chairperson
Commission on Judicial Performance

January 1991

Excerpts from an open letter to Jack E. Frankel from Chief Justice Malcolm M. Lucas

. . .I wish to concur with my colleagues who commend your exemplary contributions to the Commission on Judicial Performance during your nearly thirty years of service as Director-Chief Counsel.

By virtue of your selfless dedication to our state and its people, you were instrumental in developing the Commission and have been a distinguished leader in the organization since its inception. Indeed, you can be credited with starting the national judicial disciplinary movement by publishing in the February 1963 *ABA Journal* your article entitled, "Removal of Judges: California Tackles an Old Problem." Your commitment to excellence knew no boundaries, for you served as the first Chairman of the Advisory Committee for the Center for Judicial Conduct Organizations, and you were the first Chairman of the Association of Judicial Disciplinary Counsel. You have also helped maintain the high standards of the judiciary by serving as an annual lecturer at the California College of Trial Judges, and by speaking at numerous statewide citizens' conferences on the courts that were sponsored by the American Judicature Society.

Your contributions to the Bar have also been numerous. You have been instrumental in planning and developing lectures and seminars for various CEB programs, and you have served as an adjunct professor at the University of San Francisco School of Law.

Jack, you have served the state of California as a dedicated, principled member of our legal community, and your colleagues and I are proud of your many achievements. You can retire with the knowledge that you have made a difference; your numerous accomplishments will help maintain California's tradition of an independent and fair judiciary as we prepare to enter the twenty-first century. Of course, we are sorry to see you go, but we are confident that you will continue to contribute to the profession with your keen mind and enthusiasm for maintaining excellence in the judiciary. I salute you on your stellar career, and wish you and your family all the best in your well-deserved retirement.

Cordially,
MALCOLM M. LUCAS

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 1993

ANDY GUY
Vice Chairperson
Public Member
Lodi
Appointed November 1985
Present term expires
October 1993

P. TERRY ANDERLINI
Outgoing Attorney Member
San Mateo
Appointed January 1989
Present term expired
December 1990

ROGER J. BARKLEY
Public Member
La Canada Flintridge
Appointed February 1990
Present term expires
May 1991

DENNIS A. CORNELL
Attorney Member
Merced
Appointed January 1989
Present term expires
December 1992

COMMISSION MEMBERS continued

HONORABLE
RUTH ESSEGIAN
Judge of the Municipal Court
Los Angeles
Appointed May 1990
Present term expires
January 1992

EDWARD P. GEORGE, JR.
Incoming Attorney Member
Long Beach
Appointed January 1991
Present term expires
December 1994

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

HONORABLE
WILLIAM A. MASTERSON
Judge of the Superior Court
Los Angeles
Appointed February 1989
Present term expires
March 1991

HONORABLE
EUGENE M. PREMO
Associate Justice
Court of Appeal
Sixth Appellate District
San Jose
Appointed February 1989
Present term expires
November 1994

COMMISSION STAFF

JACK E. FRANKEL
Director-Chief Counsel
(Retired)

VICTORIA B. HENLEY
Director-Chief Counsel

KHOI NGOC BUI
Data Processing Analyst

CYNTHIA DORFMAN
Associate Counsel

NANCY GILMORE
Senior Administrative Assistant

PETER GUBBINS
Investigating Attorney

VINCENT GUILIN
Intake Assistant

BERNADETTE M. KEEVAMA
Supervising Judicial Secretary

JENNIFER L. MACHLIN
Administrative Counsel

JOHN PLOTZ
Staff Counsel

ELAINE D. SWEET
Judicial Secretary/Administrative Assistant

BARBARA JO WHITEOAK
Judicial Secretary

HILARY WINSLOW
Investigating Attorney

I. THE COMMISSION IN 1990: AN OVERVIEW

The Commission on Judicial Performance is an independent state agency that handles complaints involving judicial misconduct and disability of state judges. The commission was founded in 1960. It has nine members: two justices 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 is appointed to a term of four years. The terms are staggered. The commission meets approximately eight times a year, usually for a two-day meeting. It employs a staff of twelve.

The commission's primary duty is to investigate charges of wilful misconduct in office, persistent failure or inability to perform the duties of a judge, habitual intemperance in the use of intoxicants or drugs, conduct prejudicial to the administration of justice that brings the judicial office into disrepute, or other improper actions or derelictions of duty. The commission considers a wide variety of judicial misconduct. Rudeness to litigants, lawyers and court staff, gender and ethnic bias, abuse of contempt power, delay of decision, ex parte communications, ticket-fixing, drunkenness, systematic denial of litigants' rights, improper off-bench activities and many other forms of misconduct have claimed the commission's attention. The commission is also charged with evaluating disabilities which seriously interfere with a judge's performance.

A commission 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, another judge or a court employee. If appropriate, the staff does some initial, informal investigation into the factual background of the complaint. All complaints are presented to the commission. The majority of complaints do not on their face state a case of judicial misconduct. These complaints are closed by the commission after staff review. When a complaint appears to state a case, the commission orders its staff to make an inquiry into the matter and report at the next meeting. Usually the staff inquiry includes contact with the judge. These letters of inquiry 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, exaggerated, or unprovable, in which case the commission closes the case without any action against the judge. If ethically ques-

tionable 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 under the Rules of Court, rule 904.1. If serious issues remain after inquiry, the commission will order a "preliminary investigation" under rule 904.2. The commission sometimes orders a preliminary investigation without a staff inquiry.

After a preliminary investigation, the commission may close the case without action, defer closing the case in order to observe and review the judge's conduct, issue an advisory letter, or issue a notice of intended private admonishment. In the most serious cases, the commission will issue a notice of formal proceedings under rule 905. The notice is a formal statement of charges and leads to a hearing, usually before a panel of special masters appointed by the Supreme Court. The Constitution provides that the commission may open hearings to the public if the charges involve moral turpitude, or if the judge requests an open hearing. After the hearing the special masters report their findings to the commission.

After reviewing the report of the special masters, the commission may close the case, impose relatively minor discipline such as an advisory letter or private admonishment, or it may recommend to the Supreme Court that the judge be removed or publicly censured, or involuntarily retired because of a disability.

At any point after the notice of formal proceedings is issued, the commission may issue a "public reproval" with the judge's consent. A public reproval is not subject to review by the Supreme Court.

Two flow charts showing the progress of complaints through the commission are appended at pages 71 and 72. While not a complete overview of the various courses of commission proceedings, they illustrate some of the typical patterns.

Since its beginning, the commission has recommended the removal or involuntary retirement of 15 judges. The Supreme Court has accepted the recommendation in 13 cases and rejected it in 2. Some judges have elected to retire or resign with commission proceedings pending.

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In 1990 the commission received 885 complaints. The commission ordered 92 staff inquiries and 29 preliminary investigations. The commission instituted formal proceedings in 9 matters.

The commission issued 41 advisory letters and 11 private admonishments (see section V of this report for a summary of these matters.) The commission also issued 2 public reprovals (see section IV.)

The Supreme Court ordered the removal of Municipal Court Judge Charles D. Boags, when his misdemeanor conviction became final in 1990. In another

action that became final in 1990, the Supreme Court removed Municipal Court Judge Kenneth Kloepfer (49 Cal.3d 826). And the Supreme Court ordered the removal of Municipal Court Judge David Kennick (50 Cal.3d 297). (See section IV.)

The commission also rules on applications for disability retirement by judges. In 1990 the commission granted two applications and tentatively denied one other. This aspect of the commission's work is discussed in section VI of this report.

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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 through 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 with other relevant material.

II. RECENT CHANGES IN THE LAW

In 1990 there were few changes in the statutes and rules affecting the commission.

The California Judges Association amended Canon 5B(2) of the Code of Judicial Conduct to read as follows:

> Judges should not solicit funds for any educational, religious, charitable, fraternal or civic organization, or use or permit the use of the prestige of their office for that purpose, but they *may privately solicit funds for such an organization from other judges (excluding court commissioners, referees and temporary judges), and they* may be listed as officers, directors, or trustees of such organization. They should not be the principal speaker or the guest of honor at an organization's fund-raising events, but they may attend such events.

The Judicial Council clarified rules 78, 205 and 532.5 of the Rules of Court. These rules, which apply respectively to appellate, superior and municipal courts, define the duty of presiding judges to report the failure of other judges to perform their duties. The revised rules state that the presiding judge shall

> notify the Commission on Judicial Performance, and give the judge a copy of the notice, of (i) a judge's substantial failure to perform judicial duties, including but not limited to any habitual neglect of duty, or (ii) any absences caused by disability totaling more than 90 court days in a 12-month period, excluding absences authorized [for vacations, conferences, etc.].

The commission adopted an important new policy declaration (4.4) setting forth the procedure for handling disability retirement applications. It is discussed in section VI of this report and reprinted in full in the appendix.

There were also a few technical changes to other policy declarations.

III. SUMMARY OF COMMISSION DISCIPLINARY ACTIVITY IN 1990

COMPLAINTS RECEIVED AND INVESTIGATED

At the close of 1990, there were 1555 judicial positions within the commission's jurisdiction:

Justices of the Supreme Court.....7
Justices of the Court of Appeal.....88
Judges of the Superior Courts.....789
Judges of the Municipal Courts..... 614
Judges of the Justice Courts.....57

In 1990, the commission received 885 new complaints, all of which were carefully reviewed and evaluated. More than 600 cases were completed after initial review of the complaint because a prima facie case of misconduct was not established. In approximately 200 cases, some informal investigation was necessary before the matter was submitted to the commission for review. The commission determined that further formal inquiry was required in certain cases.

The commission ordered a "staff inquiry" (Rule of Court 904) in 92 cases. In a staff inquiry, the commission's legal staff investigates the facts underlying the complaint. Occasionally the inquiry reveals facts which clear the judge completely and make the judge's comment unnecessary. Usually, however, the judge is asked to comment on the allegations.

Under Rules of Court 904 and 904.2, the commission may institute a "preliminary investigation" to determine whether formal proceedings should be instituted, or discipline imposed of greater severity than an advisory letter, or the case should be closed. The commission ordered 29 preliminary investigations in 1990.

After a preliminary investigation, the commission may issue a notice of formal proceedings (Rule of Court 905), which is a statement of formal charges leading to a hearing. Such notices were issued in 9 cases in 1990.

Of the 885 complaints received in 1990, approximately 71% originated from litigants or their families. 14% of the complaints came from members of the public apparently unconnected to any litigation. Complaints from lawyers accounted for another 8%. All other sources, including judges, court employees, jurors, and others, amounted to approximately 7%.

III. SUMMARY OF DISCIPLINARY ACTIVITY

The 885 complaints set forth a wide array of grievances. A large number of the complaints alleged legal error not involving misconduct. Approximately 45% of all complaints fell in this category. Many of these complaints were expressions of frustration and disappointment with the legal process. The next most common category was demeanor and rudeness (10%) followed by allegations of bias or the appearance of bias (5%). Many complaints mentioned more than one sort of misconduct.

DISCIPLINE IMPOSED

Since some of the actions taken by the commission in 1990 involved cases begun in 1989, and since some cases begun in 1990 were still pending at the end of the year, the following statistics are based on cases completed in 1990, regardless of when the case began. Cases still pending at the end of 1990 are not included.

The commission completed 893 cases in 1990. Of these, 832 were closed without discipline; 57 were closed with discipline of some sort; and there were 4 retirements or resignations with charges pending.

Discipline may be imposed by the commission only after official investigation, including comment from the judge. Of the 106 officially investigated cases that were completed in 1990, 45 were closed without any discipline. In those cases, investigation showed that the allegations were unfounded or unprovable, or the judge gave an adequate explanation of the situation.

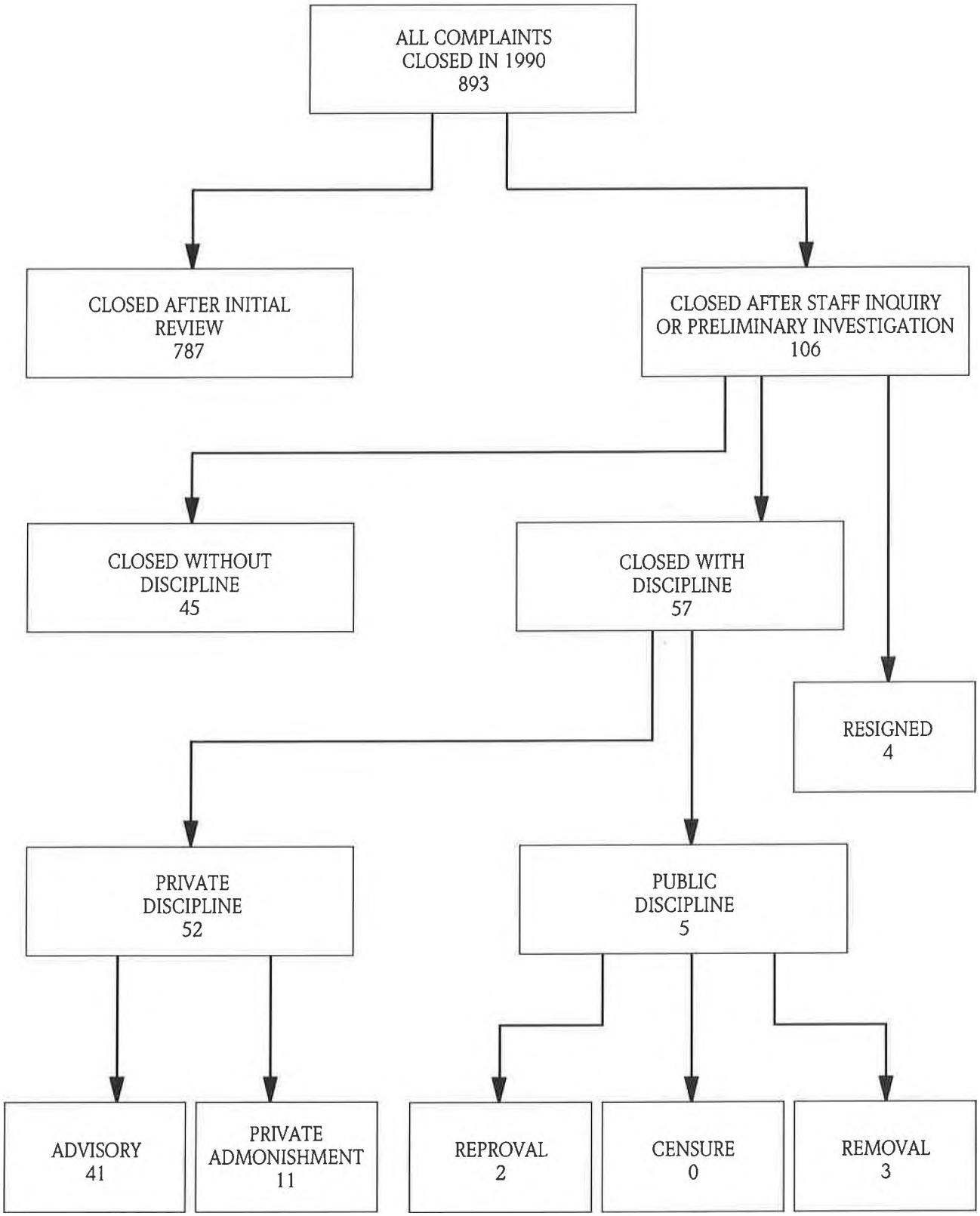
Discipline of some sort was imposed in 57 cases, ranging from mild advisory letters to removal by the Supreme Court.

Public discipline included 3 removals by the Supreme Court and 2 public reprovals by the commission. See section IV of this report for a discussion of the public discipline imposed.

Private discipline included 11 private admonishments and 41 advisory letters See section V of this report for a discussion of the private discipline imposed.

See Chart III.

CHART III


ALL COMPLAINTS
CLOSED IN 1990
893
CLOSED AFTER INITIAL
REVIEW
787
CLOSED AFTER STAFF INQUIRY
OR PRELIMINARY INVESTIGATION
106
CLOSED WITHOUT
DISCIPLINE
45
CLOSED WITH
DISCIPLINE
57
RESIGNED
4
PRIVATE
DISCIPLINE
52
PUBLIC
DISCIPLINE
5
ADVISORY
41
PRIVATE
ADMONISHMENT
11
REPROVAL
2
CENSURE
0
REMOVAL
3

IV. PUBLIC DISCIPLINE

In this Annual Report on the work of the commission we necessarily analyze all of the complaints and resulting discipline which we have addressed during this period. We would be remiss, however, if we failed to take this opportunity to observe that the vast majority of the 1555 judges comprising the California judiciary served the State of California with dedication and have not been the subject of any disciplinary proceeding. It is a goal of the commission to assist the California judiciary in maintaining its reputation for excellence.

The following is a synopsis of disciplinary action taken by the Commission on Judicial Performance and the Supreme Court in 1990.

In January 1990, the Supreme Court's order removing Judge Kenneth Kloepfer (San Bernardino Municipal Court) became final (49 Cal.3d 826; 264 Cal.Rptr. 100; 782 P.2d 239).

In March, the Supreme Court removed Judge David Kennick (Los Angeles Municipal Court) (50 Cal.3d 297; 267 Cal.Rptr. 293; 787 P.2d 591).

In May, the Supreme Court removed Judge Charles D. Boags (Beverly Hills Municipal Court) after his conviction of conspiracy to obstruct justice became final.

The commission itself issued two public reprovals (Const. art. VI, sect. 18(f)(2)).

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THE KLOEPFER CASE

In a 1989 opinion which became final in 1990, the Supreme Court removed San Bernardino Municipal Court Judge Kenneth L. Kloepfer from office for four acts of wilful misconduct and twenty-one acts of prejudicial conduct. *(Kloepfer* v. *Commission on Judicial Performance* (1989) 49 Cal.3d 826.)

The court first discussed and rejected the judge's claim that the combination of investigatory and adjudicatory functions in the commission was a denial of due process. The court also rejected the judge's argument that he was denied due process by delays in commission proceedings.

In turning to the merits, the court considered five broad counts, each containing a number of incidents, set forth in the commission's report and recommendation of removal. On the first count, the court upheld the commission's conclusion that Judge Kloepfer had engaged in ten acts of prejudicial conduct which formed a persistent pattern of rude, abusive, and hostile behavior. These acts were:

1. Angrily berating a court reporter for being late.

2. Telling a deputy district attorney in open court, "You are an embarrassment to the People of the State of California and it's frightening to think that you represent their interests."

3. Telling another deputy district attorney in open court that he was appalled that the interests of the People of the State of California rested in her hands.

4. Berating a court reporter before a courtroom full of people because she asked a defendant who was entering a plea whether he meant "yes" when he nodded his head.

5. Accusing an attorney in open court of being "psychologically afraid to take a case to trial" and demanding that she name the cases she had tried and the courts in which they had been tried.

6. Interrupting a lay witness who had been asked two questions to admonish her in an intimidating manner: "First rule is you keep your mouth shut." The Supreme Court found that "in this incident, as in others, the manner in which petitioner addressed lay witnesses reflects impatience, anger, and an intimidating lack of courtesy in explaining court procedure." (49 Cal.3d at p. 844.)

7. Displaying hostility toward the defendant, defense counsel, and a defense witness during a misdemeanor court trial. The defendant's conviction was reversed by the superior court on the ground that the judge had shown such animosity toward him that she had been denied "even the semblance of a fair trial." Noting that Judge Kloepfer had engaged in argumentative dialogue with the defense witness and had cross-examined him in a manner which reflected hostility and disbelief, the Supreme Court stated "It is fundamental that the trial court...must refrain from advocacy and remain circumspect in its comments on the evidence, treating litigants and witnesses with appropriate respect and without demonstration of partiality or bias. (*People* v. *Carlucci* (1979) 23 Cal.3d 258.)" (49 Cal.3d at p. 845.)

8. Harshly admonishing an inexperienced lay witness to "Keep your mouth shut."

9. Taking a defendant into custody for failing to respond to a question from the judge and stating that if the defendant sat there "like a bump on a log" and failed to respond to questions being interpreted to him in Spanish, he would "cage him" and bring him back "manacled" to ensure that he followed the court's orders.

10. Intimidating a defendant for whispering to his attorney after the judge asked the defendant a question. The Supreme Court stated, "[Judge Kloepfer's] argument that no one was harmed reflects his inability to appreciate the manner

in which impulsive, discourteous, threatening, and arbitrary statements by a judge affect public perception of the judiciary and the justice system." (49 Cal.3d at p. 849.)

Turning to the second count, the Supreme Court found that Judge Kloepfer had failed to ensure the rights of criminal defendants in five instances:

1. A defendant appeared before the judge on four matters. Without advising counsel previously appointed in two of the cases, and without eliciting proper waivers or obtaining a probation report, the judge took pleas and admissions and imposed sentence on the defendant. The Supreme Court found support in the record for the conclusion that the judge "knowingly failed to ensure the constitutional rights of a criminal defendant and did so to avoid the burden of proceedings in which the defendant would have adequate representation." (49 Cal.3d at p. 850.) The court agreed with the commission that this was wilful misconduct.

2. A defendant appeared without counsel for a pretrial conference. The defendant had retained counsel, who had not yet appeared. Without giving the defendant an opportunity to explain, the judge remanded him to custody for not being interviewed by a panel that screened defendants seeking appointed counsel and for not discussing his case with the district attorney. The court stated, "We disagree with petitioner's characterization of his conduct as atypical. To the contrary, it is all too typical of his pattern of discourteous remarks, threats and intimidation, and punitive rulings made on the basis of unfounded assumptions." (49 Cal.3d 850.)

3. The judge issued an arrest warrant for a defendant who did not appear at a motion hearing; the defendant had not been ordered to appear and her counsel, who had made all appearances on her behalf, was present.

4. The judge denied a defense motion to disqualify another judge under Code of Civil Procedure section 170.6 because the motion was not worded in the exact language of the statute. The Supreme Court found that this ground was "wholly irrelevant" and that the judge's action was "at least prejudicial conduct." (49 Cal.3d at p. 852.)

5. A defendant appeared before Judge Kloepfer with proof that the criminal case underlying a charge of probation violation had been dismissed. The judge insisted that the probation violation proceed to hearing immediately, although the defendant had never waived his right to counsel and repeatedly asked for counsel. After listening to hearsay testimony from a police officer, the judge found the defendant in violation of probation and sentenced him to six months in jail.

The defendant, represented by the public defender, filed a notice of appeal and a petition for writ of habeas corpus. Notwithstanding the pendency of the appeal, but pursuant to a stipulation by counsel, Judge Kloepfer reasserted jurisdiction in the case, set aside the sentence, and released the defendant from custody. The public defender then filed an affidavit of prejudice against Judge Kloepfer; he denied it, even though he recognized that this was the first appearance

by counsel. Judge Kloepfer then held another probation violation hearing at which he again found the defendant in violation and sentenced him to four months in jail.

The Supreme Court found that the judge's insistence on proceeding to hearing without obtaining a waiver of counsel, his subsequent refusal to appoint counsel, and the means by which he reasserted jurisdiction over the case after recognizing his error all supported the commission's conclusion that he had engaged in wilful misconduct and prejudicial conduct.

On the third general count, the Supreme Court found that the judge had abused his contempt power and his power to issue orders to show cause and bench warrants in five instances:

1. The judge held a defendant in contempt for asking "how come" after the judge rebuffed his request to say something. When the defendant responded "but," the judge held him in contempt again. He sentenced the defendant to two days in jail on each count.

2. The judge threatened a witness with a fine or jail after counsel objected that the witness's answer to a question was not responsive.

3. A spectator in the judge's courtroom uttered an expletive when she struck her knee on a bench. Apparently believing that the expletive was a comment on the proceedings, the judge held the spectator in contempt and imposed a short jail sentence.

4. When a defendant the judge had ruled ineligible for 10% bail was released on 10% bail and failed to appear, the judge issued an arrest warrant for the person who apparently had posted the bail. In agreeing with the commission that this constituted wilful misconduct, the Supreme Court stated, "Ordering a person to appear in court when no matter requiring his attendance is pending constitutes serious misuse of the judicial office." (49 Cal.3d at p. 857.)

5. The judge threatened a defendant with contempt for whispering to his attorney during proceedings. The court noted that the contempt power should be a "last resort" for a judge, and should never be used "to intimidate litigants and witnesses, or in a manner that interferes unnecessarily with a litigant's ability to consult with counsel." (49 Cal.3d at p. 858.)

On the fourth general count, the Supreme Court found that Judge Kloepfer failed to remain objective and became personally involved in matters before him in three incidents:

1. After granting a defense motion to suppress evidence, the judge denied the prosecutor's motion to dismiss the case, stating that he had read the police report and felt there was enough evidence to go forward. He also stated that he felt the defendant was guilty, but then denied an oral disqualification motion made by the defense.

2. The judge repeatedly criticized the office of the district attorney for exercising its right to seek extraordinary relief from one of his rulings.

3. After stating at the end of a preliminary hearing that he believed the defendant was "fraudulent, a liar, and deceitful," the judge increased bail from $13,000 to $150,000 and ordered $1500 in attorney fees paid from the bail already posted, despite the fact that this bail had been posted by the defendant's grandmother.

On the fifth and last count, the Supreme Court upheld the commission's determination that the judge abused his power to make fee orders in two instances:

1. A defendant represented by the public defender was convicted after a trial. Without advising the defendant of his right to a hearing and without taking any evidence of the cost of the public defender's services or the defendant's ability to pay, as required by Penal Code section 987.8, the judge ordered the defendant to reimburse the county $2000 for legal services. The judge later chastised the public defender for seeking modification of the order. The Supreme Court agreed with the commission that the judge's actions constituted wilful misconduct.

2. At the end of a preliminary hearing, the judge ordered $1500 in attorney fees paid out of a bail deposit. He made this order without holding a hearing or taking any evidence of the cost of the services or the defendant's ability to pay. This was found to be prejudicial conduct.

The Supreme Court then considered the question of mitigation. Noting that attorneys and other judges had testified to Judge Kloepfer's honesty and integrity, the court stated, "This evidence, and that which confirms that petitioner had a good reputation for legal knowledge and administrative skills are not mitigating, however. Honesty and good legal knowledge are minimum qualifications which are expected of every judge." (49 Cal.3d at p. 865.)

The court also pointed out that the judge's years of experience as a deputy district attorney suggested that he was aware of the constitutional and procedural rights of criminal defendants, but failed to use his knowledge to ensure those rights. The court found that the record belied the judge's claim that he had learned from past experience and modified his courtroom behavior. The court stated, "[The record] demonstrates instead an inability to appreciate the importance of, and conform to, the standards of judicial conduct that are essential if justice is to be meted out in every case." (49 Cal.3d 866.) The court concluded that Judge Kloepfer's removal was necessary to protect the public and the reputation of the judiciary.

THE KENNICK CASE

Judge David M. Kennick of the Los Angeles Municipal Court was removed from office by the Supreme Court in 1990 for persistent failure to perform judicial duties (*Kennick* v. *Commission on Judicial Performance* (1990) 50 Cal.3d 297). This marked the first time the Supreme Court has removed a judge on this constitutional ground.

The court first considered and rejected the judge's claim that the proceedings were moot because he had retired after the commission made its recommendation of removal to the Supreme Court. The court pointed out that Judge Kennick's retirement did not foreclose his future eligibility to serve as a judge, or resolve the question whether he should be suspended from the practice of law pending further order of the court.

The judge claimed that it would be a denial of due process and equal protection for the court to suspend him from the practice of law as part of the disciplinary case. In rejecting this argument, the court pointed out that a removed judge is automatically suspended from the practice of law pending further order of the court (Cal. Const., art. VI, sect. 18 (c)), and that the record of charges sustained by the commission forms the basis for any decision not to suspend.

Although the judge offered to stipulate to his ineligibility for judicial office and to the entry of an order suspending him from California law practice, the court noted that the judge, if suspended from the practice of law, could later apply for reinstatement. In view of this possibility, the court found that it was necessary to go forward with the disciplinary proceeding in order to create a record which could be used in future reinstatement proceedings. The court then stated, "In light of this conclusion, we need not consider the other reasons urged by the commission for immediately reaching the merits, e.g., protection of the integrity of the judicial system [citation], preservation of public confidence in the judiciary [citation], and provision of guidance to other judges [citation]." (50 Cal.3d at p. 313.)

On the charge of persistent failure or inability to perform judicial duties, the record established that Judge Kennick had stopped working in early 1987, about four months before the commission's formal hearing. The judge also had been absent from court about 96 days in 1985 and 1986, reporting illness on 21 of those days. At the hearing, the judge testified that he was being treated for medical and psychological problems, but offered no medical evidence. Noting that under the contitution, as amended in 1976, "persistent failure or inability to perform judicial duties" standing alone is a sufficient ground for removal, the Supreme Court ordered the judge removed on the basis of his absences. The court in *Kennick* made clear that there need not be proof that absence or other nonperformance is the result of an illness or other disabling condition in order for a judge to be removed for "persistent failure or inability."

Although the court specified that "persistent failure or inability" was the sole basis of the removal, findings were made on the other charges contained in the commission's report. The court found that Judge Kennick engaged in prejudicial conduct by behaving in a rude and uncooperative manner when arrested for driving under the influence, and by going to a California Highway Patrol office the next day to ask a sergeant if the paperwork could get lost between the office and the court. The court also found that Judge Kennick engaged in wilful misconduct when he

shouted at a deputy district attorney in chambers and later laughed with his clerk about having upset the attorney. In addition, the Supreme Court found that the judge was discourteous, impatient, and demeaning to litigants appearing before him, denied parties a full opporunity to be heard, and was rude and intimidating to witnesses. The court also found that the judge was abusive and intimidating to an attorney appearing before him, and denied her the right to be heard.

On a charge raising the issue of gender bias, the court agreed with the commission that the judge's practice of addressing female attorneys, court personnel, and others as "sweetheart," "sweetie," "honey," and "dear" in the course of conducting court business was "unprofessional, demeaning, and sexist." (50 Cal.3d at p. 325.) The court concluded that the use of these appellations was prejudicial conduct.

The court also found that Judge Kennick displayed favoritism in appointing counsel for indigent defendants and in having ex parte conversations with attorneys appearing on appointed cases. Finally, the court found that the judge engaged in prejudicial conduct when he improperly suggested to a waitress that she should not worry about her arrest for driving under the influence.

THE BOAGS CASE

Judge Charles D. Boags of the Beverly Hills Municipal Court was removed from office by the Supreme Court in 1990 after he was convicted of conspiracy to obstruct justice, a crime involving moral turpitude. (California Supreme Court Case # S008424.)

In late December of 1988, Judge Boags was found guilty of conspiracy to obstruct justice by a municipal court jury. The evidence presented at trial showed that the judge had improperly suspended fines on over 200 parking tickets issued to his son and his son's high school friends. The commission filed with the Supreme Court a recommendation that he be suspended without pay pursuant to Article VI, section 18(b) of the California Consitution. That provision states:

On recommendation of the Commission on Judicial Performance or on its own motion, the Supreme Court may suspend a judge from office without salary when in the United States the judge pleads guilty or no contest or is found guilty of a crime punishable as a felony under California or federal law or of any other crime that involves moral turpitude under that law. [....] If the judge is suspended and the conviction becomes final the Supreme Court shall remove the judge from office.

In February 1989, the Supreme Court followed the commission's recommendation and ordered the judge suspended without pay. When the conviction became final fifteen months later, the Supreme Court removed the judge from office pursuant to Article VI, section 18(b).

PUBLIC REPROVALS

1. Judge Raymond D. Mireles (Los Angeles Superior Court)

Judge Mireles, annoyed at the absence of a particular attorney from his courtroom, directed two police officers to bring him to the court, adding they should bring "a piece of" or "a body part" of the attorney. The officers went to another courtroom and used physical force to remove the attorney. Judge Mireles witnessed the forcible delivery of the attorney to his courtroom, but did not rebuke the officers or make any inquiry into their conduct despite the attorney's protests.

The commission found that the judge did not actually intend force to be used, but carelessly allowed that impression to be conveyed.

Judge Mireles acknowledged and expressed regret for the remarks which led to the mistreatment of the attorney.

2. Judge Glenda K. Doan (Corcoran Justice Court)

Judge Doan telephoned a superior court judge to ask that a defendant who was accused of serious crimes of violence be released under supervision but without bail. She told the judge she knew the defendant's family and they were "good people." The superior court judge declined, telling Judge Doan that the request was improper. Judge Doan also asked a deputy probation officer on at least two occasions to recommend the defendant's release pending trial.

In the course of its investigation, the commission asked the judge about these matters. Her response read, "Judge Doan simply agreed to check on the status of the case. . . Judge Doan made no other efforts on behalf of the defendant. . . " This response was false.

Judge Doan ultimately recognized the impropriety of her actions and assured the commission that they would not be repeated.

V. PRIVATE DISCIPLINE AND DISPOSITION

In 1990 the commission issued 11 private amonishments and 41 advisory letters.

PRIVATE DISCIPLINE AND DISPOSITIONS

Private admonishments are imposed under California Rules of Court, rule 904.3. The private admonishments imposed in 1990 are summarized below. In order to maintain privacy, it has been necessary to omit certain details. This has made some summaries less informative than they otherwise would be; but since these examples are intended in part to educate judges and assist them in avoiding inappropriate conduct, we think it is better to be vague in these descriptions than to omit them altogether.

A. A witness, who had never appeared in court before, told the judge that the judge was wrong in an earlier ruling. The judge responded by immediately ordering the witness into custody. The judge did not hear the witness's explanation or apology until several hours later.

B. During a settlement conference, a judge made rude, impatient, and sexist remarks to parties and counsel; the judge made unwarranted threats to counsel and to a party; the judge met with parties without counsel's presence or consent; the judge denounced counsel in open court and to the parties. The admonishment was severe.

C. A judge took extended lunch hours during which the judge consumed alcohol. In the afternoons, the judge was sometimes unavailable and sometimes appeared to be intoxicated. The judge agreed to undertake remedial measures.

D. A judge appeared to be personally embroiled in a number of cases. This raised questions about the judge's detachment and neutrality. For instance, the judge urged a defendant to accept an offered plea bargain, suggesting an additional charge that the prosecutor might have brought, but did not. When the defendant declined the offer, the judge displayed anger and frustration and invited the prosecutor to amend the complaint to add the suggested charge. In the course of the investigation, the judge recognized the problem and promised improvement.

E. A judge failed to rule in two cases for approximately one year.

F. In a previous disciplinary action, the judge had assured the commission that certain acts of misconduct were isolated and that the commission knew of all such acts. After discipline was imposed, the commission learned of other acts of similar misconduct which the judge had not revealed. All of the acts involved using the prestige of office to advance the private interests of others.

G. On several occasions a judge seemed to act in disregard of the rights of criminal defendants. For instance, the judge sometimes questioned defendants during arraignments in what appeared to be an effort to elicit admissions; the judge appeared to force a defendant to choose between the right to counsel and the right to a speedy trial; the judge set bail in apparent retaliation for a refusal to enter a plea bargain. The commission determined that private admonishment was appropriate because of the judge's exceptionally constructive attitude toward the problem and the concrete steps the judge took to prevent further problems.

H. A judge requested and received two personal loans from a clerk of the court.

I. A judge violated Canon 2C, which forbids membership in any organization, excluding religious organizations, that practices invidious discrimination on the basis of race, sex, religion, or national origin. However, the judge resigned the membership.

J. A judge violated Canon 2C, which forbids membership in any organization, excluding religious organizations, that practices invidious discrimination on the basis of race, sex, religion, or national origin. However, the judge resigned the membership.

K. A judge violated Canon 2C, which forbids membership in any organization, excluding religious organizations, that practices invidious discrimination on the basis of race, sex, religion, or national origin. However, the judge resigned the membership.

ADVISORY LETTERS

The commission will sometimes advise caution or express disapproval of the judge's conduct. This milder form of action is contained in letters of advice or disapproval called "advisory letters" provided for in rule 904.1. Over the years the commission has issued them in a variety of situations:

- The commission sometimes issues advisory letters when the impropriety is isolated or relatively minor. For instance, a judge who is rude to a litigant on a single occasion might receive an advisory letter.
- Advisory letters are also used when the misconduct is more serious but the the judge has demonstrated an understanding of the problem and has taken steps to improve. For instance, a judge who persistently belittled inexperienced lawyers might receive an advisory letter after acknowledging the problem and promising improvement.
- Advisory letters are especially useful where the problem is the *appearance* of impropriety. For instance, suppose a judge often leans back with closed eyes for minutes at a time. A complainant writes that the judge fell asleep during a trial. The judge claims that the judge was not asleep, but only concentrating. Other evidence on the dispute is ambiguous. It is difficult and perhaps unnecessary to find the

"truth" in this situation. The commission's view is that attorneys, litigants, and the general public have trouble distinguishing between profound cogitation and unconsciousness. The commission is in a unique position to help the judge see him- or herself as others do. An advisory letter may serve the judge as a kind of candid snapshot.

• An advisory letter might be appropriate where there is signficant misconduct but substantial mitigation.

41 complaints were closed with advisory letters in 1990.

► Demeanor

The most commonly implicated Canon is Canon 3A(3): "Judges should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom judges deal in their official capacity. . ."

1. A judge was persistently rude to litigants, counsel and court personnel. The commission closed the case with an advisory after the judge accepted the commission's advice to attend a course in courtroom behavior sponsored by the California Center for Judicial Education and Research [CJER].

2. A judge was persistently rude, especially to inexperienced attorneys. The judge made a sincere effort to improve, including attendance at the CJER program.

3. A judge's demeanor was perceived by nearly everyone as combative, harsh and rude. However, the judge's conduct was otherwise exemplary.

4. A judge sometimes appeared to slumber on the bench.

5. A judge was habitually tardy, usually taking the bench after 10 o'clock for an 8:30 calendar. However, the judge took active steps to change this pattern.

6. A judge who had previously gone through an alcohol program appeared to some to have a recurrence of the problem. The judge denied there was a problem, but agreed to avoid any such perception by not having a drink at lunch and by other means.

7. A judge was rude and impatient toward counsel. The judge also displayed the judge's gun during the hearing.

8. A judge spoke to and treated some defendants in a manner that appeared harsh, rude and demeaning. It appeared, however, that the judge's performance had recently improved.

9. A judge was insulting and undignified in remarks to counsel at a settlement conference.

See also *Kloepfer* v. *Commission on Judicial Performance* (1989) 49 Cal.3d 826, 839 - 849, *Kennick* v. *Commission on Judicial Performance* (1990) 50 Cal.3d 297, 321-327, and Admonishment B.

► Mistreatment of Attorneys

The relationship between judges and attorneys is supposed to be, and usually is, one of mutual respect. As one court said, "Members of the bar have the right to expect and demand courteous treatment by judges and court attaches; similarly, the court has the right to expect and demand that, in the course of judicial proceedings, advocates will conduct themselves in a courteous, professional manner." (*In re Grossman* (1972) 24 Cal.App.3d 624, 629.)

To control their courtrooms and enforce proper conduct judges have many tools, including the example of their own proper behavior, persuasion, warning, sanctions, contempt power, and the ability to refer misconduct to the State Bar or other authorities (see Canon 3B(3)). It does not follow that judges may insult attorneys needlessly, make entirely unfounded complaints, or otherwise abuse their authority.

10. In open court, a judge made insulting remarks about an attorney who was not present. The same judge continued to handle a case after being disqualified.

11. A judge made uncalled-for criticisms of an attorney in front of the client, causing a rift between attorney and client.

12. After a pre-trial conference in which the judge failed to persuade an attorney to endorse a plea bargain, the judge "heard" from some source that the attorney had a conflict of interest. The judge irresponsibly referred the matter to the State Bar, which investigated and cleared the attorney.

13. A judge sent memoranda to court personnel which rebuked a number of attorneys, giving the appearance of retaliation against the attorneys.

14. A judge impugned an attorney in a letter to another judge and sent copies to a third judge and opposing counsel. The reference to the attorney was gratuitous.

See also *Kloepfer*, supra, 49 Cal.3d at 860, *Kennick*, supra, 50 Cal.3d at 326 - 327, Admonishment B and Advisory Letters 1, 2, 7, 9, 20, 21, 22, 33 and 38.

► Delay

The commission issued only one advisory letter in 1990 for failure to decide cases timely. The delay in that case was over 90 days; but in some circumstances a shorter delay would be a failure to "dispose promptly of the business of the court" (Canon 3A(5)).

15. A judge delayed 6 1/2 months in deciding a small claims case.

See also Admonishment E and Advisory Letter 24.

► Ex Parte Communications

Unless expressly allowed by law or expressly agreed to by the opposing party, ex parte communications are improper.

16. A judge heard and acted upon an ex parte request to alter a docket. The

conduct was mitigated by the fact that the alteration was intended to permit implementation of a court action to which all the parties had agreed.

See also Admonishment B and *Kennick*, supra, 50 Cal.3d at 331-332, holding it improper to meet "alone in chambers with an attorney representing one side of a case pending before him in the absence of circumstances that would make ex parte communication proper." Such a meeting is improper even if the meeting is purely social and the pending case is not discussed.

►Conscious Disregard of the Law

"[A] judge should not be disciplined for mere erroneous determination of legal issues, including questions of limitations on the judicial power, that are subject to reasonable differences of opinion." (*Gubler* v. *Commission on Judicial Performance* (1984) 37 Cal.3d 27, 47-48.) But discipline is necesssary when a judge consciously chooses to disregard the law. The Supreme Court said in *Kloepfer*, supra, 49 Cal.3d at 850: "While petitioner argues that his omissions in this case amounted to no more than procedural error, the Commission could conclude on this record that petitioner knowingly failed to ensure the constitutional rights of a criminal defendant and did so to avoid the burden of proceedings in which the defendant would have adequate representation. [This] constituted wilful misconduct."

17. In order to leave the courtroom quickly, a judge routinely rushed through the criminal calendar, taking procedural short-cuts which deprived defendants of their constitutional rights. When concerns over these practices were brought to the judge's attention, the judge made significant changes. After a period of observation and review (Rules of Court, rule 904.2(d)), the commission closed the case with an advisory letter.

18. A judge publicly announced a "policy" that all offenders in a certain category of cases would receive a sentence of 90 days. This was contrary to the sentencing judge's obligation to consider the particular defendant and exercise discretion as to whether that defendant's request for probation should be granted or denied.

19. A judge refused to let attorneys represent parties in small claims appeals.

See also Admonishment G and Advisory Letters 20 and 23.

►Abuse of Contempt Power

Before sending a person to jail for contempt, or imposing a fine, judges are required to provide due process of law, including strict adherence to the procedural requirements contained in the Code of Civil Procedure. Ignorance of those procedures is not a mitigating but an aggravating factor. (*Ryan* v. *Commission on Judicial Performance* (1988) 45 Cal.3d 518, 533.)

20. A judge ordered an attorney to pay sanctions without giving notice or opportunity to be heard. In two separate matters, the judge helped plaintiff serve

process on the defendant by detaining the defendant in the courtroom, and gave a defendant less than the statutory time to answer the complaint.

21. A judge ordered an attorney to pay $250 sanctions by noon the day they were ordered. Under the circumstances this was an unreasonably short time.

22. A judge was frequently abusive toward counsel and imposed sanctions without following proper procedures. The judge acknowledged the problems and showed considerable improvement.

See also *Kloepfer*, supra, 49 Cal.3d at 854 -858, and Admonishment A.

► Miscellaneous

And there was a variety of other cases.

23. When two defendants were not present at the first calendar call, a judge revoked their bail. They arrived a few minutes later. The judge refused to hear their attorney's (quite reasonable) explanation for their lateness. The defendants were held in jail overnight before the judge reinstated their bail. The advisory letter concerned the judge's refusal to listen to the attorney's explanation.

24. A judge failed to ensure that rulings were issued promptly and that attorneys and litigants were notified of scheduling changes. The judge blamed the court clerk for these failures. The advisory letter concerned the judge's responsibility to supervise the clerk (Canon 3B(2)).

25. A judge engaged in activities which suggested that the judge had political influence and access to high officials. The commission considered this to be "political activity inappropriate to the judicial office," in violation of Canon 7.

26. A judge who favored a particular legislative action made a ruling in a case and used that ruling as part of the legislative effort. The commission found no impropriety in the legislative activity, but thought the judge was not sufficiently sensitive to the appearance of impropriety caused by the timing of these events.

27. A judge, irate at a traffic stop of the judge's spouse, used intemperate language in a telephone conversation with police officials. This fostered the impression that the judge was abusing the judicial position.

28. A judge who was advisor to a grand jury rudely and improperly demanded that a portion of a grand jury report be deleted. In remarks to the jury, the judge said that the portion impugned the integrity of the judge and a colleague.

29. A presiding judge failed either to acknowledge an attorney's complaint about a court commissioner or to advise the attorney of its disposition.

30. A judge told a reporter that an upcoming hearing might be newsworthy. In the circumstances of that particular case, the judge's statement to the reporter gave the appearance of pre-judgment.

31. A judge made a public speech in which the judge commented on a case that was pending in another court.

32. After an attorney, sitting as a judge pro tem, had heard a judge's civil calendar, the judge took the bench and heard the final item on the calendar, in

which the attorney represented a party. The judge conceded that this situation might have created an appearance of impropriety.

33. A judge attempted to pressure the parties into a settlement. In open court, the judge questioned the parties about the fees they were paying their attorneys and expressed the opinion that the parties should seek a discount or reimbursement.

34. A traffic defendant refused to enter a plea. Instead of entering a not guilty plea and moving on, the judge made the defendant wait in the courtroom all day before entering the plea. This appeared to be a vindictive use of judicial power.

35. A judge's minor child was a criminal defendant. The judge acted on the child's behalf in a way that could have been perceived as using the judicial position to benefit a family member.

36. The commission investigated a judicial act which gave the strong appearance of bias. The judge's response to the commission displayed indifference to the perceptions of others and to the appearance of bias.

37. A judge was cautioned to avoid the appearance of undue harshness and insufficient concern for due process in certain courtroom control practices.

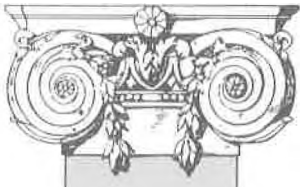
38. A judge often made rude and insulting comments to attorneys from a particular office. The judge also failed to disclose that the witness had a business relationship with the judge; but the judge was under the impression that all parties knew of the relationship.

39. A judge engaged in acts constituting a misdemeanor.

40. A judge solicited a court employee and friends to invest in a financial venture, giving the appearance that the judge was lending the prestige of judicial office to the enterprise.

41. A judge issued an order before the time had expired for a party's briefing. When the party filed the brief, the judge considered it, but decided that it did not affect the decision. The judge acknowledged to the commission that there was the risk of an appearance of unfairness.

VI. VOLUNTARY DISABILITY RETIREMENT



In addition to its duties as an investigator of judicial misconduct, the commission reviews applications for disability retirement by judges. Before taking effect, a disability retirement must be approved by the commission and the Chief Justice. See Government Code sections 75060 - 75064, which are reprinted in the appendix to this report.

In 1990, two disability applications were approved and one was tentatively denied.

In 1990 the commission adopted Policy Declaration 4.4, which sets out a new procedure for the consideration of disability retirement applications. When a judge files an application, he or she must provide medical documentation of the disability. If the commission finds the documentation inadequate, the judge is given an opportunity to supplement the application. The commission may then order an independent medical examination of the judge. The commission may ask a consultant to review the medical reports and advise the commission.

The commission must then either approve or tentatively deny the application. The commission must state reasons for its tentative denial. The judge may either accept the denial or request the opportunity to present more evidence. If there is such a request, the commission appoints a special master who will "take evidence, obtain additional medical information, and take any other steps he or she deems necessary for determination of the matter." The special master then makes a report to the commission with proposed findings.

After receiving the special master's report, the commission again considers the matter and decides either to approve the application or to deny it finally.

The complete text of Policy Declaration 4.4 may be found in the appendix.

VII. LOOKING BACK AND LOOKING FORWARD

The commission invited retiring Director-Chief Counsel, Jack Frankel, to write an essay for the Annual Report on the occasion of his retirement. The subject of the essay and the views expressed are his own.

LOOKING BACK AND LOOKING FORWARD

by Jack E. Frankel

In November 1960, on the same day John F. Kennedy was elected President, the people of California enacted a constitutional amendment creating an institution which for the first time in jurisprudence anywhere would receive and investigate the public's complaints against judges and take action towards removal. Nine months later the Commission on Judicial Performance, then called the Commission on Judicial Qualifications, opened its doors. The doors, until some time later when a regular office became available, were to the chambers in the First District Court of Appeal used by visiting pro tem judges.

The function of the fledgling program was to provide an orderly, fair and effective method for terminating the tenure of unfit judges. The judges causing problems were alcoholic judges, judges who conducted themselves outrageously in court, incapacitated judges, judges who could not or would not work regularly for whatever reason, and other judges whose mental faculties were such that they shouldn't be deciding issues affecting people's lives. The solution contemplated by the trail blazing amendment was removal or involuntary retirement by the state Supreme Court after investigation, hearing and recommendation by the nine-member commission.

Many questions were raised and debated during this period. For example: Why should judges be subject to such oversight, when legislators and other elected officials were not? Should proceedings be strictly confidential? What should be done to afford due process to the respondent judge during the investigation and hearing? How should judicial misconduct be defined? Should public and bar members be allowed to sit in judgment on judges? If so, should the majority of commission members be judges? And, fundamentally: Was the commission a viable means for inaugurating accountability of judges beyond appellate, electoral and impeachment remedies?

VII. LOOKING BACK AND LOOKING FORWARD

The commission proved itself viable. Known in the 1960's as the California Plan, state judicial conduct commissions have been established throughout the United States. They have been generally acclaimed. The media regularly objects to the secrecy of commission proceedings, and some judges (with scant evidence) have criticized perceived unfairness and aggressiveness, but on balance the commission has served its primary objective of "protect[ing] the judicial system and the public which it serves from judges who are unfit to hold office." (*McComb* v. *Commission on Judicial Performance*, (1977) 19 Cal.3d Spec. Trib. Supp. 1.)

There are a number of elements to point to in reflecting on the development and success of the CJP. I am thinking about the many excellent commission members, the able and unsung legal and support staff, and the good coverage from the media and interested journalists. I should also note the backing given by each Chief Justice of California in this 30-year period from Phil S. Gibson to Malcolm Lucas. The commission would not have achieved its standing without their endorsement and support.

Over the years, the commission's original goal of removing or retiring judges for demonstrated lack of fitness was enlarged by the people of California, the Judicial Council, and the California Supreme Court. Constitutional amendments, rule changes, and rulings of the Supreme Court instituted and validated additional grounds for imposing discipline, and added disciplinary measures short of removal and involuntary retirement. At the same time, there was a development of commission functions beyond investigating, holding hearings, and then recommending the removal of unfit judges. These ancillary functions included building a system of discipline short of removal so that various types and degrees of unethical or questionable conduct could be addressed, clearing judges who were the targets of malicious and unfounded allegations and participating in educational programs to try to prevent judicial improprieties.

The commission underwent another kind of transformation even before it was established. Its first title, "Commission on Judicial Qualifications," reflected the fact that under the constitutional amendment as originally drafted, the commission's main job was to screen nominees for the courts by exercising veto authority over nominations by the Governor. The opposition was such that this duty was dropped, leaving the removal function and the nondescriptive title; the title was changed when more substantial changes were made by further constitutional amendments in 1976. In the literature, judicial appointment and removal are often linked as judicial selection and tenure. This attempt to combine selection and removal at the operating level was therefore understandable.

Some history may be helpful here.

Beginning in 1949 and continuing through the 1950's, Chief Justice Phil S. Gibson, as the Chairman of the Judicial Council, and the State Bar leadership worked together on a number of judicial reforms. In 1949, they spearheaded the inferior court reorganization, which eliminated a maze of lower courts. (Texas and

New York still have many hundreds of such judicial anachronisms.) In the mid and late 1950's, Gibson and new State Bar leaders joined forces again to advocate several judicial reforms. Gibson tested the waters in a 1956 report to Governor Goodwin Knight "on the condition of judicial administration in California."

Gibson stressed that reforms were urgently needed to keep pace with "the onward rush of population, the mushroom growth of cities, the exciting developments in every phase of economic and social life"--a description equally applicable to the California of 1990. One reform Gibson considered crucial was an improvement of the judicial selection process. He wrote: "Even more important than the problem of removal of unfit judges is that of selection and tenure."

The reform movement headed by Gibson and the State Bar led to the creation of the Joint Judiciary Committee on the Administration of Justice in 1958. The State Bar loaned its Legislative Representative, Goscoe Farley (later a superior court judge and president of the California Judges Association), as Executive Director. In the introduction to its 1959 report, this Joint Legislative Committee discussed some complaints about problems in the judiciary.

These complaints were directed at certain judges who failed in one way or another to render the service required by their position. Some delayed decisions for months or even years. Some took long vacations and worked short hours, despite backlogs of cases awaiting trial. Some refused to accept assignment to cases they found unpleasant or dull. Some interrupted court sessions to perform numerous marriages, making this a profitable sideline by illegally extracting fees for the ceremonies. Some tolerated petty rackets in and around their courts, often involving "kickbacks" to court attaches. Some failed to appear for scheduled trials because they were intoxicated, or took the bench while obviously under the influence of liquor. Some clung doggedly to their positions and their salaries for months and years after they had been disabled by sickness or age.

All of these problems from the 50's would be dealt with after 1960 by the Commission on Judicial Performance.

The Joint Judiciary Committee proposed three reforms in its 1959 report on the Califoria Judiciary: "[1] improved methods of screening the appointment of judges, [2] more effective procedures for the removal of judges guilty of serious misconduct, and [3] a closer administrative supervision over judges." The second recommendation led to the formation of the Commission on Judicial Performance, the third recommendation led to the creation of the Administrative Office of the Courts and the constitutional position of Administrative Director of the Courts. The first recommendation led nowhere.

Judicial selection reform was a hot topic in bar circles in the 1950's--more so than removal. There was much discussion about improving the administration of justice by upgrading the method of selection. In the ensuing years, the discipline side has flourished while selection as an issue has languished. Both the State Bar and the Judicial Council have been deeply involved in many other issues which

doubtless have higher priorities than improving judicial selection. Perhaps the time has come to give renewed attention to the issue of how judges are chosen.

The prevailing school of thought on judicial selection is neo-Jacksonian: Almost anyone with the minimum qualifications and the absence of some major impediment is qualified. The prevailing assumption seems to be that "ability," "aptitude," and "performance" are terms so vague and subjective that they cannot be evaluated in a neutral manner. They are mere window-dressing on the Governor's naked power to appoint anyone he or she wishes. And since these terms have no real meaning, you might as well let the elected chief executive do the choosing on whatever personal or political bases he or she wishes. For some grossly inappropriate choice, there are commissions to encounter [Judicial Appointments and Judicial Nominees Evaluations-both discussed below]; there are judicial orientation and educational programs for new judges; and for the misfits and the unfits, the Commission on Judicial Performance is there to rap knuckles, set limits and recommend removal.

The Commission on Judicial Performance has now gone about as far in terms of disciplinary grounds and measures as the concept will allow. The constitutional grounds for removal or censure now include persistent failure and inability to perform, as well as the traditional wilful misconduct and conduct prejudicial; the grounds for admonishment include engaging in improper action or dereliction of duty. Besides removal and involuntary retirement, there is the confidential advisory letter, monitoring for up to two years, private admonishment, severe private admonishment, public reproval, censure and severe censure. Since 1989, there has been constitutional authority for public announcements. (In my view, if this power had existed in 1979, the imbroglio over the investigation of the Supreme Court would have been avoided.) With the work of the Judicial Council Advisory Committee on Judicial Performance Procedures, named by Chief Justice Lucas in 1987 to break the logjam of proposals from both the Commission on Judicial Performance and the California Judges Association, the applicable Rules of Court are now pretty much modernized. As with any important mechanism with a delicate mission, there will always be a need for maintenance, fine tuning and some change. But with a series of excellent Supreme Court decisions eloquently spelling out the disciplinary mandate of the Commission on Judicial Performance, and the explosion in California and across the country of a common law of judicial conduct, the operation of the disciplinary mechanism for judicial accountability has about reached its potential.

The same cannot be said of the commissions which pass upon judicial nominations: Judicial Appointments, a constitutional agency, for the appellate courts, and Judicial Nominees Evaluation (the Jenny Commission), a statutory body of the State Bar, for the trial courts. Both panels start with the germ of a plan: block unsatisfactory nominees. Neither panel has an office or investigative staff. Unless there are skeletons in the closet, the present system does not contemplate

influencing or rejecting any Governor's choice. That choice is commonly and correctly understood to be determined by personal and political factors. For both panels, the test is whether there is substantial cause to reject the nomination. Fortunately, the nominee is often well suited to the judicial post, but the panels do not look beyond the lowest common denominator of acceptability.

Why isn't the public entitled to excellence as a goal instead of the tiresome personal/political credentials? Stopping an unqualified aspirant is too meager an objective. The fault is not with the members of these two screening panels. They play the cards they're dealt; they do not see their role as reformers.

The tribunal for appellate judges goes through an unproductive ceremony. Its hearings resemble coronations. With rare exceptions, any dissent emanates from the lunatic fringe. There is no serious investigation of appellate aptitude or evaluation of judicial skill, nor is the Governor's choice compared with other potential choices on those bases. No standards of excellence have ever been articulated. The emperor has no clothes.

The Jenny Commission now does what was done in the 50's and 60's in a similar manner, with the same defects and limitations, by the Board of Governors of the State Bar on the basis of understandings with the governors beginning with Earl Warren. While there is regularly heard the legitimate concern that candidates receive "due process" and not be unfairly blackballed, there is surprisingly little interest in recruiting the ablest prospects or developing a talent pool. The statute establishing the Jenny Commission programs it for low effectiveness. Its only power is that the State Bar may make an announcement should a Governor appoint someone the commission has found unqualified. (Government Code Section 12011.5.)

In referring to the trial court screening system in its 1959 Report on The California Judiciary, the Joint Judiciary Committee on the Administration of Justice discussed "a serious defect in the present referral system" in words which are as true in 1991 as in 1959. "It usually works," according to their witnesses, "if the Governor's choice is notoriously bad. But it does not work if the choice is merely mediocre." The judicial appointments in the past 30 years, as in the 50's when that report was written, have been good, excellent, poor and indifferent, regardless of who is Governor. Fortunately, there have been more of the first two than the last two.

In 1970, when the Carswell nomination to the Supreme Court was before the U.S. Senate, the opposition protested on the ground of inadequacy. Finally, an exasperated Sen. Hruska countered: "Even if he is mediocre, there are a lot of mediocre judges and people and lawyers. They are entitled to a little representation, aren't they?" I think it has been unfortunate that "Qualified" and "Qualifications" are the terms of reference. Judicial ability and aptitude should be what is looked for. "Qualified" and "qualifications" suggest that the emphasis should be on approving an individual in the absence of reasons not to do so, instead of searching for the choices with positive characteristics.

VII. LOOKING BACK AND LOOKING FORWARD

We sit by apathetically while each Governor imprints his personal predilections on judges to be. Professional factors are often an afterthought. Instead of tunnel vision, why not a vision of quality? I write not about certain Governors but as an observer of five administrations. The present system does allow for good appointments; it has produced many first rate judges. But professional attributes should be the foremost factor in every choice, instead of receiving erratic and sporadic consideration.

Many years ago a good friend who was a bar activist wishing to be on the bench frequently grumbled to me, "All you have to know to be a judge is one thing: the Governor." Then one day I read that my friend was appointed to the superior court. He proved to be an excellent judge, unfortunately dying early in his new career. However, after he went on the bench I never heard him criticize the process.

Similarly, an ambitious lawyer who is effectively locked out of the appointive process because he or she doesn't satisfy the particular profile ordained by some Governor but then successfully appeals to the voters is not inclined to look critically at the elective option; it worked for him or her. It is understandable that by and large the California judiciary is not dissatisfied with the system by which it has reached office. Neither are those who are politically astute or who have a sufficient foothold in the political structure that exists when it is time to seek a place on the bench or elevation.

Some things have changed. One important and welcome change is the diversity provided by the selection of women and minorities. There also seem to be more opportunities for younger lawyers and those coming from the public sector, although this may be a reflection of the drop in real compensation, which is more of a deterrent than in the past to mid-career private sector lawyers accepting judicial office. Another important change derives from the excellent educational programs sponsored by the Center for Judicial Education and Research, which did not exist in the 50's. Probably the most significant change for the reviewing courts has been the growth of a permanent corps of staff attorneys usually chosen on ability. The excellence of the justices' research attorneys and each court's central staff attorneys is often given as a reason by insiders why the judicial position itself is secondary.

On balance, it should be noted that by comparison with the executive and legislative branches, the judicial branch has done remarkably well. It is a tribute that the judiciary functions so well, considering how society has dumped on the judicial system many of the ills and problems which society is unwilling to deal with directly.

Some suggest that the judicial selection process cannot be other than "political." Judicial selection, they point out, is part of the political or governmental process. Since an appointment is by definition political in that sense, it is reasoned that the usual political factors apply. But we have allowed "politics" to be too

pervasive in both the appointive and elective processes. Neutral criteria such as capacity for sustained work, good judicial outlook and temperament, and a track record of training, experience and accomplishments in the profession and the community are far more significant than positions on controversial questions or self-serving pronouncements about judicial philosophy. As Bernard Witkin has said, "What is a social viewpoint in a suit on a promissory note, a personal injury case or a corporate dissolution? Not once in a hundred times is a judge called upon to make great philosophic determinations." (*California Lawyer*, September 1982, p. 82.)

Political experience can be valuable for a judge. But why should that weigh so heavily? Why should measuring up to the individual ideology of the person happening to occupy the chief executive's chair in Sacramento outweigh professional criteria? Talent in and out of the judiciary is squandered. A common rejoinder to this by defenders of the status quo is: Do you realize how much worse it is in state X or Y or Z -- all where politics is more pervasive than California.

Some unwelcome changes that have taken place regarding selection are those which are derived from the contested judicial election. There are a number of currents in that direction. To name only one, a recent decision of the Ninth Circuit Court of Appeals allowing political parties to endorse judicial candidates is an ominous portent. (*Geary* v. *Renne*, 911 F.2d 280 (9th Cir.) cert. granted (January 14, 1991) 111 S.Ct. 750.) Party endorsements of judicial candidates are a ghastly prospect. Anomalies and excesses of judicial electoral campaigning and fundraising, as if a county supervisor's seat were at stake, increasingly pollute the system. However, it is argued that since prospects with judicial aptitude and capacity are often not considered by the appointing power on the basis of their abilities, legitimate ambitions justify an outlet.

For many decades we have tolerated a four-pronged "Rube Goldberg" judicial selection scheme: the gubernatorial appointment process, the two screening commissions, and the occasional contest at the polls. Each component is seriously flawed but the scheme works, provided our standards are low enough. These weaknesses are factors in the future business of the Commission on Judicial Performance.

When this essay is discussed, it may seem that I do not value the outstanding work of California judges. This is far from the case. As I have said, a large number of men and women in the California courts are truly excellent judges. They labor tirelessly with good humor, great skill and scant praise.

I foresee the time when the personalization and politicization inherent in the method by which judges are chosen will once again engender discussion of reform. We should grapple with this challenge without denigrating the achievements of the California judiciary.

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