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Commission on
Judicial Performance

STATE OF CALIFORNIA

BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

INQUIRY CONCERNING
JUDGE PATRICIA GRAY,
NO. 159.

ANSWER OF JUDGE GRAY TO
NOTICE OF FORMAL
PROCEEDINGS

To the Commissioners of the California Commission on Judicial Performance, Respondent hereby respectfully answers the Notice of Formal Proceedings pursuant to Rules of the Commission on Judicial Performance, rules 119 and 119.5.

The allegations set forth in the Notice of Formal Proceedings (hereinafter the "Notice") are solely in relation to the distribution of a campaign mailer by Judge Patricia Gray during the hotly contested March 7, 2000, judicial election in Sonoma County.

Respondent objects to these proceedings on the grounds that the distribution of the campaign mailer is core political speech protected by the First Amendment and that to the extent that the CJP imposes a restraint on core political speech, the Canons charged against Respondent are unconstitutionally overbroad, vague and chill the right of judicial candidates to speak openly and freely, thereby precluding the free

discussion of governmental affairs, all in violation of the First Amendment to the United States Constitution. This case is a matter of first impression before the California courts and CJP, addressing the issues of a Judge's First Amendment rights during an election campaign.¹

CJP acknowledges that this First Amendment issue has merit and should be considered in the CJP proceeding.²

¹Similar restrictions in other jurisdictions have been overturned, enjoined or narrowly construed by federal courts. Federal courts in other jurisdictions consistently either strike down the broad application of the Canons or interpret them as narrowly as possible. *Buckley v. Illinois Judicial Inquiry Board*, 997 F.2d 224 (7th Cir. 1993)(Striking down prohibition of comment in campaign literature that judge had "never written an opinion reversing a rape conviction" as overbroad); *Stretton v. Disciplinary Board*, 944 F.2d 137 (3d Cir. 1991) (Upholding prohibition based on prediction state would construe restriction narrowly only to issues likely to come before the courts); *Pittman v. Cole*, 117 F. Supp 2d 1285, (S.D. Ala 2000) (TRO issued to enjoin Judicial Inquiry members from enforcing advisory opinions restricting candidates speech answering Christian Coalition questionnaire); *Butler v. Alabama Judicial Inquiry Comm.*, 111 F. Supp 1241 (D.C. M.D. Ala 2000) and 111 F. Supp. 2d 1224 (TRO and preliminary injunction issued enjoining enforcement of Canon 2A(integrity) and 7B prohibiting dissemination of truthful information in a misleading fashion); *Republican Party of Minnesota v. Kelly*, 63 F. Supp 2d 967 (D.C. Minn. 1999)(Dismissing complaint challenging threatened chill but interpreting "announce clause" as only prohibiting discussion of candidates predisposition to issues likely to come before the court.); *Beshear v. Butt*, 863 F. Supp 913, E.D. Ark. 1994)(Striking down "announce clause" prohibiting candidate's expression of views on disputed legal or political issues as vague and overbroad as to form and application and issuing permanent injunction against enforcement); *Ackerson v. Kentucky Jud. Ret. & Removal Com'n*, 776 F. Supp 309 (W.D. Ky. 1991) (TRO and preliminary injunction issued after finding "announce" clause overbroad as to comments re court administration); *ACLU v. Florida*, 744 F. Supp 1094 (N.D. Fla. 1990) (Preliminary injunction issued enjoining enforcement of prohibition of judicial candidates discussion of "disputed legal or politi campaign issues"); Also see Elections-Judicial Campaigns "Don't Ask, Don't Tell Rules for Judges Undermined by Judicial Campaign Cases, U.S. Law Week, Vol. 69, No. 19 11-21-00.

²Jerome Falk, attorney for CJP, stated that if the Commission determines that everything Judge Gray did was constitutionally protected by the First and Fourteenth Amendments, "she wins." *Gray v. Hanlon*, USDC Case No. 01-1829-RSWL, Hearing of March 2, 2001.

The Notice alleges that the Commission on Judicial Performance (hereinafter “CJP”) has jurisdiction over the Judge Gray’s conduct in distributing a campaign mailer expressing core political speech. The CJP asserts that Judge Gray in expressing core political speech violated the California Code of Judicial Ethics in two regards:

First, the campaign “misleadingly presented” statements made by her opponent “as representing his personal views and biases, thus implying that he was not qualified to be a judge” and “also implied that [Judge Gray] might not be sufficiently concerned with the rights of persons charged with crimes, and might not be impartial toward those defendants and their attorneys. . . .,” conduct contrary to Canons 1, 2A, 5, and 5B; and,

Second, statements in the mailer concerning the two unnamed cases were public comments on cases then pending or impending appeal, contrary to California Code of Judicial Ethics, Canons 1, 2A, and 3B(9).

The Notice charges that the alleged violations of Canons 1, 2A, 3B(9), 5, and 5B constitute “willful misconduct in office, conduct prejudicial to the administration of justice that brings the judicial office into disrepute, improper action and dereliction of duty within the meaning of Article VI, section 18 of the California Constitution. . . .” providing for disciplinary action.

While the fundamental issue in this case is whether the campaign mailer is protected speech, the specific allegations of the Notice are addressed below.³

³Respondent herein addresses the allegations as she understands the charges. The Notice contains string citations of the canons, making it difficult to identify which conduct is attached to which conduct.

I. Respondent denies that the distribution of the campaign mailer is an action “that constitutes willful misconduct in office” within the meaning of Article VI, section 18, subsection (d)(2) of the California Constitution providing for censure.

Conduct that constitutes willful misconduct in office is “unjudicial conduct committed in bad faith by a judge acting in his [or her] judicial capacity.” *Spruance v. Commission on Judicial Qualifications*, 13 Cal. 3d 778, 795 (1975).

To support a finding of bad faith, it must be established by clear and convincing evidence that the judge performed a judicial act (1) “for a corrupt purpose (which is any purpose other than the faithful discharge of judicial duties),” or (2) “with knowledge that the act is beyond the judge’s lawful judicial power,” or (3) “that exceeds the judge’s lawful power with a conscious disregard for the limits of the judge’s authority.” *Broadman v. Commission on Judicial Performance*, 18 Cal. 4th 1079, 1092 (1998) (Judge intentionally misled a criminal defendant and his counsel in the course of a hearing.)

The proper standard is proof by clear and convincing evidence sufficient to sustain a charge to a reasonable certainty. *McComb v. Commission on Judicial Performance*, 19 Cal. 3d Spec. Trib. Supp. 1, 12 (1977), citing *Geiler v. Commission on Judicial Qualifications*, 10 Cal. 3d 270, 275 (1973).

The distribution of campaign mail during an election by a candidate for judicial office cannot be considered the performance of a judicial act “committed in bad faith by a judge acting in his [or her] judicial capacity.” *Spruance, supra*, at 795 (judge was found to have conducted his court in a bizarre and unjudicial manner, engaging in a pervasive course of acting vindictively toward attorneys who sought to have the judge disqualified or who appealed from his decisions, and to have permitted his business relationships and social friendships improperly to influence his judicial rulings.)

Nor can campaign speech be considered “bad faith, bias, abuse of authority,

disregard for fundamental rights, intentional disregard of the law or any purpose other than the faithful discharge of judicial duty.” See *In re Whitney*, 14 Cal. 4th 1, 2-3 (1996) (failure to follow the law regarding arraignment procedures is willful misconduct.)

Nothing in the litany of cases where “willful misconduct” has been determined to occur suggests that the distribution of a campaign mailer in the course of an election campaign was acting in any judicial capacity.⁴

⁴ See also, *McCullough v. Commission on Judicial Performance*, 49 Cal. 3d 186, 192 (1989) (willful misconduct to direct guilty verdict in criminal action and thereby deprive the defendant of fundamental right to jury trial); *Gonzalez v. Commission on Judicial Performance*, 33 Cal. 3d 359, 374-375 (1983) (willful misconduct to visit jury room during deliberations); *Gubler v. Commission on Judicial Performance*, 37 Cal. 3d 27, 47-48, 55-59 (1984) (improper collection practices involving attorney fees, improper gun sale is willful misconduct); *Kloepfer v. Commission on Judicial Performance*, 49 Cal. 3d 826, 838-863 (1989) (willful and prejudicial misconduct for failing to protect the rights of defendants, and abuses of power involving contempt procedure, orders to show cause, and bench warrants); *Cannon v. Commission on Judicial Qualifications*, 14 Cal. 3d 678, 693-694 (1975) (the judge committed 21 acts of wilful misconduct and 8 other acts of prejudicial conduct, including an egregious abuse of the contempt power, often arbitrarily ordering the incarceration of public defenders and thereby depriving their clients of effective assistance of counsel); *Fletcher v. Commission on Judicial Performance*, 19 Cal. 4th 865 (1998) (improper entry of judgment against nonparty; improper comments about counsel; improper use of court staff for campaign purposes; telling clerk she was in contempt; ex parte communications regarding criminal defendant; failure to disqualify; alteration of court records; etc., together constitute a continuing, pervasive pattern of willful misconduct); *Wenger v. Commission on Judicial Performance*, 29 Cal. 3d 615, 643-645 (1981) (backdating affidavit was willful misconduct.); *Adams v. Commission on Judicial Performance*, 10 Cal. 4th 866, 906 (1995) (judge's inaccurate and incomplete responses and material omissions to the Commission constituted willful misconduct); *Ryan v. Commission on Judicial Performance*, 45 Cal. 3d 518 (1988) (judge contacted the district attorney ex parte and urged him to pursue the matter as a felony rather than misdemeanor is willful misconduct); *In re Rasmussen*, 43 Cal. 3d 536, 538 (1987) (misconduct to initiate

(continued...)

Respondent's distribution of the campaign mailer was made in the course of a hotly contested election, not while she was acting in a judicial capacity. The distribution of the campaign mailer therefore cannot constitute willful misconduct in office within the meaning of Article VI, section 18, subsection (d)(2) of the California Constitution.

⁴(...continued)

probation revocation proceedings for "personal reasons other than the faithful discharge of [judicial] duties"); *Gonzales v. Commission on Judicial Performance*, 33 Cal.3d 359, 371, 374 (1983) (judge committed misconduct by making "insulting and derogatory comments from the bench and in his chambers impugning the character and competence of his judicial colleagues"; judge summoned a deputy district attorney into his chambers and attempted to persuade the latter to dismiss charges in cases not before the judge; issuance of "press release opinion" motivated by a desire for preelection publicity was "a blatant exploitation of the judicial office for political ends"); *Geiler v. Commission on Judicial Qualifications*, 10 Cal.3d 270 (1973) (willful misconduct includes the use of vulgar language and sexual innuendo, prodding a deputy public defender with a dildo, curtailing cross-examination, and interfering with the attorney-client relationship); *Kennick v. Commission on Judicial Performance*, 50 Cal. 3d 297 (1990) (actions relating to arrest and conviction of judge for drunk driving, numerous instances of demeaning, rude, impatient, or abusive behavior, and denial of litigants' and attorneys' rights to be heard, both on the bench and in chambers, is willful misconduct); *Furey v. Commission on Judicial Performance*, 43 Cal.3d 1297 (1987) (eight charges of willful misconduct arising out of four incidents, plus ten charges of prejudicial conduct; the charges included abuses of the contempt power and an attempt to influence a case in which the judge had been disqualified); *Doan v. Commission on Judicial Performance*, 11 Cal. 4th 294, 339 (1995) (willful misconduct included intervening on behalf of a defendant, her gardener, in a pending criminal case while at the same time presiding over his case; corruptly attempting to influence the outcome of a criminal case she was presiding over to ingratiate herself with the defendant's aunt, a friend of the judge's who had lent the judge money; and instructing witnesses not to cooperate with the Commission on Judicial Performance); *In re Whitney*, 14 Cal. 4th 1, 2-3 (1996) (refusal to appoint counsel to assist indigent defendants at the arraignment constituted willful misconduct in office); *In re Chargin*, 2 Cal. 3d 617 (1970) (during the course of a juvenile court hearing over which he presided, judge made certain improper and inflammatory remarks reflecting upon the juvenile's family and members of his ethnic group).

II. Respondent denies that the distribution of the campaign mail is “conduct prejudicial to the administration of justice that brings the judicial office into disrepute” within the meaning of Article VI, section 18, subsection (d)(2) of the California Constitution providing for censure.

“Conduct prejudicial to the administration of justice that brings the judicial office into disrepute” includes two types of conduct:

(1) judicial acts that a judge “undertakes in good faith but which nevertheless would appear to an objective observer to be not only unjudicial conduct but conduct prejudicial to public esteem for the judicial office.” *Geiler v. Commission on Judicial Qualifications*, 10 Cal. 3d 270, 284 fn.

omitted. (1973) or,

(2) “wilful misconduct out of office, i.e., unjudicial conduct committed in bad faith by a judge not then acting in a judicial capacity.” (*Id.* at p. 284, fn. 11.)

“To constitute prejudicial conduct, a judge’s actions must bring ‘the judicial office into disrepute,’ that is, the conduct would appear to an objective observer to be prejudicial to “public esteem for the judicial office.” [Citation.]” *Broadman, supra*, 18 Cal. 4th at p. 1093.⁵

Bad faith requires a culpable mental state beyond mere negligence and consisting of either knowing or not caring that the conduct being undertaken is unjudicial and prejudicial to public esteem. *Id.*

Plaintiff’s distribution of campaign mail during an election, widely covered in

⁵In *Broadman*, Petitioner granted “an interview to Time magazine and commented on the then-pending *Johnson* case after the Commission’s letter to him stating that public comment on pending cases was improper.” *Broadman, supra*, 18 Cal. 4th at 1099 (italics in original). Such actions would appear to an objective observer to be “prejudicial to public esteem for the judicial office.” *Kennick, supra*, 50 Cal. 3d at p. 314.

the local press, bears little resemblance to “objectively unjudicial conduct prejudicial to public esteem for the judicial office” or “conduct committed in bad faith by a judge not then acting in a judicial capacity.”⁶

⁶See *In re Whitney*, 14 Cal. 4th 1, 2-3 (1996) (failing to exercise judicial discretion to consider release of defendants on their own recognizance, or to consider grants of probation or concurrent sentencing for defendants pleading guilty or no contest at arraignment, or to inform defendants pleading guilty or no contest of the negative consequences a conviction could have on a noncitizen with regard to immigration constituted, at most, conduct prejudicial to the administration of justice); *In re Norman W. Gordon*, 13 Cal. 4th 472 (1996) (making of sexually suggestive remarks to and asking sexually explicit questions of female staff members; referring to a staff member using crude and demeaning names and descriptions and an ethnic slur; referring to a fellow jurist's physical attributes in a demeaning manner; and mailing a sexually suggestive postcard to a staff member addressed to her at the courthouse, none of which occurred while court was in session or while the judge was on the bench conducting the business of the court, constituted “conduct prejudicial to the administration of justice that brings the judicial office into disrepute.”); *Dodds v. Commission on Judicial Performance*, 12 Cal. 4th 163, 172 (1995) (judge obstructed a law enforcement investigation, “has frequently given the appearance of rudeness and prejudgment in his handling of cases,” and made an offensive remark in chambers about two lawyers who had appeared before him.); *Doan v. Commission on Judicial Performance*, 11 Cal. 4th 294, 339 (1995) (failing to disqualify or disclose relationship to defendant; the giving of assurances to a defendant as to the outcome of the prosecution against her, with an implication of inside information and influence; and an apparent intent to mislead defendant in order to continue to obtain money and food; intentionally failing to disclose loans as required by Government Code section 87200 et seq.; failing to list all creditors in bankruptcy petition; and offering to provide legal services on behalf of a defendant's husband constitutes “conduct prejudicial to the administration of justice that brings the judicial office into disrepute”); *Adams v. Commission on Judicial Performance*, 10 Cal. 4th 866, 906 (1995) (by accepting gifts and favors from attorneys and a litigant appearing before him and assisting those attorneys in cases pending before the court of which he was a member and before another court, petitioner committed prejudicial conduct); *Fletcher v. Commission on Judicial Performance*, 19 Cal. 4th 865 (1998) (by insisting over objections that everyone participate, securing cooperation by stating that the picture was simply a personal memento, and failing to disclose his intent to use the picture in
(continued...)

III. Respondent denies that the distribution of the campaign mailer is an “improper action” or “dereliction of duty” within the meaning of Article VI, section 18, subsection (d)(3) of the California Constitution providing for public or private admonishment.

To the extent the Notice alleges “improper action” or “dereliction of duty” for the expression of core political speech, Respondent denies that such conduct is improper or a dereliction of duty.⁷ Respondent denies that she commented on a pending or impending case such that she substantially interfered with appellate review.⁸

⁶(...continued)

his campaign, petitioner committed prejudicial misconduct both in taking and using the picture for campaign purposes); *Mardikian v. Commission on Judicial Performance*, 40 Cal.3d 473, 485 (1985) (the extraordinary delay in the decision of submitted cases, and petitioner’s practice of routinely ordering these cases resubmitted beyond the 90-day period, warrants censure as being “prejudicial to the administration of justice that brings the judicial office into disrepute”).

⁷ For examples of improper conduct and dereliction of duty, see *Adams v. Commission on Judicial Performance*, 10 Cal. 4th 866, 906 (1995) (judge’s acceptance gifts and favors, including a “rain check” dinner, the computer loan, condominium stay, and fishing trips constituted “improper action.”); *Doan v. Commission on Judicial Performance*, 11 Cal. 4th 294 (1995) (judge who prevailed on a member of the court staff to lend her several thousand dollars privately admonished for “improper action[s]”); *Ryan v. Commission on Judicial Performance*, 45 Cal. 3d 518, 535 (1988) (improper conduct to fail to provide a court reporter upon return of the bench warrant and to sentenced defendant without a reporter present); *In re Alexander H. Williams III*, Com. on Jud. Performance, *Ann. Rep.* (1997) p. 18. (judge verbally assaulted plaintiff, yelling that plaintiffs’ settlement demand was ‘bullshit,’ and plaintiff had ‘shit for brains.’)

⁸ Contrasting that theory, the Honorable Daniel M. Hanlon, CJP Chairperson, who signed the Notice against Respondent, was the Presiding Judge of the Court of Appeals, First Appellate District, and signed the order affirming Respondent’s ruling in the *McMasters* case on August 2, 2000.

IV. Respondent answers the remaining allegations.

Respondent admits that in March 2000, the Committee to Re-Elect Judge Gray to Sonoma County Superior Court Seat 2 distributed the campaign mailer described in the Notice of Formal Proceedings.

Respondent admits that the campaign mailer contains the following statements: "Elliot Daum Cares About the Rights of Violent Criminals. Judge Patricia Gray Cares About the Rights of Crime Victims" and "A Tough Judge Who Makes Criminals' Lawyers Unhappy."

Respondent admits that Daum is described as a "criminal defender" on the front page.

Respondent denies that Daum's statements were misleadingly presented in the mailer as representing his personal views and biases, thus implying that he was not qualified to be a judge.

Respondent denies that the campaign mailer constitutes public comment about a pending or impending proceeding, or expresses Respondent's opinion regarding a pending or impending case, or gave the appearance that Respondent was a public advocate for Respondent's own rulings.

Respondent denies violating California Code of Judicial Ethics, Canons 1, 2A, 3B(9), 5 and 5A.

Date: March 5, 2001

GERAGOS & GERAGOS

By: _____


MARK J. GERAGOS

VERIFICATION

STATE OF CALIFORNIA, COUNTY OF SONOMA

I have read the foregoing ORDER OF JUDGE GRAY TO NOTICE OF FORMAL PROCEEDINGS

and know its contents.

CHECK APPLICABLE PARAGRAPHS

I am a party to this action. The matters stated in the foregoing document are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters I believe them to be true.

I am an Officer a partner a _____ of _____

a party to this action, and am authorized to make this verification for and on its behalf, and I make this verification for that reason. I am informed and believe and on that ground allege that the matters stated in the foregoing document are true.

The matters stated in the foregoing document are true of my own knowledge, except as to those matters which are stated on information and belief, and as to those matters I believe them to be true.

I am one of the attorneys for _____

a party to this action. Such party is absent from the county of aforesaid where such attorneys have their offices, and I make this verification for and on behalf of that party for that reason. I am informed and believe and on that ground allege that the matters stated in the foregoing document are true.

Executed on March 5, 2001 at Sonoma, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Patricia Gray
Type or Print Name

Patricia Gray
Signature

PROOF OF SERVICE
Title 9, Code of Civil Procedure

STATE OF CALIFORNIA, COUNTY OF _____

I am employed in the county of _____, State of California.

I am over the age of 18 and not a party to the within action; my business address is: _____

On _____ I received the foregoing document described as _____

_____ on _____ in this action

by placing the true copies thereof enclosed in sealed envelopes addressed as stated on the attached mailing list

by placing the original a true copy thereof enclosed in sealed envelopes addressed as follows:

BY MAIL:

I deposited such envelope in the mail at _____, California.

The envelope was sealed with postage thereon fully prepaid.

As follows: I am "heavily familiar" with the local practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at _____, California in the ordinary course of business. I am aware that on motion of the

party served, service is presumed to be made if postal cancellation date or postage meter date is next day after date of deposit for mailing in affidavit.

Executed on _____ at _____, California.

(BY PERSONAL SERVICE) I delivered such envelope by hand to the offices of the addressee.

Executed on _____ at _____, California.

(State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

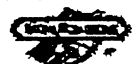
(Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Type or Print Name

Signature

THE MAIL SERVICE DIVISION OF REGIONAL COURTS ENVELOPE IS
MAIL, NOT A POST OFFICE

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Form 200