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FILED

JUN 06 1997

Commission on
Judicial Performance

STATE OF CALIFORNIA
BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

INQUIRY CONCERNING JUDGE
JAMES RANDAL ROSS, NO. 141.

FIRST AMENDED
NOTICE OF FORMAL PROCEEDINGS

To JAMES R. ROSS, a judge of the Orange County Superior Court from January 2, 1983, until retirement on July 7, 1995, and at all relevant times therein:

Preliminary investigation pursuant to former California Rules of Court, rules 904 and 904.2, and 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, improper action and dereliction of duty within the meaning of Article VI, section 18 of the California Constitution providing for removal, censure, or public or private admonishment of a judge, to wit:

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COUNT ONE

In the following two cases, you exhibited unjudicial demeanor or conduct:

A. *Zapone v. Jaridly*

In 1992, 1993 and 1994, in *Zapone v. Jaridly*, a personal injury case arising out of an automobile accident, you became embroiled, threatened contempt, demonstrated anger, impatience and lack of courtesy, and you appeared not to be impartial.

You presided over several mandatory settlement conferences held in late 1992 and in 1993. You were advised at the December 18, 1992, mandatory settlement conference that there was an insurance coverage dispute. On December 1, 1993, a declaratory relief action to resolve the coverage dispute was filed by State Farm Insurance Company in federal court. On December 9, 1993, State Farm filed a motion in superior court to stay the personal injury action until the federal court declaratory relief action was resolved.

On December 16, 1993, you presided over another mandatory settlement conference. At one point during that settlement conference, you were in chambers with State Farm's coverage attorney Sherman Spitz, State Farm senior claims representative Lynn Ellis, and State Farm claims superintendent Mike Syverson. Spitz discussed the coverage dispute and the reasons that State Farm was not willing to offer money to settle the case. Spitz explained that State Farm had information that the accident was not covered under the defendant's insurance policy because (1) the defendant insured was not the driver of the vehicle involved in the accident; (2) the driver was the insured's son, who was a named excluded driver on the policy; and (3) the vehicle involved in the accident was not the vehicle reported to have been involved in the accident, but a similar vehicle owned by the insured which did not have a current State Farm policy in force at the time of the accident.

You then asked the insurance company representatives if they were willing to pay money to settle the case. Spitz instructed the representatives not to respond. You then left chambers, took the bench and asked the insurance claims representatives on the record if they would pay anything. The insurance representatives told you that they would not. You asked who the Chief Executive Officer of State Farm was. Spitz told you that the out-of-state president of the company was Ed Rust, Jr. You ordered that Rust appear in your courtroom on January 3, 1994.

1 State Farm's motion to stay the personal injury action was set for December 29, 1993. Attorney
2 Spitz was present on behalf of State Farm. After the attorneys stated their appearances, you refused to
3 hear the motion on the grounds that State Farm was not a proper party and lacked standing to bring the
4 motion. You made comments to Spitz, including the following:

5 Spitz: May I explain, your honor?
6

7 The Court: No, you cannot, sir....[to the bailiff] Therefore, if he says one
8 more word even under his breath in this courtroom I will hold him in
9 contempt of court and you will take him to the Orange County jail.

10 ...

11 The Bailiff: Sir, please wait in the hallway.

12 The Court: Unless you want to say one more word.

13 On January 3, 1994, the president of State Farm, Rust, did not appear in court. Carol Trueman, a
14 senior regional employee with full authority to discuss and negotiate the insurance company's position
15 regarding settlement, appeared in place of Rust. You put on the record your version of what had
16 happened in chambers with the insurance representatives at the December 16, 1993, settlement
17 conference. You asked Spitz if your version of what had occurred was correct. When Spitz disagreed
18 with your characterization and asked to explain, you stated: "No, you can't because you're a liar
19 because that's what you told them and I'll go up against you any time and my reputation against yours
20 because you told them --"

21 Without notice to Spitz, you then put the two insurance representatives (Ellis and Syverson) who
22 had been present at the December 16, 1993, settlement conference on the witness stand under oath and
23 questioned them, over objection, as to what had occurred at the settlement conference. You were
24 argumentative and sarcastic with insurance representative Ellis, and threatened Spitz with contempt for
25 objecting to your questions.

26 You then asked Trueman how much authority she had from State Farm and she stated that she
27 had authority of \$100,000, which was the policy limit. You stated that the "ramifications of this case
28 could well be in seven figures, it might even rival Judge Jameson's award against Farmers for 60
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1 million, and then you do not have authority like in the millions, do you?" which apparently was a
2 reference to a judgment for bad faith against Farmer's Insurance Company. (There was no bad faith
3 claim pending against State Farm in the *Zapone* case, either in state court or as a cross-claim in the
4 federal court declaratory relief action.) You ordered Rust to be present in your courtroom on January 12,
5 1994, stating that "we're also going to reorder or continue to have Mr. Rust here so we can have
6 somebody with some real authority --I'm talking about seven figures -- and he's going to be the one that
7 I have ordered and I'm going to reorder it..."

8 You questioned Spitz and Cullins, the defendant's insurance company defense attorney, about
9 whether they had personally notified Rust to be present in court. You imposed \$5,000 in sanctions
10 against Spitz, \$5,000 in sanctions against attorney Cullins, and \$5,000 in sanctions against State Farm.
11 You did not allow the attorneys to make a record regarding that order. You stated that if Rust was not
12 present on January 12, "I will guarantee you \$5,000 will look minuscule." You also stated that you
13 would consider striking the answer and entering a default judgment if Rust did not appear on January 12,
14 1994.

15 Thereafter, the case settled. On January 26, 1994, you presided over a status conference. You
16 recited what you believed to be the terms of the proposed settlement. When attorney Wade and attorney
17 Blum, the defendant's privately retained attorney, attempted to correct the figures you had recited, you
18 responded by stating that you would again order the president of State Farm to be present in court.

19
20 B. *Harris v. Chevron USA, Inc.*

21 In October 1992, you presided over a jury trial in a case entitled *Harris v. Chevron USA, Inc.*
22 You became angry at the defense attorney for asking the plaintiff a certain question. You slammed a
23 tablet or other object down and dismissed the jury to the hallway. You yelled at the defense attorney
24 loudly enough to be heard by some of the jurors in the hallway.

25
26 COUNT TWO

27 You wrote a book entitled I, Jesse James, about your distant relative, Jesse James. The book was
28 published in 1989. From approximately 1991 to June 1995, you had the book available for purchase in
29 your courtroom and chambers. You announced to counsel and others present in court that the book

1 could be purchased from the bailiff and that copies were available at the bailiff's desk. Approximately
2 12 copies of the book were sold. You thereby lent, or appeared to lend, the prestige of office to advance
3 your own private interests.

4 5 COUNT THREE

6 You have been asleep, or have appeared to be sleeping, on the bench while presiding over jury
7 trials. Examples include the following cases: *Harris v. Chevron USA, Inc.* in 1992, *Kreyche v. Santiago*
8 *Air Conditioning* in 1992, *Wellema v. Wall* in 1994, and *McCartin v. San Diego Gas & Electric* in 1994.
9 Sleeping, or appearing to sleep, while presiding is inconsistent with judicial obligations to maintain a
10 high standard of conduct and to act at all times in a manner that promotes public confidence in the
11 judiciary.

12 13 COUNT FOUR

14 In 1994, you presided over the trial of the case of *Wellema v. Wall*, which involved allegations of
15 sexual abuse of a minor girl by an adult male neighbor. The alleged sexual abuse included vaginal and
16 anal intercourse. During a hearing in which a psychologist called by the plaintiff was testifying outside
17 the jury's presence, you told the following joke:

18
19 "Did you hear about the psychologist that had this man in for testing for
20 the Rorschach -- if I'm saying it right -- test and he said what's this one,
21 and the man looks at him and says that's a man and a woman having
22 intercourse. So, he showed him the next one. He says that's two women
23 making love. He turned over to the third one. What's this? Oh, that's a
24 gang intercourse. And he turned over another one. Oh, they are having
25 sodomy, a man and a woman. About that time the doctor said man, I think
26 you're a pervert, and the man looked at him and said don't talk about me,
27 doctor. They are your pictures."

28 The jury was not present, but other people were present in the courtroom, including the then
29 adult plaintiff and members of the public observing the proceedings. Under the circumstances, the
telling of the joke was inappropriate, undignified and offensive.

COUNT FIVE

1
2 In 1995, you presided over the personal injury case of *Walker v. Craig, Hi-Standard Automotive*.
3 Plaintiff Jane Walker was represented by Lawrence Eisenberg. Defendant Craig was represented by
4 Harris Himes. Defendant Hi-Standard was represented by Mary Erickson.

5 In the *Walker* case, you committed misconduct by becoming embroiled and abusing your judicial
6 authority to advance your personal interests, including: obtaining waivers of complaints against you to
7 the Commission on Judicial Performance, and of civil claims; threatening retaliation for complaints to
8 the Commission on Judicial Performance, and for civil suits; obtaining agreement to indemnify you for
9 costs incurred in future Commission on Judicial Performance proceedings; conditioning not going
10 forward with contempt proceedings on agreement to the waivers and indemnification. Your misconduct
11 is more specifically described as follows:

12 On June 12, 1995, near the end of the day, Mr. Eisenberg whispered to Ms. Erickson during the
13 examination of a witness by Mr. Himes. You said that you would cite counsel for contempt if there
14 were any further in-court communication between attorneys.

15 On the morning of June 13, 1995, you ordered Ms. Erickson to put on the record what Mr.
16 Eisenberg had allegedly said to her. You then implied that if a complaint were made against you for the
17 manner in which you handled the whispering incident, you would retaliate by making the incident public
18 and complaining to disciplinary authorities and other attorney organizations. You stated, "if one word of
19 the incident yesterday or this morning is ever reported back to me and it gets back I will release the
20 transcript of yesterday afternoon and this morning to the following: The Orange County Register, the
21 Los Angeles Times, the Orange County Bar Association, the Orange County Trial Lawyers Association,
22 the California Trial Lawyers Association, whatever their new name is, the State Bar of the State of
23 California so that they may act accordingly."

24 Later in the morning of June 13, 1995, Mr. Eisenberg complained about certain alleged conduct
25 by Mr. Himes toward plaintiff's husband, David Walker. You stated that any further such conduct
26 would result in a contempt proceeding. That afternoon, Mr. Himes complained to you about a comment
27 allegedly made against him by Mr. Walker. You said that you would set a contempt hearing against Mr.
28 Walker. The attorneys and the Walkers entered into a stipulation concerning the conduct of Mr. Himes
29 and Mr. Walker. You proposed and obtained the following addendum to that stipulation: "The parties

1 and counsel also waive any claims against Judge James Ross of a civil nature or before the Judicial
2 Performance Commission.” The stipulation, with the waiver, was filed that day. Contempt proceedings
3 were not held.

4 On June 20, 1995, during closing argument, Mr. Eisenberg made certain statements regarding
5 plaintiff’s worker’s compensation benefits for which you indicated that you were going to cite him for
6 contempt. The attorneys then entered into a stipulation regarding the worker’s compensation issue. You
7 wanted waivers of disciplinary complaints and civil claims added to the stipulation. The following
8 exchange then occurred:

9
10 *Mr. Eisenberg:* I’ll waive it. I don’t care. I just don’t care any more.

11 *The Court:* No, counsel.

12 *Mr. Eisenberg:* I’ll waive it. No. We have a stipulation and I don’t –what—your conduct
13 already is prejudicial to my client.

14 *The Court:* I disagree. We’re going to get the proof out.

15 *Mr. Eisenberg:* That’s not the final arbiter of this problem. (Inaudible).

16 *The Court:* I assume – and if you sue me, Mr. Eisenberg, I’ll get your ass for the rest of your life.

17 *Mr. Eisenberg:* Oh –

18 *The Court:* I will be after you. I’m tired of your –

19 *Mr. Eisenberg:* I’m glad this is all on the record. You’ll get me for the rest of my –

20 *The Court:* You’re going to sue me. You said that.

21 *Mr. Eisenberg:* I don’t want to.

22 *The Court:* Are you going to report me?

23 *Mr. Eisenberg:* I, I can’t make that –

24 *The Court:* Or is your client? Okay. Then we’ll have the contempt proceeding right now.
25 Okay.

26 *Mr. Eisenberg:* That’s retaliation. May I have a –

27 *The Court:* We’re going to have the contempt proceeding. That’s what you want.

28 *Mr. Eisenberg:* No, sir. I didn’t ask for it.

29 *The Court:* Yes you did.

1 *Mr. Eisenberg:* Your Honor, I apologize to the court. I will be glad to waive it. I have no
2 interest in proceeding in any kind of judicial performance complaint or anything of that nature. I
3 would like to get on and complete my argument and let the jury decide the case.

4 *The Court:* All right. Sergeant Walker, would you come forward, please? Sergeant Walker –

5 *Sgt. Walker:* Yes, your Honor.

6 *The Court:* I want a truthful answer. You've been sworn before in this court. I'm not putting
7 any duress or coercion on you whatsoever, but I'm not going to have an action a year from now
8 that's going to take me two years to fight, \$50,000 and whatever. Are you waiving any right that
9 either you or your wife has to file any action against me in any civil court or before the Judicial
10 Performance Commission?

11 *Sgt. Walker:* No, Sir. I couldn't do that without advice of an attorney.

12 *The Court:* Okay. Then we'll go ahead with the proceeding of contempt.

13 Do you want to talk to your client? If he doesn't want to do that, fine. We'll go proceed with the
14 contempt. Bring the jury in. I'm going to read them the evidence and then I'm going to have the
15 contempt proceeding....Your client doesn't want to waive anything—

16 *Mr. Eisenberg:* He's not my client any more.

17 *The Court:* --and bring an action against me, fine.

18 *Mr. Eisenberg:* He is not really my client any more.

19 *The Court:* He just said he wouldn't do. Fine.

20 *Mr. Eisenberg:* I can't speak for Mr. Walker.

21 *The Court:* Fine. I'm not --you're going to have your contempt proceeding so we'll have it all
22 on the record when this, when we have a pure transcript for the commission or whoever it is to
23 see it and when I sue Mr. Walker or whatever my attorney tells me to do.

24
25 (Mr. Eisenberg informed the court that Mr. Walker would agree to the waiver.)

26
27 *The Court:* I want him to waive it for himself and his wife. If he doesn't want to waive it for his
28 wife for indemnity why then I will not accept it. It's up to him...If your client is not willing to
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1 waive it on behalf of he and his wife then we're going to proceed. I'm not putting any pressure
2 on him. It's entirely up to him.

3
4 (Mr. Eisenberg said that Mr. Walker was not interested in filing a complaint against you. You called
5 Mr. Walker forward.)

6
7 *The Court:* All right. Sergeant Walker, you understand that you're under no duress or coercion
8 of any kind from this court?

9 *Sgt. Walker:* Yes, Sir.

10 *The Court:* All right. Now I want to find out because I don't want to be faced with this after I've
11 retired, and of our own knowledge do you wish to waive any right that you have in any civil
12 court or filing of any complaint with the Judicial Performance Commission because of this
13 matter?

14 *Sgt. Walker:* This matter today, Sir? That's fine.

15 *The Court:* For anything in this trial?

16 *Sgt. Walker:* That's fine, sir.

17 *The Court:* All right. And your wife, you have the authority to waive on her behalf?

18 *Sgt. Walker:* Are you asking if I do?

19 *The Court:* Same thing. What --

20 *Sgt. Walker:* I don't know if I do or not, Sir.

21 *The Court:* You better call her and ask her.

22 *Sgt. Walker:* But I will waive on her behalf....

23 *The Court:* Will you further indemnify James R. Ross for any action that she brings or anything
24 to the Judicial Performance Commission which could cost me many thousands and thousands
25 and thousands and thousands and thousands of dollars?

26 *Sgt. Walker:* Yes, Sir.

27 *The Court:* Okay. Then we'll proceed.
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1 The stipulation was then filed that day with the following addendum, "The parties and all
2 counsel also waive any claims against Judge James Ross of a civil nature or before the Judicial
3 Performance Commission." Contempt proceedings were not held.
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8 YOU ARE HEREBY GIVEN NOTICE, pursuant to Rules of the Commission on Judicial
9 Performance, rule 118, that formal proceedings have been instituted and shall proceed in accordance
10 with Rules of the Commission on Judicial Performance, rules 101-138.

11 Pursuant to Rules of the Commission on Judicial Performance, rules 104(c) and 119, you
12 must file an answer to the charges against you within twenty (20) days after service of this notice
13 upon you. The answer shall be filed with the Commission on Judicial Performance, 101 Howard
14 Street, Suite 300, San Francisco, California 94105. The answer shall be verified and shall conform
15 in style to subdivision (c) of rule 15 of the Rules on Appeal. The notice of formal proceedings and
16 answer shall constitute the pleadings. No further pleadings shall be filed and no motion or demurrer
17 shall be filed against any of the pleadings.

18 This notice of formal proceedings may be amended pursuant to Rules of the Commission on
19 Judicial Performance, rule 128(a).
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21 BY ORDER OF THE COMMISSION ON JUDICIAL PERFORMANCE

22 DATED: June 2, 1997
23

24 Alvin C. Bowmer
25
26 CHAIRPERSON
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28
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