

FILED

JAN 14 2010

**Commission on
Judicial Performance**

STATE OF CALIFORNIA

BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

**INQUIRY CONCERNING FORMER
JUDGE BRETT C. KLEIN,**

No. 187.

**NOTICE OF FORMAL
PROCEEDINGS**

To Brett C. Klein, a judge of the Los Angeles County Superior Court from January 23, 1990 to November 30, 2009:

Preliminary investigation pursuant to Rules of the Commission on Judicial Performance, rules 109 and 111, having been made, the Commission on Judicial Performance has concluded that formal proceedings should be instituted to inquire into the charges specified against you herein.

By the following allegations, you are charged with willful misconduct in office, persistent failure or inability to perform your duties, conduct prejudicial to the administration of justice that brings the judicial office into disrepute, and improper action within the meaning of article VI, section 18 of the California Constitution providing for removal, censure, or public or private admonishment of a judge or former judge, to wit:

COUNT ONE

Jacqueline Cohen, et al. v. Windsor Fashions, Inc. (Los Angeles Superior Court No. BC381468) was a class action lawsuit against a women's clothing store chain. The suit alleged that Windsor Fashions violated the Song-Beverly Credit Card Act (Civ. Code, §§ 1747-1748.95) by asking customers who made purchases by credit card for their personal identification information. Plaintiffs were represented by Neil Fineman. Defendant was represented by Dennis Kass.

The case was assigned to Judge Susan Bryant-Deason. In November 2008, Judge Bryant-Deason certified the class and granted preliminary approval of a settlement reached by the parties after mediation. The terms of the settlement included a permanent injunction prohibiting Windsor Fashions from requesting and recording personal identification information from credit card purchasers, its agreement to purge information already obtained, and the issuance to class members of a \$10 voucher that could be used at any California Windsor Fashions store. The settlement agreement also provided for the payment by Windsor Fashions of a \$2,500 award to plaintiff Jacqueline Cohen for her services as the class representative, and for payment of \$125,000 in attorney's fees and costs to Attorney Fineman.

After giving notice of the settlement to the class members and receiving no objections, the parties filed a joint application for final approval of the settlement, which included a proposed final approval order. The final approval hearing, referred to as a fairness hearing, was set for the morning of January 16, 2009, a Friday. Because Judge Bryant-Deason was ill that day, you presided over the fairness hearing. You had reviewed the court file on January 15, 2009.

During the January 16 hearing, you engaged in a pattern of sarcasm and improper remarks toward the attorneys, as exemplified by the following:

THE COURT: How did [class plaintiff] come to learn that this was a violation of law to ask for her phone number? Did she already know it that day?

MR. FINEMAN: That day, she did not know it.

THE COURT: Someone mentioned it to her at a cocktail party?
(R.T. 5:18-23.)

[¶] ... [¶]

THE COURT: There's nothing in the court records to identify her other than this name, which is probably more common than the most common legal fictitious name for a woman, which would be Jane Doe. There are probably more Jacqueline Cohens than there are Jane Does in the world; right?
(R.T. 6:15-20.)

[¶] ... [¶]

THE COURT: Surely [Windsor Fashions] know[s] what the average customer purchase is.

MR. KASS: I'm not qualified to discuss that. I have not had that conversation with them.

THE COURT: This is the lawyer's way of saying I don't know?
(R.T. 17:2-7.)

[¶] ... [¶]

THE COURT: ... So you reduced your charges for the typing time?

MR. FINEMAN: Yes, Your Honor.

THE COURT: To what level?

MR. FINEMAN: That's a good question, Your Honor. I'd have to go back.

THE COURT: Thank you. I appreciate the praise.
(R.T. 23:26 – 24:3.)

[¶] ... [¶]

THE COURT: Would your [\$]395 rate have been higher or would you have used the higher rate if you had decided to sign your declaration rather than to file it unsigned or would it have been the same?
(R.T. 27:13-16.)

At the end of the hearing, you said that you were taking the matter under submission. That afternoon, you revised paragraphs 8 and 9 in the proposed final approval order, which concerned payment of attorney's fees and costs and payment of the incentive award to class representative Cohen. You did so by typing new paragraphs 8 and 9 and pasting them over the corresponding paragraphs in the proposed final approval order. Instead of receiving payment in cash, the new paragraphs 8 and 9 provided that Mr. Fineman and Ms. Cohen would be paid in the form of \$10 gift cards for Windsor Fashions. Paragraph 8 provided that Mr. Fineman was to receive 12,500 gift cards, with 3,500 cards due in January 2009 and 750 due every month for the following twelve months. Paragraph 9 provided that Ms. Cohen would receive 250 gift cards in January 2009. You signed and dated the order, and crossed off the word "Proposed" on the caption.

You had not mentioned during the January 16 hearing that you were considering making such changes to the proposed settlement. On the afternoon of January 16, you instructed your clerk to e-mail your order to the attorneys. The e-mail message to the attorneys, which you dictated to your clerk, was: "The Final Approval Order was signed and filed this afternoon. A scan is attached. (Five pages, pdf format.)"

On January 16, 2009, you transmitted your order to the Metropolitan News-Enterprise, a local daily legal newspaper. On January 21, 2009, the Metropolitan

News-Enterprise published a disparaging article about the *Cohen* case settlement that described your January 16 order with approval. The article resulted in further publicity and Internet postings critical of the case and Mr. Fineman.

On January 29, 2009, you sent an e-mail message to Judge Bryant-Deason regarding the possibility of reconsideration of your January 16 ruling in *Cohen*. On February 2, 2009, on your own motion, you ordered reconsideration of your ruling “granting the Joint Application for Final Approval of Class Actions Settlement ... in light of the decision in *Meyer v. Sprint Spectrum L.P.*” The reconsideration motion was set for February 13 in Judge Bryant-Deason’s department. On February 9, Judge Bryant-Deason advanced the date to February 9, vacated your January 16 ruling and entered a new final order providing for a plaintiff’s award of \$2,500 and attorney’s fees of \$125,000, to be paid as originally approved.

Your conduct reflects a failure to be patient, dignified and courteous to those appearing before you. It displays bias and embroilment, and constitutes an abuse of authority. Your conduct violates the Code of Judicial Ethics, canons 1, 2A, 3B(4) and 3B(5).

In 2004, you were publicly admonished for abusing your authority and displaying bias and embroilment through actions you took after a judgment you had entered was reversed by the Court of Appeal. (Pub. Adm. No. 33.)

YOU ARE HEREBY GIVEN NOTICE, pursuant to Rules of the Commission on Judicial Performance, rule 118, that formal proceedings have been instituted and shall proceed in accordance with Rules of the Commission on Judicial Performance, rules 101-138.

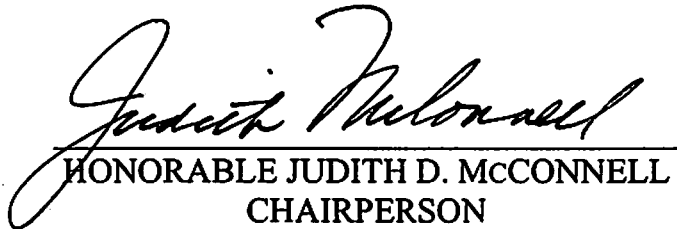
Pursuant to Rules of the Commission on Judicial Performance, rules 104(c) and 119, you must file a written answer to the charges against you within twenty (20) days after service of this notice upon you. The answer shall be filed with the Commission on Judicial Performance, 455 Golden Gate Avenue, Suite 14400, San

Francisco, California 94102-3660. The answer shall be verified and shall conform in style to the California Rules of Court, rule 8.204(b). The Notice of Formal Proceedings and answer shall constitute the pleadings. No further pleadings shall be filed and no motion or demurrer shall be filed against any of the pleadings.

This Notice of Formal Proceedings may be amended pursuant to Rules of the Commission on Judicial Performance, rule 128(a).

BY ORDER OF THE COMMISSION ON JUDICIAL PERFORMANCE

Dated: December 28, 2009


HONORABLE JUDITH D. McCONNELL
CHAIRPERSON

FILED

JAN 14 2010

**Commission on
Judicial Performance**


**STATE OF CALIFORNIA
BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE**

**INQUIRY CONCERNING FORMER
JUDGE BRETT C. KLEIN,
NO. 187.**

**ACKNOWLEDGMENT OF SERVICE
OF THE NOTICE OF FORMAL
PROCEEDINGS**

I, Reginald A. Vitek, on behalf of my client, former Judge Brett C. Klein, hereby waive personal service of the Notice of Formal Proceedings in Inquiry No. 187 and agree to accept service by mail. I acknowledge receipt of a copy of the Notice of Formal Proceedings by mail and, therefore, that former Judge Klein has been properly served pursuant to Rules of the Commission on Judicial Performance, rule 118(c).

Dated: 1-14-10



Reginald A. Vitek
Attorney for Former Judge Brett C. Klein,
Respondent