

STATE OF CALIFORNIA

BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

INQUIRY CONCERNING  
JUDGE JOSEPH W. O'FLAHERTY,  
  
No. 171.

NOTICE OF  
FORMAL PROCEEDINGS

To Joseph W. O'Flaherty, a judge of the Placer County Municipal Court from January 3, 1989 to June 30, 1998, and of the Placer County Superior Court from June 30, 1998 to the present:

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, 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

In December 1999, you presided over a jury trial in the matter of *People v. Joy Ann Mello* (Placer County Superior Court No. 62-7093). The defendant, an African-American, was charged with participation in a robbery. After the prospective jurors were sworn under penalty of perjury to answer all questions truthfully during voir dire (Code Civ. Proc., § 232, subd. (a)), you addressed them as follows:

Now, a touchy subject .... [¶] All right. Here's a sensitive one. The defendant is African American. Okay. Almost everybody in this courtroom is white, Caucasian. [¶] Now, race simply does not – I don't want any racism in my court, which most of you know by now, but I go a little further than that. [¶] I recognize that most people in today's age don't want to raise their hand and say ['I am a bigot'] or ['I'm a racist.']. *So what I'm going to do, if any of you have the slightest doubt that you might not, for racial reasons, be able to give this defendant a fair trial, I'm going to give you permission to lie.* [¶] *I want you to tell me – there's plenty of other reasons, which you as intelligent people know that you can dream up, how you will not – you can get out of sitting here.* [¶] *Okay. I want you to come up with something so that you can get out of sitting here.* I don't want that issue to raise its head in this courtroom. All right. Can everybody assure me of that? (Emphasis added.)

The defendant moved for a mistrial on the ground that you had prejudiced or tainted the panel of prospective jurors, citing among other things the instruction quoted above. You denied the motion and also denied the defendant's motion to discharge the entire panel and replace it with a new one. You then addressed the prospective jurors as follows:

Now, the defendant is African American. Okay. Obviously, racism has no place in the courtroom. I would like to see it have no place at all, but it's around, and so I don't want it in here. [¶] So when we go through this, I mean, I know that some people, unfortunately, still harbor some bigotry, and my job is definitely not to judge you jurors. I want to make that

clear, and I'm not doing that; but on the other hand, like I said, bigotry cannot have any place in this courtroom. [¶] If you feel, if you have the slightest doubt that you can give the defendant a fair trial because of this reason, you can just come right out and say it. [¶] That would be one way to do it, but I recognize that this is – it's kind of insulting and embarrassing to raise your hand and say I'm a racist. [¶] *What I'd like you to do, and I will give you permission in this very narrow area, you can lie. You can say that – what I want you to do is to find some other reason to get excused. [¶] It doesn't take a rocket scientist to figure out how to get excused, if you put your mind to it, and I'd rather have you do that than sit on the jury if there's a problem in this area.* Okay. Does everybody understand that? (Emphasis added.)

A jury was ultimately impaneled and the defendant was convicted. The defendant moved for a new trial, contending among other things that your instructions to prospective jurors about racial bias were prejudicial error. You denied the motion. The defendant appealed. The Court of Appeal, in *People v. Mello* (2002) 97 Cal.App.4th 511, reversed the conviction on the grounds that your instructions to prospective jurors to lie under oath during voir dire violated the defendant's rights under the United States and California constitutions to a fair and impartial jury and to due process of law.

Your conduct reflected abuse of authority, disregard for fundamental rights, intentional disregard of the law, and was in violation of the Code of Judicial Ethics, canons 1 and 2A.

### **COUNT TWO**

In February 2000, you presided over a jury trial in the matter of *People v. Mohammad Ali Abbaszadeh* (Placer County Superior Court No. 63-1593). The defendant, an Iranian, was charged with fraud offenses. After the prospective jurors were sworn under penalty of perjury to answer all questions truthfully during voir dire (Code Civ. Proc., § 232, subd. (a)), you addressed them as follows:

Now, you probably all know that race and nationality have no place in this courtroom. The very integrity of the system that has developed in the last several generations depends on that we keep this social problem at least out of the courtroom.

Now, obviously, being labeled a bigot or a racist, this sort of thing, is insulting to most people. And so it's entirely possible that if you harbor these types of feelings that you may not want to raise your hand and basically put a sign on yourself saying: I am a racist, et cetera.

I don't want somebody who harbors those types of feelings sitting on this jury, for obvious reasons.

*So I would ask that you do whatever you have to do to get off the jury. And it's much more important, in my opinion, that you get off the jury, even if, you know, you have to answer my questions in such a way that you get off in some other way, then do it. [¶] Does everybody understand that? (Emphasis added.)*

A jury was ultimately impaneled and the defendant was convicted. The Court of Appeal, in *People v. Abbaszadeh* (2003) 106 Cal.App.4th 642, citing *Mello*, reversed the conviction because of your instruction or invitation to the jurors to lie under oath during voir dire, and remanded the case with directions that it be reassigned to a different judge.

Your conduct reflected abuse of authority, disregard for fundamental rights, intentional disregard of the law, and was in violation of the Code of Judicial Ethics, canons 1 and 2A.

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 subdivision (b) of rule 14 of the California Rules of Court. 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 10, 2003

/s/  
RISE JONES PICHON  
CHAIRPERSON