

STATE OF CALIFORNIA
BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

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

No. 187

**DECISION AND ORDER
IMPOSING PUBLIC CENSURE AND
BAR PURSUANT TO STIPULATION
(Commission Rule 127)**

I. INTRODUCTION AND PROCEDURAL SUMMARY

This disciplinary matter concerns former Judge Brett C. Klein (Judge Klein), a judge of the Los Angeles County Superior Court from January 23, 1990 to November 30, 2009, when he irrevocably retired from judicial office.

The commission filed a Notice of Formal Proceedings (Notice) on January 14, 2010, charging Judge Klein with misconduct constituting an abuse of authority and reflecting embroilment, bias and a failure to be patient, dignified and courteous in his handling of a hearing in a class action lawsuit. Judge Klein and his counsel, Reginald A. Vitek, Esq., and the examiner for the commission, Andrew Blum, Esq., (the parties) submitted a Stipulation for Discipline by Consent (Stipulation) to the commission pursuant to Commission rule 127. Pursuant to the Stipulation, the judge agreed to the imposition of a censure and bar from holding judicial office in California or receiving assignments, appointments, or references of work from any California state court. If Judge Klein fails to comply with any of the terms and conditions of the agreement, the commission may withdraw the censure and proceed with formal proceedings. In an affidavit of consent for discipline filed with the Stipulation pursuant to rule 127 (d), Judge Klein admits the truth of the charges in the Notice and waives all further proceedings and review by the Supreme Court. According to the terms of the Stipulation, Judge Klein also agrees that in the decision and order imposing a censure and bar, the commission may articulate the reasons for its decision. The Stipulation was accepted by the commission on January 27, 2010.

II. STIPULATED FACTS AND LEGAL CONCLUSIONS

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 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, Judge Klein presided over the fairness hearing. Judge Klein had reviewed the court file on January 15, 2009.

During the January 16 hearing, Judge Klein 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, Judge Klein said that he was taking the matter under submission. That afternoon, Judge Klein 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. Judge Klein 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. Judge Klein signed and dated the order, and crossed off the word "Proposed" on the caption.

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

On January 16, 2009, Judge Klein transmitted the 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 Judge Klein's 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, Judge Klein sent an email message to Judge Bryant-Deason in which he stated that his January 16 ruling in *Cohen* "troubles me," and referred to the provisions in paragraphs 8 and 9 of his order as "unusual." He suggested that he could order sua sponte reconsideration of the joint motion for final approval and then recuse himself so that Judge Bryant-Deason could decide the matter. On February 2, 2009, on Judge Klein's own motion, he ordered reconsideration of the ruling, and set the matter for February 13 in Judge Bryant-Deason's department. On February 9, Judge Bryant-Deason advanced the date to February 9, vacated Judge Klein's 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.

Judge Klein's conduct displays bias and embroilment, and constitutes an abuse of authority. His conduct also reflects a failure to be patient, dignified and courteous to those appearing before him. Judge Klein's conduct violates the Code of Judicial Ethics, canons 1 (judge shall observe high standards of conduct), 2A (judge shall act at all times in a manner that promotes public confidence in the judiciary), 3B(4) (judge shall be patient, dignified, and courteous to persons with whom the judge deals in an official capacity), and 3B(5) (judge shall not perform judicial duties with bias or prejudice, or engage in conduct that would reasonably be perceived as bias or prejudice). Judge Klein's conduct constitutes, at a minimum, conduct prejudicial to the administration of justice that brings the judicial office into disrepute pursuant to article VI, section 18(d)(2) of the California Constitution.

OTHER FACTS RELEVANT TO DISCIPLINE

In 2002, Judge Klein received an advisory letter for improper and unprofessional remarks at a hearing about an attorney who was not present. The remarks suggested bias and embroilment. In 2004, Judge Klein was publicly admonished for abusing his authority and displaying bias and embroilment through actions he took after a judgment he had entered was reversed by the Court of Appeal. The Court of Appeal had found that Judge Klein acted "arbitrarily and capriciously" in reducing a damages award to plaintiffs in a personal injury case and remanded the case to him with instructions to enter judgment in accordance with the evidence. Judge Klein failed to follow the remand instructions. (Pub. Adm. No. 33.)

III. DISCIPLINE

Article VI, section 18, subsection (d) of the California Constitution provides that the commission may "censure a judge... for action... that constitutes... conduct prejudicial to the administration of justice that brings the judicial office into disrepute." By the terms of the Stipulation, Judge Klein concedes that his conduct was, at a minimum, prejudicial misconduct.

The stipulated censure and bar is the maximum sanction the commission may impose upon a former judge. (Cal. Const., art. VI, § 8, subd. (d).) We have determined that this is the appropriate discipline based on the serious nature of the misconduct and Judge Klein's history of discipline for similar misconduct.

As noted in the stipulated facts, Judge Klein has previously been disciplined for misconduct reflecting bias and embroilment, for making improper remarks about an attorney, and for abusing his authority. Despite this disciplinary history, Judge Klein continued to engage in the same type of misconduct in his handling of the case of *Jacqueline Cohen, et al. v. Windsor Fashions, Inc.* His embroilment and bias are manifested through the highly unorthodox manner in which he modified the proposed final order to provide for the payment of \$125,000 in attorney's fees in \$10 gift cards rather than cash and by his action in transmitting the order to the

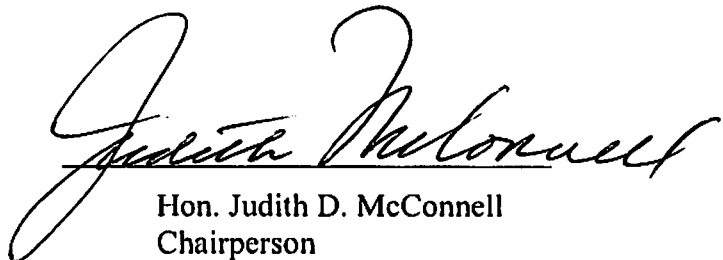
press. Judge Klein abandoned his role as a neutral arbitrator and gave the appearance of being punitive toward the plaintiffs' attorney and grandstanding to the press. Further, his conduct in the case demonstrates a continued pattern of making improper comments toward those with whom he deals in his judicial capacity.

With Judge Klein's prior discipline in mind, we conclude that the misconduct in the present matter demonstrates a continuing "course of conduct establishing a 'lack of temperament and ability to perform judicial functions in an even-handed manner.' [Citation.]" (*Fletcher v. Commission on Judicial Performance* (1998) 19 Cal.App.4th 865, 918, quoting from *Wenger v. Commission on Judicial Performance* (1981) 29 Cal.3d 615, 653.) As such, the commission determines that the discipline proposed in the Stipulation is necessary for the protection of the public and maintenance of public confidence in the integrity of the judiciary.

Based upon the parties' stipulation, and good cause appearing, the commission hereby censures former Judge Brett C. Klein and bars him from holding judicial office in the state of California and from receiving an assignment, appointment, or reference of work from any California state court.

Commission members Hon. Judith D. McConnell, Hon. Katherine Feinstein, Peter Flores, Esq., Marshall B. Grossman, Esq., Mr. Samuel A. Hardage, Ms. Barbara Schraeger, Mr. Lawrence Simi, Ms. Maya Dillard Smith, Ms. Sandra Talcott, and Mr. Nathaniel Trives voted to issue this decision and order imposing a public censure and bar pursuant to the Stipulation. Commission member Hon. Frederick P. Horn did not participate in the vote.

Dated: February 2, 2010



Hon. Judith D. McConnell
Chairperson