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COMMISSION ON
JUDICIAL PERFORMANCE

Attorneys for Judge Bruce Clayton Mills

THE STATE OF CALIFORNIA
BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

INQUIRY CONCERNING
JUDGE BRUCE CLAYTON MILLS

No. 201

**ANSWER BY JUDGE BRUCE
CLAYTON MILLS TO NOTICE OF
FORMAL PROCEEDINGS**

On October 19, 2017, the Honorable Bruce Clayton Mills, Judge of the Contra Costa County Superior Court, demanded that Inquiry No. 201 be dismissed on the ground that the entire Commission, including its Executive Director and staff, had conflicts of interest and was disqualified pursuant to Policy Declaration 3.13 of the Policy Declarations of the Commission on Judicial Performance. Being disqualified, the Commission could not undertake an investigation of Judge Mills, issue the notice of Formal Proceedings, nor could it now or in the future adjudicate any matters involving Judge Mills and Joseph Sweeney. As of the filing of this Answer, the Commission had yet to respond to the demand.

The Commission authorized a Preliminary Investigation and ordered Formal Proceedings in connection with claims asserted by Joseph Sweeney and relating to *Sweeney v. Evilsizor*, Contra Costa County Superior Court Case No. D13 01648. Joseph Sweeney is

the president or managing member of Court Reform LLC, an organization that has been highly critical of the California judiciary and extremely vocal in charges against the Commission on Judicial Performance. Sweeney and Court Reform, LLC have sought to fundamentally change the structure and organization of the Commission on Judicial Performance. Mr. Sweeney has self-proclaimed that he is responsible, or at a minimum extremely instrumental, in the decision by Elaine M. Howle, the California State Auditor, to conduct an audit of the Commission on Judicial Performance. The efforts by the State Auditor resulted in The Commission filing action CPF 16 515308 in the Superior Court for the City and County of San Francisco styled *Commission on Judicial Performance v. Elaine M. Howle*. Further, and as the Commission knows, Mr. Sweeney has accused Judge Mills “as the hatchet man for the Judicial branch’s retaliation against” him because he is a “court reform activist”. Finally, Mr. Sweeney also claimed that Judge Mills colluded with Judge Thomas Maddock, while Judge Maddock was a CJP Commissioner, to incarcerate him.

To any reasonable, objective person the Commission’s relationship with Joseph Sweeney is and has been such that he or she would seriously question the ability of the Commission on Judicial Performance, its Executive Director and staff, to be fair and impartial in investigation of and decisions relating to the charges made by the Commission’s antagonist, Mr. Sweeney, against Judge Mills. The Commission was hopelessly conflicted in the first instance in investigating the complaint of Mr. Sweeney. An objective person would conclude that any past or future action by the Commission would be influenced by Mr. Sweeney’s involvement in the complaint process.

Judge Mills has been denied his due process rights by reason of the Commission's failure to abide by its own Policy Declarations:

3.13 Procedures and Standards for Staff Recusal

(1) The chairperson of the commission or the chairperson's designee shall be informed if any member of legal staff, the director, or the legal advisor has any possible conflicts of interest involving either a case assigned to him or her or any other case pending before the commission and of information that might be considered relevant to the question of disqualification, even if the attorney believes there is no actual basis for disqualification.

(2) The chairperson or the chairperson's designee shall make a determination as to whether the attorney shall be recused or other action taken. The commission shall be appraised at each meeting of any conflicts or potential conflicts brought to the attention of the chairperson. The commission may overrule or modify any resolution of a conflict by the chairperson.

(3) An attorney shall be recused under the following circumstances:

(a) The attorney in the course of a previous representation of a client has received confidential information that has any relevance to a commission investigation;

(b) The attorney has personal knowledge of disputed evidentiary facts concerning the proceedings;

(c) The attorney has a current personal, financial, or professional relationship with the judge, the judge's counsel, or the complainant;

(d) The attorney has a previous personal, financial, or professional relationship with the judge, the judge's counsel, or the complainant which casts a substantial doubt on the attorney's ability to be impartial;

(e) The attorney's spouse or partner has a personal, financial, or professional relationship with the

judge, the judge's counsel, or the complainant which casts a substantial doubt on the attorney's ability to be impartial;

(f) Where a reasonable person aware of the facts would entertain a substantial doubt that the attorney would be impartial.

(4) In the event an attorney other than the director is recused, the recused attorney shall not review any materials concerning the matter or discuss the matter with commission staff. The recusal shall be noted prominently in the file and commission staff shall be directed not to circulate any materials concerning the matter to the recused attorney, not to consult with the recused attorney concerning the matter and not to discuss the matter in the presence of the recused attorney. The entire legal staff need not be recused from the matter unless the commission determines that the recused attorney's conflict casts a substantial doubt on the ability of the entire staff to be impartial. The recusal of the attorney shall be noted in the commission's minutes.

(5) In the event the director is recused, the entire legal staff, excluding the legal advisor, shall be recused. The commission may obtain outside counsel to handle intake, investigation, and any further proceedings involving the case, including acting as media contact, without consultation with the director or legal staff. The recusal of the director shall be noted in the commission's minutes.

(6) In the case of a recusal of the legal advisor or trial counsel, the commission may designate a member of legal staff or obtain outside counsel to advise the commission or act as examiner.

These Policy Declarations mandated that the entire Commission, its Executive Director and staff be recused in connection with this matter. Notwithstanding Rule 134.5, an independent body should have been appointed to investigate and pass on the complaint filed against Judge Mills by Mr. Sweeney, and the failure to do so requires this Inquiry be dismissed. In addition and based on the foregoing facts, each Commissioner must be

recused pursuant to Policy Declaration 6.1(1)(g) from any further participation in this Inquiry.

COUNT ONE ALLEGATIONS

On August 12, 2016, you presided over a contempt hearing in a family law case, *Evilsizor v. Sweeney*, D13-01648. You found the citee, Joseph Sweeney, guilty of contempt of court on five of the eleven counts alleged. During a discussion of a possible sentence, you informed the attorneys and parties that Mr. Sweeney would get “good time” credits during any custody time imposed and would probably “get one day good time for each day that he serves....” You also said, “So the reality is he’ll only serve half of it [the sentence] to begin with.” You set the sentencing hearing to take place on August 16, 2016.

On August 16, 2016, you sentenced Mr. Sweeney to 25 days in custody (which amounted to five days for each count of contempt, to be served consecutively), imposed a fine, and awarded attorney’s fees and costs. Neither the Findings and Order Regarding Contempt that was signed and filed on August 16, 2016, nor the minute order for August 16, 2016, contained any reference to good time credits.

After Mr. Sweeney surrendered, the Sheriff’s Department contacted you ex parte, through your clerk, to find out whether Mr. Sweeney should receive good time credits. Without notifying the parties of the substance of the ex parte communication or providing them with an opportunity to respond, you directed your clerk to modify the Findings and Order Regarding Contempt to read: “No good time credits to be given.” The amended order was provided to the jail where Mr. Sweeney was being held, but not to the parties.

On August 25, 2016, after being informed that the jail was not giving Mr. Sweeney good time credits, Mr. Sweeney’s counsel contacted the jail and learned of the addition to the Findings and Order Regarding Contempt. In a letter dated August 25, 2016, and delivered to you that day, Mr. Sweeney’s counsel wrote that you said at the August 12, 2016 hearing that Mr. Sweeney would receive half-time credits, and that Penal Code section 4019, subdivision (a)(3) provides that half-time credits apply. Later that day, after receiving counsel’s letter, you issued an order stating that Mr. Sweeney was “entitled to receive good time credits[,]” even though you did not necessarily believe that he was entitled to them.

Your conduct violated the Code of Judicial Ethics, canons 1, 2, 2A, 3B(2), 3B(5), 3B(7), and 3B(8).

COUNT ONE RESPONSE

Evilsizor v. Sweeney is a perfect example that the right to free speech is not absolute.

In 1993, the California legislature responded to staggering statistics regarding domestic

violence by enacting the Domestic Violence Prevention Act (“DVPA”). The DVPA authorizes a court to issue orders to restrain abusers, protect victims, and hopefully, prevent future abuse. Appellate courts have universally upheld the DVPA, holding that dissemination of intimate details of a victim’s life is not protected speech afforded constitutional protection.

Following a fair and open hearing, the Family Court in Contra Costa County found that Joseph Sweeney had committed acts of domestic violence warranting a restraining order under the DVPA prohibiting Mr. Sweeney from disclosing intimate details about his spouse which the court characterized as abusive. Mr. Sweeney appealed the order. The California Court of Appeal refuted every contention raised by Mr. Sweeney and ruled that, “The order did not violate Sweeney’s constitutional rights to free speech.” The California Supreme Court denied review, thus affirming the order.

After losing his appeals, Mr. Sweeney expressed his contempt for the appellate court ruling. He disregarded the prior court order and posted numerous intimate details of his spouse’s life on an Internet website that he created for that purpose. The victim filed a petition for an order to show cause as to why Mr. Sweeney should not be held in contempt for violating a court order and sanctioned for his flagrant disregard of the law. At the hearing before Judge Mills, the ex-wife, Ms. Evilsizor, testified that the postings caused her “extreme embarrassment, fear and intimidation.” Judge Mills found five clear violations committed by Mr. Sweeney, all constituting domestic abuse.

A complicating factor was that the contempt citation sought by Ms. Evilsizor’s attorney was for civil contempt in connection with a family law order. At the sentencing on August 16, 2016, Judge Mills noted that:

This is very, very clear cut. This was a willful violation of Judge Weil's order. It was done to harm Ms. Evilsizor. It was malicious in its nature. And it deserves custodial sanctions. And the court is going to proceed to sentencing. [RT 112:17-21.]

On August 12, 2016, Ms. Evilsizor's attorney requested incarceration for Mr. Sweeney's violation of the court order, requesting "the maximum combined sentence in terms of if he was to be incarcerated . . .," at which point Judge Mills stated, "Well, keep in mind, he's also going to get good time credits. You don't do criminal. But he's also going to get one day good time for each day that he serves, probably" (emphasis added), and then turned to his bailiff, inquiring, "So out of twenty-five, he'll serve twelve or thirteen?" [R.T. 86:22-27] This was a question asked of the bailiff because in any misdemeanor sentencing the protocol is not to set forth on the sentencing order whether good time credits are available or not in misdemeanor cases. Judge Mills' use of the word "probably", which is glaringly omitted from the quotation cited by the Commission in the above charges, is important. This calculated omission falsely conveys that this was a settled question, when in reality, Judge Mills wasn't making a determination or finding on the issue. Those credits are usually available, so it is the sheriff's department at jail that determines the amount of good time that would be allotted thus the reason for making the inquiry of the bailiff, a deputy sheriff. Judge Mills was not the person to determine the exact amount of good time credit allotted, if any. That would be determined by the deputy sheriffs at the jail.

When Joseph Sweeney was delivered to the Contra Costa County jail, the deputy sheriffs were apparently unsure whether he was entitled to good time credits in connection with a contempt order arising out of the violation of a civil order. The sentencing minute

order accompanying Mr. Sweeney to the jail is silent on the issue, as are all sentencing orders. After his incarceration, the Sheriff's Department made an inquiry to Judge Mills' clerk seeking a clarification whether the sentencing minute order included good time credits. The clerk then presented the issue to Judge Mills. Judge Mills reviewed Penal Code Section 4019 to determine whether the contempt citation giving rise to jail time was covered by the statute allowing good time credits, or not. Judge Mills opined, based on his analysis of the statute, that the civil contempt citation at issue was not reduced by the good time provisions of the Penal Code, so he had his clerk clarify the minute order, which had been returned to court by the deputy sheriffs at jail, that good time credits were not available. Judge Mills' Clerk then clarified and returned the minute order, to the jail.

Subsequent to the clerk's notation on the order that good time credits were not available, Mr. Sweeney's attorney wrote a letter to the court claiming that Mr. Sweeney was entitled to Penal Code § 4019 (a)(3) and pointed out that the minute order in his possession was different than the minute order in the jail's possession. When Judge Mills found out that Mr. Sweeney's lawyer was claiming good time entitlements pursuant to the statute, he conferred with Judge John Kennedy, the supervising criminal law judge in Contra Costa County. Judge Kennedy also opined that the application of the criminal statute to a civil contempt incarceration wasn't clear. Following that discussion, Judge Mills exercised his discretion and allowed for good time credits to be applied in this case under Penal Code §4019. As a result of the judges' conference, an "unreported minute order" was prepared specifying that Mr. Sweeney was to receive good time credit.

Mr. Sweeney did receive the good time credit and was later released from jail after the credits were applied. Based on information and belief, Mr. Sweeney did not serve any

more jail time than he would have served had he been given the good time credits from the start of his incarceration following sentencing. Thereafter, Mr. Sweeney filed a writ petition to the Court of Appeal regarding the contempt finding and the writ was denied by Justices Humes, Dondero and Banke on October 26, 2016.

Judge Mills denies that he engaged in improper ex parte communications. Canon 3B (F)(a) of the Code of Judicial Ethics provides that “a judge may consult with... others so long as the communication relates to that person’s duty to aid the judge in carrying out the judge’s adjudicative responsibilities.” Judge Mills was authorized to communicate with the sheriff’s department to clarify the minute order because of apparent confusion on the part of the department and did not consider the communication improper. As noted by Justice Pollack in *Bodega Bay Concerned Citizens v. County of Sonoma*, a trial court has “inherent power to clarify its orders” 125 Cal. App. 4th1061, 1067. Judge Mills instructed his clerk to make the clarification and had her return the order to the Sheriff’s office at the jail. Judge Mills apologizes for the oversight in not instructing the clerk to provide copies of the clarified order to the parties.

The evidence in this matter establishes that Judge Mills did not violate Code of Judicial Ethics, canons 1, 2, 2A, 3B(2), 3B(5), 3B(7), or 3B(8).

COUNT TWO ALLEGATIONS

In March 2016, you presided over a jury trial in *People v. Jeffers*, No. 01-171912-9. The defendant was charged with driving under the influence of alcohol (DUI) and driving with a blood alcohol level of 0.08% or higher. During trial, Deputy District Attorney (DDA) William Moser presented testimony from the investigating officer and from a criminalist regarding the breath test results. The defense attorney, Ryan Smith, introduced expert testimony challenging the accuracy of the breath test results. Among other things, the defense expert testified that the lack of a breath temperature corrector on

the breath machine resulted in the machine reporting inaccurately high results if the subject's breath was over 34 degrees Celsius.

On March 23, 2016, while the jury was deliberating, you engaged in an ex parte conversation with DDA Moser in the courtroom. In relation to Mr. Smith's expert witness, you told DDA Moser that when you last prosecuted a DUI case, about 29 years previously, Grady Goldman, a forensic toxicologist at the Contra Costa County Crime Lab, tracked the accuracy of the breath machines. You told DDA Moser that over a protracted period of time, Mr. Goldman monitored the limited number of cases in which both breath samples and blood samples were taken, in order to determine whether the breath machines were testing properly. You stated that if the data existed, it could potentially counter the defense that was presented in the Jeffers case. You also told DDA Moser that if there really was a problem with the breath machines, as the defense expert suggested, someone may have to look at that issue. Later that day, the jury reported that it was unable to reach a verdict and you declared a mistrial. You did not disclose on the record your conversation with DDA Moser or recuse yourself from further proceedings in the case until April 1, 2016, after the district attorney's office disclosed the ex parte conversation to a supervising judge and to defense counsel.

Your conduct violated the Code of Judicial Ethics, canons 1, 2, 2A, 3B(5), and 3B(7).

COUNT TWO RESPONSE

Canon 3B(7) provides that "A judge shall not initiate, permit, or consider ex parte communications, that is, any communications to or from the judge outside the presence of the parties concerning a pending or impending proceeding . . ." Judge Mills' comments to Mr. Moser were misconstrued. Judge Mills simply told a "war story" from 29 years earlier. This was not an ex parte communication.

People v. Jeffers involved a prosecution for alleged driving under the influence. The evidentiary portion of the trial involved only three witnesses; the investigating officer and each parties' forensic expert. It was originally estimated to be one-half day trial. Judge Mills relayed the time estimation to the jury. Incredibly, the trial actually lasted three days. In only the second time in twenty plus years, Judge Mills considered imposing time restrictions on counsel because of what appeared to be insufficiency on the part of both

attorneys. Judge Mills admonished counsel on the record to limit their questions to the events of September 21, 2014, and not collateral matters.

During the trial, both sides presented expert testimony regarding the breath test results. Defense counsel, Mr. Smith, introduced expert testimony challenging the accuracy of the breath test results, who opined that the lack of a temperature regulator on the machine made it prone to report inaccurately high results. This was the first time that Judge Mills heard from a witness testifying in a DUI case that the breath machines then in use in Contra Costa County did not have a temperature regulator and allegedly, as a consequence, there was a propensity for the machines to test and report an inaccurately high sample. On March 23, 2016, the jury was instructed and retired to deliberate the case.

While the jury was in session deliberating, in open court and in the presence of the courtroom bailiff and courtroom clerk, Judge Mills had a conversation with Mr. Moser. Judge Mills is prone to remain in court and work through inbox matters while awaiting a jury's verdict. While Mr. Moser was in the courtroom, Judge Mills remembers discussing numerous innocuous things with him including where he went to school and what he did before joining the District Attorney's office.

At some point, Judge Mills recalled, and shared with Mr. Moser, a topical story, tangentially related to breath machines from 29 years earlier involving the last DUI case that he prosecuted. Significantly those breath machines are no longer in use in Contra Costa County and have not been used for years. At the time of that 29 year old case, an expert named Grady Goldman tracked the accuracy of a breath machine by monitoring the limited number of cases where there was both a breath sample and a blood sample. Judge Mills told Mr. Moser that as a result of having a blood sample along with a breath machine test,

it had been possible to monitor, in those limited cases, whether the breath machine registered at or below the actual blood sample. Judge Mills commented that if there really was an accuracy problem with the current machines used by the County, then someone should look at the issue. The comment was not meant to, nor did it, apply to *People v. Jeffers*. Judge Mills denies saying “if the data existed, it could potentially counter the defense that was presented in the *Jeffers* case” as alleged by the Commission.

Judge Mills’ comments had no relationship with the *Jeffers* action since “the data” he mentioned was at least 29 years old, involved different machines and, as far as Judge Mills knew had not been updated since. The discussion had no bearing on the *Jeffers* case since the jury was deliberating at the time of the conversation and there was no similar data available at the time for use in the *Jeffers* trial or for that matter any DUI case.

Simply stated, Judge Mills was making small talk with Mr. Moser in open court with the courtroom bailiff and courtroom clerk present. In Judge Mills mind, he was simply telling a war story about “how things used to be back in the day”, expounding on the historical difference in forensic evidence presentation in 1986 versus 2016. His story and the “data” he related had no relationship to the *Jeffers* case. As defined by Canon 3B(7), this was not an ex parte communication.

Nonetheless, after the fact, Mr. Moser seems to have been concerned about this conversation and reported it to his supervisor, Assistant Deputy District Attorney Nancy Georgiou. Ms. Georgiou reported the conversation to Mr. Smith and the Honorable John Kennedy, Criminal Supervising Judge of the Contra Costa County Superior Court. Judge Kennedy calendared *People v. Jeffers* for the purpose of placing on the record the story Judge Mills told Mr. Moser, which Judge Mills did on April 1, 2016.

PRIOR DISCIPLINE

Judge Mills objects to the inclusion of prior discipline in these Formal Proceedings on the grounds that so doing is in violation of Cal. Const. Art. VI, § 18(d) and Judge Mills' due process rights. Judge Mills further objects on the grounds that prior discipline is irrelevant and unduly prejudicial to these proceedings. See Cal. Evid. Code §§350 and 352.

It is respectfully submitted that in the interest of justice this formal proceeding against Judge Bruce Clayton Mills be dismissed.

DATED: October 30, 2017 MURPHY, PEARSON, BRADLEY & FEENEY

By


James A. Murphy

Janet L. Everson

Attorneys for Judge Bruce Clayton Mills

VERIFICATION

I, Bruce Clayton Mills, declare that I am the Responding Judge in Inquiry No. 201, that I have read the foregoing Answer, and know the contents thereof, that I believe the same to be true, except as to those matters which are alleged on information and belief, and as to those matters, I believe them to be true.

DATED: 10 / 30 / 17


Bruce Clayton Mills

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CERTIFICATE OF SERVICE

I, Alice Kay, declare:

I am a citizen of the United States, am over the age of eighteen years, and am not a party to or interested in the within entitled cause. My business address is 88 Kearny Street, 10th Floor, San Francisco, California 94108.

On October 30, 2017, I served the following document(s) on the parties in the within action:

ANSWER BY JUDGE BRUCE CLAYTON MILLS TO NOTICE OF FORMAL PROCEEDINGS

X	VIA HAND: The above-described document(s) will be placed in a sealed envelope which will be hand-delivered on this same date, addressed as listed below
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Mark A. Lizarraga, Esq. Trial Counsel
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Via Hand Delivery

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Via Hand Delivery

I declare under penalty of perjury under the laws of the State of California that the foregoing is a true and correct statement and that this Certificate was executed on October 30, 2017.

By


Alice Kay