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5	Attorneys for Respondent, Commission on		
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9	BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE		
10	DEFENSE THE CONTRIBUTION ON SOBJETAE I ENTONIANCE		
11	INOUTRY CONCERNING JUDGE FRED L		
12	HEENE, JR., NO. 153. VERIFIED ANSWER TO NOTICE OF		
13	}		
14	This is Judge Fred L. Heene, Jr.'s Verified Answer to the Notice of Formal Proceedings filed		
15	on February 16, 1999.		
16	1. Judge Heene is a Judge of the San Bernardino County Superior Court, and has held		
17	that position from December 1992 until the present. Judge Heene denies any willful misconduct in		
18	office, conduct prejudicial to the administration of justice which may bring the judicial office into		
19	disrepute, or improper action within the meaning of Article VI, section 18, of the California		
20	Constitution.		
21	2. At all times during his tenure in office, Judge Heene has attempted to act to the best		
22	of his ability in a manner consistent with the proper and efficient administration of justice and in a		
23	manner which is fair, non-prejudicial, and responsible to all litigants, to the people in San		
24	Bernardino County, and to the people of the State of California.		
25	COUNT ONE		
26	3. Judge Heene presided over a preliminary hearing in <i>People</i> v. <i>Fullerton</i> , San		
27	Bernardino County Municipal Court Case No. FCH-01977, on July 30, 1996. The case involved an		
28 :ws, d'amato,	allegation of rape against the defendant.		
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The Commission's allegation that the alleged victim "testified inconsistently with 4. 1 what she had told police" is true only in part. The phrase is not completely accurate in that it 2 3 seriously understates what occurred. The alleged victim undisputedly lied in this case. The only question was, when did she lie? Under penalty of perjury during her trial testimony in Judge 4 Heene's courtroom, she stated that she lied by filing a false charge of rape against the defendant. If 5 it is true that the charge she filed was false, a gross injustice was done to the defendant. Under such 6 circumstances, he would have been falsely branded as a "rape defendant" and would have been 7 incarcerated (for some 18 days) before the preliminary hearing for a crime he did not commit. Plus, 8 he would have been in jeopardy of being convicted as a rapist, imprisoned, and branded as a sex-9 offender upon release, if the alleged victim did not recant her false allegations. It appears from the 10 record that the only evidence against the defendant was the victim's report to police and others. 11

5. The alleged victim's court testimony under penalty of perjury went beyond just her contention that she filed a false report of rape. She also testified that police had put falsehoods in their reports regarding things the alleged victim supposedly said during interviews. Her trial testimony in effect claimed that the police had lied and conspired to lie against the defendant.

6. The prosecutor in the case and a testifying police detective expressed opinions in the
hearing that the alleged victim was lying on the stand out of concern for the safety of her family and
possibly herself. The alleged victim denied this under oath. However, even if true that perjured
testimony was being given for reasons of safety, it was perjured testimony nevertheless — a felony.
Perhaps the worst part is that if the alleged victim's court testimony was a lie, then the charged
defendant would not only go unpunished for a serious felony, but would be free out in the
community, putting other women at serious risk.

7. The alleged victim was represented by an attorney at the hearing. When Judge Heene
recognized initially that the witness was beginning to recant or deny making an allegation against the
defendant, Judge Heene took precautions to protect the alleged victim. He summoned counsel to the
bench to discuss the matter and then had the following discussion with the alleged victim on the
record:

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1		THE COURT: Ms. Doe, it is very important that at this point in time
2		that we understand two things about your testimony. First off,
3		everybody in America has the right to remain silent, to say nothing, to
4		do nothing. Do you understand that right?
5		THE WITNESS: Yes.
6	:	THE COURT: You cannot be required, okay, to testify against
7	·	yourself. Do you understand that?
8		THE WITNESS: Yes.
9		THE COURT: You further have a right, ma'am, to understand that
10		filing of a false police report is a crime in this State. Do you
11		understand that?
12		THE WITNESS: Yes.
13		THE COURT: Further, if you are up here testifying and if you should
14		be for some reason not telling the truth, then someone could file
15		against you, ma'am, for something called perjury. Do you understand
16		what that is?
17		THE WITNESS: Yes.
18	1 	THE COURT: That is not telling the truth. Now I understand that you
19		have a gentlemen with you today. Is he your attorney?
20		THE WITNESS: Yes he is.
21		THE COURT: Okay. Sir, what is your name?
22		MR. TAYLOR: Glen Taylor, your honor.
23	:	THE COURT: Mr. Taylor, have you been here before?
24		THE WITNESS: Yes.
25		THE COURT: Have you advised your client with regard to the right to
26		remain silent?
27	:	THE WITNESS: Yes, I have.
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THE COURT: And you further advised her of the right to -- with her
 duty to tell the truth in this matter?
 THE WITNESS: That's correct, your Honor.
 THE COURT: Then based on those admonitions, ma'am, I'm going to
 let the questioning. Sir, thank you very much, sir.
 Upon the conclusion of the witness' testimony, Judge Heene announced that she witness

8. Upon the conclusion of the witness' testimony, Judge Heene announced that she was
not allowed to leave and ordered the bailiff to take her into custody, to set bail at \$25,000, and he
asked that charges be filed based on the fact that the witness had admitted in court to a crime.

9. The prosecutor then asked for a recess before the witness was taken into custody. 9 10 Judge Heene declined this request, but consented to the prosecutor's second request moments later for a recess to discuss the matter further. The trial transcript infers that the witness was "in custody" 11 only for about five minutes until the hearing continued. Judge Heene wanted to discuss the matter in 12 open court; others complained that the preliminary hearing was not concluded and must continue. 13 The problem for Judge Heene was that all but the testifying witnesses had to be excluded from the 14 courtroom during the preliminary hearing --- Judge Heene did not want the witness in question going 15 anywhere until the question of arrest was resolved, and that question was not resolved at that point. 16

10. During the hearing, there was a brief discussion between Judge Heene and Deputy 17 District Attorney Hansen. Mr. Hansen "expressed concerns about taking somebody into custody." 18 He told Judge Heene that he, in essence, had performed a citizen's arrest of the witness. Judge 19 Heene denied that, explaining that she was not free to leave because she had admitted to a crime, but 20 also that she could not stay in the preliminary hearing because "the courtroom is closed to witnesses" 21 except during their testimony. Mr. Hansen said that he had never seen a witness taken into custody 22 during a preliminary hearing before — "subject to the determination by the District Attorney's 23 Office whether a crime has been committed." The Commission's charge - that the District 24 Attorney's Office had not determined whether a crime had been committed in this case — is not 25 completely accurate, as Mr. Hansen did not directly address that point with reference to the alleged 26 27 victim.

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1 10. The problem was resolved when the witness' attorney agreed to watch her outside of 2 the courtroom until the preliminary hearing had been concluded, after which the new problem was 3 addressed. Immediately, the witness was released from the Marshal's custody. The witness was 4 never sent to jail.

After the alleged victim's release from her brief custody, she stayed at the courthouse 11. 5 6 through her attorney's stipulation with the Court that she would do so. There then was a testimony 7 from one witness in the preliminary hearing, a lunch break, and then the alleged victim was brought 8 back before Judge Heene. Judge Heene ordered a transcript of the hearing to be reviewed by the District Attorney's Office to see if charges should be filed. He announced an intention to order her 9 to appear in court again, but never actually issued that order in light of the prosecutor's 10 representation that, "I will assure that the report in conjunction with the transcript will thoroughly be 11 reviewed by the District Attorney's Office to see whether or not criminal charges should be filed." 12

13 12. Judge Heene told the alleged victim that she was "free to go ... without any further
14 proceedings whatsoever."

15 13. Judge Heene had the power to order detention of the witness pursuant to Penal Code §
16 838:

17MAGISTRATES MAY ORDER ARREST. A magistrate may orally order a18peace officer or private person to arrest any one committing or19attempting to commit a public offense in the presence of such a20magistrate.

14. The only limit on Section 838 is that the judge must observe a public offense being committed. Judge Heene saw such an offense being committed — either admission to the filing of a false report to police or perjury. Judge Heene had the authority to detain under a direct contempt order (Code Civ. Proc. § 1211), but chose not to do so. Instead, Judge Heene used his lawful authority under Section 838. Accordingly, Judge Heene denies that he improperly ordered the witness into custody and violated ethical canons by doing so. To question Judge Heene's actions in this regard unlawfully invades judicial independence.

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1	<u>COUNT TWO</u>
2	15. Judge Heene admits the facts as alleged. Judge Heene admits that he committed a
3	legal error in the case by denying the defendant the right of cross-examination regarding a traffic
4	infraction. Judge Heene's legal error was corrected on appeal to the Superior Court, as it should be.
5	16. Judge Heene denies that his conduct in this regard violated any canon of judicial
6	ethics. On the contrary, Canon 1 of the California Code of Judicial Ethics states in pertinent part:
7	A judicial decision or administrative act later determined to be
8	incorrect legally is not itself a violation of this Code.
9	Because Judge Heene's judicial act involved no bias nor bad faith against the defendant, a
10	conclusion of judicial misconduct is prohibited by law.
11	<u>Count Three</u>
12	17. Judge Heene presided over a case entitled <i>People</i> v. <i>Boykin</i> on December 1, 1997.
13	The transcript does not reference the case number.
14	18. According to court records, it appears that Mr. Boykin was ticketed on or about July
15	1997 for lack of vehicle registration (Vehicle Code § 4000A). His date to appear on the matter was
16	September 19, 1997. Mr. Boykin extended that date to October 16, 1997. He further extended that
17	date to October 16, 1997. He requested and was granted one final extension until November 13,
18	1997. When he appeared on November 13th, he pled not guilty and asked to the set the matter for
19	trial. Judge Heene complied and set the trial for December 15, 1997. Mr. Boykin was informed that
20	he had to post \$200 bail, but complained he did not have the money. Judge Heene did not respond to
21	that complaint. Mr. Boykin appears to have represented himself.
22	19. Mr. Boykin appeared in court on December 1, 1997 to reiterate his inability to post
23	the bail money. The transcript portion the Commission references appears to be accurate. Mr.
24	Boykin conceded that the car in question was not registered. He also conceded that he continued to
25	drive the unregistered car — continual violations of Vehicle Code § 4000A. Judge Heene suggested
26	that Mr. Boykin "get rid of the car" so that the ticket could be taken care of, as well as the continual
27	violation of the law. Judge Heene suggested to Mr. Boykin a way he could stay out of jail, because
28	he could not post bail. Mr. Boykin agreed to the suggestion without being ordered to sell the car.
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20. 1 Based on that voluntary agreement, Judge Heene told Mr. Boykin to be back in court on December 11, 1997 with proof that he had sold the car so that the case could be disposed of. 2 (Exh. 3, p. 6.) It is true that Judge Heene referred to giving Mr. Boykin "some vacation time to think 3 4 about it," if the car was not sold. Yet, that was not in the form of a court order or disposition. Judge 5 Heene was referring to the apparently probable scenario whereby the defendant would not sell the car, would not have it registered, would continue to drive the car, would have no defense to the 6 Section 4000A case, and would not be able to pay the fine after a guilty disposition. Indeed, Vehicle 7 8 Code § 22651 gives the police the authority to impound unregistered vehicles. If those 9 circumstances occurred, Judge Heene would have the authority to impose custody, and might have no other reasonable option. 10

11 21. Judge Heene stayed Mr. Boykin's need to pay the \$200 bail. He decided to sell the
12 car, presented proof of the sale to the court on December 11th, and Judge Heene dismissed the case,
13 ordering Mr. Boykin only to pay \$10 in court costs by January 21, 1998. Judge Heene later learned
14 the \$10 was not paid and on that basis a different judge ordered issuance of a bench warrant.

15 22. Judge Heene denies that he "ordered" Mr. Boykin to sell the car or go to jail. Judge
16 Heene denies that his conduct violated the Code of Judicial Ethics.

17

## **COUNT FOUR**

18 23. The factual allegations of this count are true. Ms. Lopez apparently was involved in a 19 car accident in September 1996. She was cited for (1) driving with a suspended license; (2) driving 20 with a child unrestrained; and (3) having no proof of insurance. Although each of these matters are 21 unfortunate, the failure to restrain her 3-year-old child in the manner provided by law is a serious 22 concern particularly as that child was left unprotected in the accident. Mrs. Lopez was arraigned by, 23 pled guilty before, and was sentenced by judicial officers other than Judge Heene.

24 24. The record shows she was ordered by another judge in December 1996 to serve 30
days in jail despite her obvious status as a mother. 20 days of that sentence was suspended, with 10
days to be actually served on weekends. She was also ordered to pay a \$1,314 fine. At Ms. Lopez'
request, she was allowed to perform 263 hours of community service within the next six months in
lieu of the fine. She appeared before a judge other than Judge Heene on May 16, 1997, explaining

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complete the rest. (Presumably, she had completed her 10 days of jail time.) She was given an
extension until December 13, 1997. December 13th came and went with no further appearances. On
December 30, 1997, Ms. Lopez filed a belated request for another extension. The request was sent
to Judge Heene for a hearing on January 8, 1998.

5 25. Judge Heene was faced with a defendant who had previously agreed to and had
7 served 10 days in actual custody despite being a mother. Judge Heene did not order the first
8 incarceration. Only half of the defendant's community service obligation had been performed
9 despite over a year to meet that commitment --- twice the normal time.

10 26. The transcript excerpt from January 8th hearing (quoted in the Notice of Formal
11 Proceedings) appears to be accurate.

12 27. The Notice of Formal Proceedings does not allege that anything is relevant in this
13 judicial misconduct claim about Ms. Lopez' claimed status as a woman who had just given birth.
14 The Notice does not allege that Ms. Lopez made truthful representations about that situation.
15 Accordingly, this Answer does not address those particular matters.

28. The Notice simply alleges that Judge Heene "failed to give the defendant proper 16 notice that [he was] conducting a violation of probation hearing" and that he "sentenced the 17 defendant to jail without affording due process." Under Commission Rule 119(c)(3), Judge Heene 18 does not at this time have sufficient information to admit or deny the Commission's legal allegation 19 20 in this regard, and on that basis denies it. The Notice is the first time Judge Heene and his counsel 21 have been made aware of such a legal contention by the Commission. (See First Affirmative 22 Defense below.) A reasonable inquiry has been made into the validity of the legal claim, yet we 23 conclude that full discovery is needed before admission or denial of that contention is possible.

24 29. If Judge Heene is determined to have committed a procedural error regarding the
25 notice of a violation of probation hearing or sentencing, his judicial act would have involved no bias
26 nor bad faith against the defendant, and thus, a conclusion of judicial misconduct is prohibited by
27 law.

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1	Count Five
2	30. The factual allegations of this count are true. Judge Heene issued a citation regarding
3	the contempt order. As stated in that document, the juror was assigned to serve on a criminal matter,
4	People v. Hillman, MVA 01909. The jury was given its final charge on Friday, January 10, 1998.
5	They retired to deliberate at 2:00 p.m., and were discharged at 4:30 p.m. without reaching a verdict.
6	They were ordered to return on Monday, January 12, 1998, at 1:30 p.m. to continue deliberations.
7	31. The juror in question knew he was to return at 1:30 p.m. on January 12th. He called
8	Judge Heene's bailiff at 1:30 p.m., told the bailiff he was working in Victorville, and stated he could
9	not be in court for another hour and a half. The bailiff instructed him to come to court immediately.
10	Judge Heene personally observed the juror's failure to appear and had to discuss with the attorneys
11	in the case how to proceed. The attorneys stipulated to allow the alternate juror take the missing
12	juror's place and began deliberations anew. Judge Heene accepted the stipulation.
13	32. The jury returned its verdict at approximately 3:50 p.m. that day. The juror in
14	question arrived at court at about 4:00 p.m. on that day. Judge Heene researched his authority to
15	issue a direct contempt order under Code Civ. Proc. § 1211. He held a hearing on the matter on the
16	record and a transcript was generated. The juror in question explained that he thought he could
17	complete his work assignment and be at court by 1:30 p.m., but miscalculated due to an
18	overabundance of work. He did not dispute knowing of when he had been ordered to return. Judge
19	Heene found the juror to be in contempt of court and remanded him into custody.
20	33. Code Civ. Proc. § 1211 provides in part:
21	When a contempt is committed in the immediate view and presence of
22	the court, or of the judge in chambers, it may be punished summarily;
23	for which order must be made, reciting the facts as occurring in such
24	immediate view and presence, adjudicating that the person proceeded
25	against is thereby guilty of contempt and that he be punished as therein
26	prescribed. [Emphasis added.]

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1 34. Under that rule, the contempt citation (with its findings and order), the transcript, and 2 the facts as related in those documents, the juror in question was appropriately and summarily found 3 to be in direct contempt. Legal experts familiar with this case agree; the Commission knows this.

35. Judge Heene denies that he "failed to follow proper contempt procedures." He
followed the procedure under Section 1211 for a direct contempt. In the California Supreme Court
case of Arthur v. Superior Court (1965) 62 Cal.2d 404, 407, Justice Mosk addressed an analogous
situation where an attorney failed to appear before the court at the appointed time:

Where counsel fails to appear, however, the offensive conduct, to wit, the absence, occurs in the presence of the court. Thus, when an absent attorney reappears in the courtroom, due process should be satisfied if the judge confronts him with the charge and offers him a reasonable opportunity to explain.

13 (See also, In re Buckley (1973) 10 Cal.3d 237.)

36. If Judge Heene is determined to have committed a procedural error regarding any
aspect of the contempt order, his judicial act would have involved no bias nor bad faith against the
defendant, and thus, a conclusion of judicial misconduct is prohibited by law.

37. Judge Heene received no notice during the investigation of this matter that the 17 Commission was investigating any concerns with the "notice" given of the contempt hearing. Under 18 Commission Rule 119(c)(3), Judge Heene does not at this time have sufficient information to admit 19 or deny the Commission's legal allegation in this regard, and on that basis denies it. The Notice is 20 the first time Judge Heene and his counsel have been made aware of such a legal contention by the 21 Commission. (See First Affirmative Defense below.) A reasonable inquiry has been made into the 22 validity of the legal claim, yet we conclude that full discovery is needed before admission or denial 23 of that contention is possible. 24

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# COUNT SIX

38. Ms. MacLeod was cited for doing 95 m.p.h. in a 65 m.p.h. zone. Her date to appear
on the matter was extended three times. She finally appeared before a judge other than Judge Heene
in November 1997.

LEWIS, D'AMATO, BRUSADIS & BISGAARD LLF 550 WEST "C" STREET SAN DIEGO, CA 92101 (619) 233-1008 39. Judge Heene does not recollect that the defendant in her original hearing did not plead
 to the charge. Yet, one document reviewed after the fact seems to indicate that there was no plea
 before the other judge. On this basis, and pending the discovery that will take place in this matter on
 that question, Judge Heene cannot admit or deny that allegation at this time.

40. Regardless, she opted to attend traffic school before February 2, 1998 and pay a fee of
\$310 by January 5, 1998. As of February 10, 1998, she had not paid her traffic school fee and a
violation of Vehicle Code § 42005(e) was automatically added.

41. Ms. MacLeod came before Judge Heene on February 19, 1997 under the
circumstances described in the Notice. The quote referenced in the Notice appears to be accurate
from the transcript of the hearing. Despite the mention of a remand into custody, Ms. MacLeod, at
some point was sentenced to \$589 or 20 days in jail. The fine total was calculated by the original
amount plus the standard amount for the additional charge resulting from MacLeod's failure to
comply with the previous court order.

14 42. The docket sheet indicates Ms. MacLeod opted to pay the fine and was not remanded
15 into custody.

16 43. If a defendant was sentenced without a plea or a waiver of rights, then legal error 17 occurred. It is not clear at this point what Judge Heene knew about the status of the case and any 18 plea at the time Ms. MacLeod appeared before him. If he was operating under a mistaken belief as 19 to the facts of the case, such is not judicial misconduct and does not violate any judicial canon of 20 ethics. If the error was procedural rather than factual, we also contend that such does not constitute 21 judicial misconduct.

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#### COUNT SEVEN

44. The underlying facts and the transcript excerpt recited in the Notice appear to be
accurate. More information is relevant, however.

45. Government Code § 27707 details the determination of a defendant's financial ability
to pay for private counsel. Without a determination that a defendant is not financially able to
employ private counsel, a public defender may not be appointed under Government Code § 27706.
In fact, appointing a public defender for a defendant *without* such a showing has been held to be

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judicial misconduct. (Spruance v. Commission on Judicial Qualifications (1975) 13 Cal.3d 778. 1 799.) Canon 3C(4) expressly states, "[a] judge shall not make unnecessary court appointments." 2 Spruance also recognizes that the court makes the final determination whether the defendant is 3 financially qualified for representation at county expense. (Id.) 4

5 46. Mr. Howell was arraigned for misdemeanor vandalism on February 2, 1998. A "not guilty" plea was entered. Judge Heene asked Mr. Howell if he was employed. He responded that he 6 7 was. Judge Heene asked how much he made and Mr. Howell said he made \$14/hour. On that basis, Judge Heene determined Mr. Howell did not qualify for a public defender. This determination has 8 not been challenged by the Commission in the Notice.

10 47. On February 17, 1998, Mr. Howell appeared again before Judge Heene. He again asked Mr. Howell about his employment status. At that time, he was still employed. He speculated 11 that he was about to be terminated, but that had not happened yet. Judge Heene asked him why he 12 had not gotten an attorney yet and he replied, "I was planning on defending myself, but I decided to 13 go ahead and get a Public Defender if I can." Yet Judge Heene again, based on the facts before him, 14 15 made a determination that Mr. Howell did not qualify for a Public Defender. Mr. Howell never tried to submit any type of financial statement or evidence as to his ability to pay. He was still employed 16 at the time at a job that grossed more than an amount previously held in another case to be enough to 17 allow engagement of a private attorney. (People v. Longwith (1981) 125 Cal.App.3d 400, 411.) 18 Further, a non-indigent adult has no right to appointed counsel in a criminal case. (Id., 125 19 20 Cal.App.3d at 410.) Longwith also affirmed that a trial judge is in the best position to determine ability to pay. 21

Mr. Howell next appeared on March 24, 1998. (Exh. 10, pp. 5-12.) His first request 48. 22 was not for an appointed lawyer, but for dismissal of his case. Judge Heene again asked Mr. Howell 23 if he was representing himself and mr. Howell replied he was. Mr. Howell apparently knew in 24 general of rights regarding appointed counsel at that time, but made no request for legal 25 26 representation. The hearing ended, but then resumed a short time later.

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The prosecutor had offered a plea to Mr. Howell and also gave him the offer of 49. 1 getting a continuance to hire an attorney. At that time, Mr. Howell requested that a Public Defender 2 be appointed. Judge Heene did not reject the request outright, but instead commenced his obligation 3 of finding out if Mr. Howell had the ability to pay for an attorney. Mr. Howell said he was "not 4 employed right now" though he had held his previous job for over eight years. He said he had made 5 \$26,000 the previous year, had a settlement of \$3,000 after leaving his previous employment, and 6 had a \$1,000 tax refund coming. Mr. Howell said he would use the \$1,000 to get an attorney and to 7 look for a job right away. On that basis, Judge Heene said he would not appoint a Public Defender 8 "at this point in time," meaning the question would still be open if he remained unemployed. 9

10 50. Judge Heene's ruling on the request for appointed counsel is reviewed under the 11 abuse of discretion standard. Two possibilities exist: either he did not abuse his discretion in this 12 matter, or he abused his discretion by delaying appointment of counsel until the matter could be 13 revisited in the future. Like with any legal error, if Judge Heene was wrong in his decision, he 14 deeply regrets that. Yet, legal error is not a basis for a judicial misconduct finding on this count.

#### **COUNT EIGHT**

16 51. The OSC hearing regarding the probation revocation hearing was properly noticed in 17 advance. Judge Heene does not have a clear recollection of all of the details of this hearing. It is his 18 custom and practice in such a hearing to advise the defendant of a right to an attorney, a right to a 19 hearing, and a right to subpoena and examine witnesses. He believes he did so in this case. The 20 transcript of the hearing, however, does not reflect that those advisements were given. If the 21 defendant did not receive a proper advisement of rights, this was wrong.

52. If such a wrong occurred, we contend that it was due to mere negligence on Judge
Heene's part and does not constitute a basis for judicial discipline.

#### COUNT NINE

53. The OSC hearing regarding this probation revocation hearing was properly noticed in advance. Like with the *Anderson* case, Judge Heene does not have a clear recollection of all of the details of this hearing. It is his custom and practice in such a hearing to advise the defendant of a right to an attorney, a right to a hearing, and a right to subpoena and examine witnesses. He believes

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he did so in this case. Yet, the transcript of the hearing, like in Anderson, does not reflect that those
 advisements were given. If this defendant did not receive a proper advisement of rights, this also
 was wrong.

4 54. If such a wrong occurred, we contend that it was due to mere negligence on Judge
5 Heene's part and does not constitute a basis for judicial discipline.

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# **FIRST AFFIRMATIVE DEFENSE**

# (Lack of Due Process Regarding Commission Investigation and Charging)

55. Judge Heene asserts that the Commission has violated its own procedural rules and 8 Judge Heene's due process rights regarding the preliminary investigation of this matter and the 9 10 issuance of the Notice of Formal Proceedings. This claim includes, but is not limited to: (1) informing Judge Heene that it was investigating People v. Lopez out of a concern that Judge Heene 11 was harsh and impartial in his treatment of the defendant, obtaining a response from Judge Heene 12 concerning the claimed "impartiality," and then issuing a charge related to Lopez not based on 13 "impartiality" but rather on lack of proper legal notice of the hearing; and (2) informing Judge Heene 14 that it was investigating People v. Hellman out of a concern that Judge Heene was harsh and 15 impartial in his treatment of the defendant and "failed to follow proper contempt proceedings," 16 obtaining a response from Judge Heene concerning the claimed "impartiality" and conduct in the 17 proceedings, and then issuing a charge related to Hellman not based on "impartiality" but rather on 18 lack of proper legal notice of the hearing. 19

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# SECOND AFFIRMATIVE DEFENSE

#### (Lack of Subject Matter Jurisdiction)

56. Judge Heene asserts the Commission lacks subject matter jurisdiction to bring all or
some of the Counts or their sub-parts, as such concern matters of pure legal error or of purely
administrative matters exclusively reserved for the judicial branch of State government.

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1	THIRD AFFIRMATIVE DEFENSE	
2	(Failure to Allege Charges Involving Violations of Judicial Ethics)	
3	57. Judge Heene alleges that the charges brought against him, even if proven to be	
4	factually correct, fail to allege violations of the Code of Judicial Ethics, California statutes, or	
5	California constitutional provisions. As such, this inquiry constitutes an unlawful inquiry.	
6	FOURTH AFFIRMATIVE DEFENSE	
7	(Vagueness of Charges)	
8	58. Judge Heene alleges that some or all of the charges or their sub-parts are vague to the	
9	point of denying Judge Heene the opportunity to adequately defend against the charges. Moreover,	
10	no pleading vehicle exists whereby Judge Heene may move for a more definite statement. This	
11	violates Judge Heene's due process rights.	
12	FIFTH AFFIRMATIVE DEFENSE	
13	(Violation of Due Process)	
14	59. Judge Heene alleges that the Commission's procedure whereby it investigates the	
15	charges on its own motion, drafts the charges against the judge, determines if evidence supports the	
16	charge, prosecutes the charge, and imposes discipline on the judge with the judge being given no	
17	right of mandatory appellate review, violates federal and State due process guarantees. Judge Heene	
18	furthers asserts that ex parte communications between the Examiners and the Commission and/or its	
19	staff violate the investigated judge's due process rights. Judge Heene believes and thereon alleges	
20	that a material witness in this case, a member of the Commission staff, has given testimony to the	
21	Commission in secret, that not all aspects of this testimony have been produced to Judge Heene, and	
22	that the fact of this testimony violates due process. Judge Heene further asserts that the	
23	Commission's act of withholding any portion of its file on the investigated judge denies the judge	
24	with an opportunity to fully defend against the charges and, accordingly, violates that judge's due	
25	process rights. Judge Heene asserts that such denial of his constitutional due process rights is being	
26	knowingly and willfully undertaken by the Commission, and not committed on the basis of mere	
27	negligence.	
28		

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1	SIXTH AFFIRMATIVE DEFENSE		
2	(Improper Denial of Discovery Rights)		
3	60. Judge Heene alleges that the rules enacted by the Commission governing discovery in		
4	a judicial misconduct case are legally insufficient and discriminatory. He alleges the discovery		
5	procedures that are allowed are insufficient to permit an adequate opportunity to defend against the		
6	charges. He alleges such rules that give the Commission a "work product" privilege not available to		
7	the judge violate the equal protection clause of federal and State constitutions. He alleges that a		
8	listing of potential witnesses not interviewed during the investigation violates due process.		
9	Seventh Affirmative Defense		
10	10 (Violation of Separation of Powers Doctrine and "The Principle of Check")		
11	61. Judge Heene alleges that rules giving the Commission (with its non-judge, non-		
12	lawyer majority) the power to discipline a judge, with the judge having no right of mandatory		
13	appellate review, violate the State separation of powers doctrine and the "principle of check."		
14	Eighth Affirmative Defense		
15	(Violation of State and Federal Workplace Statutes)		
16	62. Judge Heene alleges that these proceedings, in whole or in part, violate his rights		
17	under state and federal workplace statutes including, but not limited to, Cal. Const., Art. I, § 8; Gov.		
18	Code §§ 12900, et seq.; and 42 U.S.C. § 12101, et seq.		
19	NINTH AFFIRMATIVE DEFENSE		
20	(Mitigation)		
21	63. Judge Heene alleges that other matters not pled as facts in the Notice of Formal		
22	Proceedings render the charges invalid and/or serve to mitigate against any act which could		
23 otherwise be characterized as judicial misconduct.			
24	Dated: April 28, 1999 Lewis, D'AMATO, BRISBOIS & BISGAARD LLP JAMES E. FRIEDHOFER		
25	ERIC D. WEITZ		
26	By: mengolytz		
27	JAMES E. PRIEDHOFER Attorneys for Respondent,		
28 LEWIS, D'AMATO,	THE HONORABLE FRED L. HEENE, JR.		
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#### VERIFICATION

I, Fred L. Heene, Jr., have read the foregoing Answer to Notice of Formal Proceedings in Inquiry No. 153 and know its content. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed at Chino Hills, California on April 27, 1999.

Fred L. Heene, Jr. Judge of the Municipal Court

#### DATA9750-10798.1

#### **PROOF OF SERVICE**

# CASE NAME:INQUIRY CONCERNING JUDGE FRED L. HEENE, JR., NO. 153CASE NUMBER:N/ACOURT:BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

I, the undersigned, am a citizen of the United States, over the age of 18 years, and not a party to or interested in the within action. I am an employee of the Law Offices of Lewis, D'Amato, Brisbois & Bisgaard LLP and my business address is 550 West "C" Street, Suite 800, San Diego, California 92101.

On April 28, 1999, I served the following document(s):

#### **VERIFIED ANSWER TO NOTICE OF FORMAL PROCEEDINGS**

addressed to:

Richard G.R. Schickele, Esq. COMMISSION ON JUDICIAL PERFORMANCE 455 Golden Gate Avenue, Suite 14400 San Francisco, CA 94102

[] (BY MAIL) I placed the original or a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid. I deposited said envelope in the United States Mail in the City and County of San Diego, California. I am readily familiar with our law firm's practice for collection and processing of correspondence for mailing with the United States Postal Service, that this mailing will be deposited with the United States Postal Service on this date in the ordinary course of business and that I sealed and placed each envelope for collection and mailing on this date following ordinary business practices.



(BY FEDERAL EXPRESS) I sent the original or a true copy thereof enclosed in a sealed envelope to be delivered to Federal Express for overnight service to the office(s) of the addressee(s).

(BY TELECOPIER) In addition to service by mail as set forth above, the counsel by whose name an asterisk is affixed on the attached service list were also forwarded a copy of said document(s) by telecopier.

Executed on April 28, 1999, at San Diego, California. I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

LESLID. MILLER

# LEWIS, D'AMATO, BRISBOIS & BISGAARD LLP

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Hon. Fred L. Heene, Jr. **COMMENTS:** 

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Richard G.R. Schickele

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