

STATE OF CALIFORNIA
BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

**IN THE MATTER CONCERNING
JUDGE MORRIS D. JACOBSON**

**DECISION AND ORDER IMPOSING
PUBLIC ADMONISHMENT**

This disciplinary matter concerns Judge Morris D. Jacobson, a judge of the Alameda County Superior Court. Judge Jacobson and his attorney, James A. Murphy, appeared before the commission on June 27, 2012, to object to the imposition of a public admonishment, pursuant to rule 116 of the Rules of the Commission on Judicial Performance. Having considered the written and oral objections and argument submitted by Judge Jacobson and his counsel, and good cause appearing, the Commission on Judicial Performance issues this public admonishment pursuant to article VI, section 18(d) of the California Constitution, based on the following statement of facts and conclusions.

STATEMENT OF FACTS AND CONCLUSIONS

Judge Jacobson has been a judge of the Alameda County Superior Court since December 2005. His current term began in January 2009.

On October 13, 2010, the judge presided over the matter of *People v. Andrew Barrientos*, No. 564482A, which was on calendar for Mr. Barrientos's motion to continue the preliminary hearing scheduled for the following day. Mr. Barrientos was charged, among other things, with the attempted murder of a police officer. There were two co-defendants charged as accessories, one of whom had not waived time for the preliminary hearing.

The judge called the case at approximately 9:00 a.m. Attorney Anne Beles appeared on behalf of Mr. Barrientos and Deputy District Attorney John Brouhard appeared for the People. Mr. Barrientos was present; however, the co-defendants were not present. The following colloquy occurred:

THE COURT: People versus Barrientos, 564482A. Ms. Beles is here along with Mr. Brouhard. Do you want your client --

MS. BELES: He's here.

THE COURT: Okay. Very good. You filed a motion to continue preliminary hearing. There's two other defendants in the case, one of the other defendants declined to waive the 10-day rule.

MS. BELES: That is true.

THE COURT: I can't do anything in terms of ruling on this at this point until everyone is here. What I do want to do, Ms. Beles, is I'm ordering you to spend every waking moment between now and when we are next in court working on this case. And one of the things I'll be inquiring about is how you've spent your time since --

MS. BELES: September 30th.

THE COURT: Is that the day that --

MS. BELES: Your Honor, I have kept my hours and been very cautious about that. We put this on calendar to make sure that maybe somehow miraculously I can be ready. I cannot be. I will be not able to competently defend Mr. Barrientos at preliminary examination if it is sent out tomorrow. I'm making that record now, and I'll make it tomorrow morning.

THE COURT: Plan on it being sent out as long as it's in a no time waiver basis on a 10-day rule, that's what I'm telling you to plan on. I'm telling you to spend every waking moment working on it, and I'll take this matter up tomorrow. [¶] I have not read your papers yet. You just mentioned at side-bar that you've got 1,100 pages of discovery. Mr. Brouhard just

produced some sort of gang report. [¶] I'm saying to you that one of the things that I'm looking at is if Mr. Brouhard is able to be ready as the person who carries the burden of proof, you can imagine how that's part of the context. If he can be ready I expect that you can be ready.

MS. BELES: I thought that you might say that. I would like the Court to be aware even before it reads my papers, which I did file yesterday, that Mr. Brouhard has been integral in the investigation. So the statements that I am reviewing, many of which Mr. Brouhard conducted, so it is a different situation where we have a District Attorney who is faced with a certain amount of information. He was there, so he doesn't need to review these hours of statements. But I can't do it all. [¶] I've also requested an in-camera discussion tomorrow, because some of what I have done and some of what I would need to do in order to be competent would compromise defense strategy, so I would request an in-camera at that time.

THE COURT: We'll take that up tomorrow. I'm telling you since September 30th there's plenty of time to read and absorb 1,100 pages of stuff.

MS. BELES: There is not, and I strongly disagree.

THE COURT: I read about 2,000 pages a week. You and I differ on that. I read nearly 500 pages of documents every day. I'm not real sympathetic to 1,100 pages is so overwhelming. [¶] Why don't you bring your discovery with you tomorrow, because I'm going to look through it and see what 1,100 pages consists of. Please bring that and be ready to go tomorrow, that's my order to you today. We'll take up the --

MS. BELES: You --

THE COURT: Please let me finish. We'll take up the 1050 tomorrow morning when all parties are here.

MS. BELES: 9:00 or 8:30?

THE COURT: You need to contact co-counsel. I can't do anything until everyone is here. The sooner you get here the sooner I will deal with it. There's a starting place. [¶] Work all day today, work all night. Get up early tomorrow morning --

MS. BELES: Your Honor, I don't need your advice on how to be competent.

THE COURT: That is contemptuous. That is contemptuous. That was disrespectful. Take a seat.

Following the above colloquy, Ms. Beles took a seat in the courtroom and the judge called a brief recess during which he went to chambers to gather his thoughts and review a checklist to be followed in adjudicating a contempt. The judge subsequently returned to the bench and called other cases. At approximately 10:20 a.m., while the judge was handling a hearing in another matter, Ms. Beles walked across the courtroom to obtain a portion of the *Barrientos* file to review. The judge stated to Ms. Beles from the bench that she was to take a seat and remain in the courtroom as she had been told. Ms. Beles complied.

At approximately 11:05 a.m., the judge re-called the *Barrientos* case. The judge ordered Ms. Beles to return at 2:00 p.m. that afternoon for a hearing. Ms. Beles apologized for her earlier remark, which she said was "improper and too informal." The judge stated that he was holding the hearing in the afternoon out of consideration to Ms. Beles because fewer people would be present. Mr. Barrientos waived his appearance for the afternoon hearing.

At approximately 2:35 p.m., the judge called the *Barrientos* case for the contempt hearing. Ms. Beles was present. The judge proceeded to describe what had occurred when the case had been called during the morning calendar and he explained why the contempt hearing had been continued to the afternoon. When Ms. Beles was allowed to speak, she again apologized for her conduct that morning. However, she did not concede that her remark was contemptuous on its face or that the court had the authority "to order [her] to do certain things." The judge stated that he appreciated and accepted the apology. He stated that he had not been advising Ms. Beles on how to practice law, but instead was "ordering [her] how to spend the next 24 hours." The judge stated that he thought he had the authority, in the context of a no time waiver preliminary hearing, to order her to work

on the *Barrientos* case alone and to not engage in social functions. The judge did not find Ms. Beles to have been in contempt.

The commission determined that Judge Jacobson's actions constituted abuse of the contempt power and abuse of authority. Whether or not Ms. Beles's remark constituted contempt, it was improper for the judge to have ordered her to remain in the courtroom from the time she was told to "take a seat" until the case was re-called at approximately 11:05 a.m. – a period of over an hour and a half – without adjudicating the alleged contempt. In a direct contempt situation, a judge may detain an alleged contemnor in the courtroom for the time necessary to review the contempt checklist and compose oneself. (Rothman, *California Judicial Conduct Handbook* (3d ed. 2007) § 4.22, p. 164.) Here, however, Judge Jacobson's detention of Ms. Beles continued long after he took a recess for those purposes. In the commission's view, requiring Ms. Beles, who had not been found in contempt, to remain in the courtroom pending a contempt hearing that was to take place at a later, unspecified time was tantamount to punishing her for contempt without a hearing. It is misconduct for a judge to impose punishment for contempt without first adjudicating the contempt and sentencing the contemnor. (See *Ryan v. Commission on Judicial Performance* (1988) 45 Cal.3d 518, 533.)

In his response to the commission, Judge Jacobson maintained that he continued to have jurisdiction over the case, the parties, and the attorneys until the conclusion of the *Barrientos* hearing that afternoon. However, the judge cited no authority, and the commission is aware of none, that supports the proposition that a court can continue to detain an individual for a direct contempt when the matter is not summarily adjudicated and the contempt hearing is put off to a later time. The judge also asserted that his intention during the morning session was to proceed with the contempt hearing as soon as he was able to clear some cases off the calendar, in order to avoid embarrassment to Ms. Beles, but other matters took too long. The commission noted that the judge could have expeditiously conducted a contempt hearing in chambers, which would have avoided any undue embarrassment to Ms. Beles. (See Rothman, *California Judicial Conduct Handbook*, *supra*, § 4.35, p.188; *Hawk v. Superior Court* (1974) 42 Cal.App.3d 108,

131.) Further, the commission notes the paradox in detaining Ms. Belles in the courtroom for over an hour and a half after having ordered her to spend every waking moment working on the case.

The commission further found that Judge Jacobson abused his authority by ordering Ms. Beles to “spend every waking moment” working on the *Barrientos* case until the time set for the preliminary hearing, to the exclusion of other cases and social activity. In his objections to the notice of intended public admonishment, Judge Jacobson contended that his direction to Ms. Beles was in accord with statutes discouraging continuances in criminal cases and authorizing a judge to relieve assigned counsel¹ or impose sanctions upon assigned counsel who, without good cause, is not ready for a preliminary hearing. (Pen. Code, §§ 1050(a), (e); 987.05.) These statutes require a judge to deny a motion for a continuance absent good cause; they do not permit a judge to direct an attorney on how to prepare his or her case.

Judge Jacobson states that his intention was to give Ms. Beles a “heads up” on what she would need to establish in order to have her motion for a continuance granted. However, that is not what Judge Jacobson said. He did not inform Ms. Beles that her convenience or other work commitments would not be considered in determining good cause. Rather, he stated, “I’m ordering you to spend every waking moment between now and when we are next in court working on this case.”

Judge Jacobson also asserts that the commission’s decision will chill judges from probing into the grounds for a requested continuance. There is a clear distinction between asking questions to determine why an attorney is not prepared and ordering an attorney to spend every waking moment working on a case.

¹ Penal Code section 987.05 authorizes a judge to sanction or remove an attorney who accepted assignment of a criminal case after representing that he or she would be ready to proceed with the preliminary investigation or trial, and thereafter, without good cause, is not ready on the date set. This section applies to appointed counsel. Judge Jacobson acknowledges that he does not know whether Ms. Beles was appointed.

The commission concluded that the judge's order constituted an abuse of authority and violated canon 1, which requires judges to uphold the integrity and independence of the judiciary, and canon 2A, which requires judges to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

The commission also found that the judge's statements to Ms. Beles during the morning court session to "spend every waking moment" on the case, to "work all day today, work all night" and "get up early tomorrow," violated canon 3B(4), which requires judges to be patient, dignified, and courteous to those persons with whom they deal in an official capacity. The commission concluded that the judge's remarks were demeaning and discourteous because they appear to call into question Ms. Beles's work ethic and suggest she had not adequately prepared her case. As they were made in the presence of her client, they are also the type of remarks that could be expected to damage the attorney-client relationship.

The commission concluded that Judge Jacobson's conduct as described above constituted, at a minimum, improper action.

Judge Jacobson's prior discipline for similar misconduct was a significant factor in the commission's determination to impose this public admonishment. In 2010, the judge received a strong advisory letter for abuse of authority and poor demeanor. The judge ordered an attorney to appear in his court when no matter requiring the attorney's presence was pending. When the attorney appeared, the judge chastised him for engaging in what the judge perceived as an improper ex parte communication arising out of the attorney's discussion of a matter with a court administrator. The judge ordered the attorney to remain in the courtroom while the judge summoned opposing counsel in one of the attorney's cases that was awaiting trial, after which he conducted an un-calendared hearing. In the commission's view, Judge Jacobson's repeat of similar misconduct in the present case reflects a lack of appreciation for the bounds of his authority and his duty to treat those who appear before him with courtesy, dignity and respect.

The vote of the commission to impose a public admonishment was 7 ayes and three noes. Commission members Mr. Lawrence Simi, Anthony P. Capozzi, Esq., Hon. Frederick P. Horn, Hon. Judith D. McConnell, Nanci E. Nishimura, Esq., Mr. Adam N. Torres, and Mr. Nathaniel Trives voted for a public admonishment. Commission members Hon. Erica R. Yew, Ms. Maya Dillard Smith and Ms. Sandra Talcott would have issued a private admonishment. Commission member Ms. Mary Lou Aranguren did not participate.

Dated: July 11, 2012



Lawrence Simi
Chairperson