STATE OF CALIFORNIA

BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

INQUIRY CONCERNING JUDGE ROBERT GEORGE SPITZER, No. 182.	NOTICE OF FORMAL PROCEEDINGS

To Robert George Spitzer, a judge of the Riverside County Municipal Court from January 26, 1990 to July 29, 1998, and of the Riverside County Superior Court from July 29, 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, 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

In the following matters, you backdated, attempted to backdate, and/or caused or directed the backdating of orders, and violated your duty to dispose of the matters promptly and efficiently:

A. On June 21, 2002, in *Frances Hubbard, et al. v. James Madia, et al.*, Nos. RIC 347542 and RIC 356392, you presided over a hearing at which you granted defendant Patrick McAfee's motions for summary judgment against plaintiffs Frances and Peter Hubbard. On or about August 14, 2002, you received proposed orders for summary judgment against Frances and Peter Hubbard. On or before February 17, 2003, you signed the Order Granting Defendant Patrick McAfee, Ph.D.'s Motion for Summary Judgment as Against Frances Hubbard and the Order Granting Defendant Patrick McAfee, Ph.D.'s Motion for Summary Judgment as Against Peter Hubbard, and backdated the orders to August 30, 2002.

B. On or about May 6, 2003, you received a Proposed Judgment and Writ of Mandate in the case of *City of Moreno Valley, et al. v. Southern California Association of Governments (SCAG), et al.*, No. RIC 354003. On or about May 19, 2003, you received objections to the Proposed Judgment and Writ of Mandate. In early June 2004, Presiding Judge Douglas Miller directed you to resolve a number of outstanding orders, including the Proposed Judgment and Writ of Mandate in this case. On or before June 9, 2004, you signed the Judgment and Writ of Mandate, backdated the document to July 3, 2003, file-stamped it July 7, 2003, and left it for your courtroom assistant, Tonia Bealer, to process.

On August 16, 2004, SCAG filed a notice of appeal from the judgment. On September 23, 2004, the California Court of Appeal dismissed the appeal as untimely on the ground that the notice of appeal was filed "approximately thirteen months following the entry of judgment[]" on July 7, 2003.

C. On May 23, 2003, in *California Casualty Insurance v. Cindy Renee Metheny, et al.*, No. RIC 373045, you orally informed counsel of your ruling on the plaintiff's Motion for Summary Judgment. On or about November 3, 2003,

you received a proposed Order Granting Motion for Summary Judgment. In early June 2004, Presiding Judge Miller directed you to resolve a number of outstanding orders, including the Motion for Summary Judgment in this case. On or before June 9, 2004, you signed an Order Granting Motion for Summary Judgment and, with the intention of backdating the document to December 31, 2003, erroneously dated the document December 31, 2004. On June 9, 2004, you gave the Order Granting Motion for Summary Judgment to Arethia Floore, a courtroom assistant who was filling in for Tonia Bealer, and asked her to process it.

D. On or about February 9, 2004, in *Edwin Sharp v. Bitelli, S.P.A., et al.*, No. RIC 351678, you took under submission the defendants' Motion for Summary Judgment or in the Alternative for Summary Adjudication. On June 7, 2004, Presiding Judge Miller directed that your paycheck be withheld due to the fact that the motion had been pending and undetermined for over 90 days after it had been submitted for decision. On or before June 9, 2004, you completed and signed Rulings on Defendants Bitelli, S.p.A. and Mecom Equipment's Alternative Motions for Summary Judgment and/or Summary Adjudication, backdated the document to May 10, 2004, file-stamped it May 14, 2004, and left it for Tonia Bealer to process. When Ms. Bealer brought to your attention the discrepancy between the file-stamped date and the date on the signature page, you responded that you wanted the document dated May 10, 2004.

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

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COUNT TWO

You failed to timely decide matters that were submitted to you for decision and filed false salary affidavits, as follows:

A. On or about June 21, 1996, you presided over a trial de novo in the small claims case of *McGuire v. L. M. Jones Roofing*, No. CIV 115366, and took the case under submission. You failed to rule following trial and the case remained undecided until you entered judgment following a second trial de novo that took place on May 17, 2002. On numerous occasions while the cause was pending for over 90 days, including but not limited to August through November 1999, January through September 2000, November 2000 through May 2001, July, September, November and December 2001, and February and April 2002, you signed salary affidavits pursuant to Government Code section 68210 in which you falsely declared that no cause remained pending and undetermined that you had under submission for decision for the 90 days preceding the effective date of each affidavit.

B. On July 30, 2001, in *Pownall v. American City Mortgage Corporation, et al.*, No. RIC 339906, you heard the plaintiff's Motion for an Order to Compel Defendants, American City Mortgage and Kevin Theodora, to Provide Further Verified Responses to Demand for Inspection and Production of Documents, Set Two and for an Order for Monetary Sanctions. According to the motion, the defendants had objected to a demand for inspection and production of Mr. Theodora's employment file. You ordered defense counsel to lodge Mr. Theodora's personnel file in your department by August 16, 2001, for your in camera review. The personnel file was lodged on August 15, 2001. You never issued a ruling on whether the contents of the personnel file were discoverable. The plaintiff filed a Notice of Settlement on December 31, 2001, and the case was dismissed on January 22, 2002. On or about December 11, 2001, while the cause was pending for over 90 days, you signed a salary affidavit pursuant to Government Code section 68210 in which you falsely declared that no cause

remained pending and undetermined that you had under submission for decision for the 90 days preceding January 1, 2002.

C. On May 1, 2003, in *Lindsay v. City of Riverside, et al.*, No. RIC 306812, the plaintiff filed a Motion to Tax Costs and Fees. At a hearing on May 12, 2003, you ordered that defendant City of Riverside file additional documents with the court on the motion by May 19, 2003, that any opposition be filed by May 23, 2003, and that the matter would then stand submitted. The City of Riverside filed an Amended Memorandum of Costs on May 19, 2003, the plaintiff submitted an opposition to the Amended Memorandum of Costs on May 21, 2003, and the matter stood submitted. You never issued a ruling on the plaintiff's Motion to Tax Costs and Fees. From September 2003 to the present, while the cause was pending for over 90 days, you signed salary affidavits pursuant to Government Code section 68210 in which you falsely declared that no cause remained pending and undetermined that you had under submission for decision for the 90 days preceding the effective date of each affidavit.

D. In 2004, you presided over the case of *Cervantes, et al. v. Riverside Community Hospital, et al.*, No. RIC 371645. On March 1, 2004, defense counsel Michael Young made an oral request to reopen discovery to permit an additional independent medical examination of the minor plaintiff. You requested that counsel file a written request, and continued the hearing to March 8, 2004. On March 5, 2004, Mr. Young filed a declaration requesting that the court allow further designation of experts and reopen discovery to allow the defendants to more formally investigate a new allegation and obtain Spanish-speaking experts to evaluate the minor plaintiff. At the hearing on March 8, 2004, you requested that the transcripts of the depositions of Ronald S. Gabriel, M.D. and Perry Lubens, M.D. be lodged with the court before you ruled on the defense requests. The transcripts were lodged with the court on March 11, 2004. Although you took the defense requests under submission, you never ruled on the requests. From July through September 2004, while the requests had been pending for over 90 days,

you signed salary affidavits pursuant to Government Code section 68210 in which you falsely declared that no cause remained pending and undetermined that had been submitted to you for decision for the 90 days prior to the effective date of each affidavit.

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

COUNT THREE

You failed to perform your judicial duties in the following matters:

A. On or about April 23, 2003, you received proposed case management orders submitted by the parties in *Robinson v. Brighton Lake Hills Associates, et al.*, No. RIC 373233. California Rules of Court, rule 212(i) provides that the court must enter a case management order setting a schedule for subsequent proceedings and otherwise providing for the management of the case. On June 27, 2003, you conducted a case management conference hearing at which you stated that you were going to issue a case management order the following week. You never signed or issued such an order in the case.

B. On April 17, 2003, defendants Van Daele Development Corporation and Temecula 344/AF XV, Ltd. filed motions for summary judgment in *Portofino Development, L.P. v. Van Daele Development Corp., et al.*, No. RIC 368636. On September 26, 2003, you announced your tentative decision to deny the motions for summary judgment, but grant summary adjudication as to the third cause of action for strict liability in tort. On or about January 15, 2004, at your request, your clerk contacted plaintiff's counsel and requested that counsel prepare proposed orders on the September 26, 2003 motions. Plaintiff's counsel submitted proposed orders, which you received on or about January 28, 2004. On or about February 11, 2004, you received the defendants' proposed orders on the motions. Although the case remained pending before you until at least June 11, 2004, you never issued a written order on the motions for summary judgment.

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

COUNT FOUR

You failed to timely decide the following matters that were submitted to you for decision:

A. On November 26, 2001, the defendant in *People v. Charles Robert Gorton*, No. RIF 092588, appeared before you and pleaded guilty to 37 violations of Penal Code section 288, subdivision (a). On February 1, 2002, you sentenced the defendant and remanded him to custody. On March 26, 2002, the defendant filed a Notice of Appeal and Request for Certificate of Probable Cause. The request was accompanied by a statement under penalty of perjury signed by Mr. Gorton's attorney. At the time, California Rules of Court, rule 31(d) provided that within 20 days of the filing of such a statement, the trial court shall execute and file either a certificate of probable cause or an order denying a certificate. You failed to act on the Request for Certificate of Probable Cause until on or about January 24, 2003, when a supervising judge directed you to immediately take action on the matter.

B. On March 7, 2003, in *Horst, et al. v. Del Webb Corp., et al.*, No. RIC 321183, you issued an order to show cause (OSC) why Sphere Drake Insurance Company should not be held in contempt for failing to contribute to the settlement of defense claims and set the OSC hearing for April 11, 2003. At the hearing on April 11, 2003, you took the matter under submission. You failed to make a ruling until you issued your Findings & Order on or about August 11, 2003.

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

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COUNT FIVE

You presided over the trial in *People v. Carl Glen Johnson*, No. RIM 382725, which began on September 8, 1999. On or about September 8, 1999, outside the presence of the parties, you initiated a communication with the watch commander at the sheriff's station where the arresting officer (Deputy Sheriff Kevin Villalobos) worked, asked him about Deputy Villalobos, and learned that the deputy was on medical leave.

On September 9, 1999, all of the prosecution's witnesses except for Deputy Villalobos testified. At approximately 3:00 p.m., when the prosecution had run out of witnesses, the defense moved that the court strike certain testimony and dismiss the case. Deputy District Attorney (DDA) Carlos Monagas asked that the case be trailed to the following day or to Monday, September 13, so that Deputy Villalobos, who had not appeared, could testify. You denied the prosecution's request, granted the defense motion and dismissed the case. In reaching your decisions, you improperly considered your communication with the watch commander.

You also stated that if Deputy Villalobos "had a measure of credibility in the court," he "now walks into the court with a certain negative impression which will be not confined to this courtroom, but to every courtroom in western Riverside County." This comment reflected embroilment and prejudgment and indicated that you had reached a conclusion about Deputy Villalobos's credibility without hearing his explanation for why he was absent. At the time, you presided over criminal cases in which law enforcement officers such as Deputy Villalobos would be likely to testify; your comment suggested that you (and other judges) would not be able to be impartial in cases in which Deputy Villalobos might be a witness.

Your conduct violated the Code of Judicial Ethics, canons 1, 2, 2A, 3B(4), 3B(5) and 3B(7).

COUNT SIX

In March 2000, you presided over the trial in *People v. Feliciano Cobarruvias*, No. RIF 080752. The defendant was charged with attempted murder, assault with a firearm, and various enhancements. On the date of the alleged offense, May 19, 1998, Margaret Herrera, who was then the principal of Longfellow Elementary School in Riverside, acted as a Spanish language translator between the police and the victim, Demecio Arredondo Beltran.

On March 13 and 14, 2000, several witnesses, including Mr. Beltran and Riverside Police Officer Kenneth Tutwiler, testified on behalf of the People. After the People rested on March 14, Deputy Public Defender Joni Williams-Sinclair stated outside of the presence of the jury that she wished to call Officer Tutwiler as a witness to testify about Mr. Beltran's prior inconsistent statements made to Ms. Herrera. DDA Deborah Lucky stated that Ms. Herrera, who worked for the Riverside County Office of Education, was out of the state.

You then telephoned the Riverside County Office of Education outside the presence of the parties, spoke to Ms. Herrera's administrative assistant, requested that Ms. Herrera contact you, and left your telephone number. You then told the parties that you were not inclined to admit Officer Tutwiler's testimony concerning Mr. Beltran's statements, partly because the testimony of Mr. Beltran and Officer Tutwiler had suggested that there may have been a problem with the translator's interpretation of Mr. Beltran's statements. You also cited a Court of Appeal opinion that stood for the proposition that an officer can testify about a declarant's statements made through a translator if the translator was acting as the declarant's agent, but that a lack of capacity or demonstrated incompetence on the part of the translator tended to refute an inference of agency.

Later on March 14, 2000, you received a return call from Ms. Herrera and initiated a communication with her about the facts of the case outside the presence of the parties. Although neither side had called Ms. Herrera to testify, you decided, based on your conversation with Ms. Herrera, to telephone her in the

presence of counsel the following day. You made arrangements with Ms. Herrera to contact her again, and then called both counsel and advised them that they could interview Ms. Herrera by phone in your chambers the following day.

On March 15, 2000, you telephoned Ms. Herrera in the presence of counsel. While Ms. Herrera was on the telephone, you placed her under oath and proceeded to take her testimony outside the presence of the jury. You then determined that Ms. Herrera was acting as Mr. Beltran's agent, that you had no reason to believe that Ms. Herrera was not competent in doing her interpretation, and that Officer Tutwiler would be allowed to testify about Mr. Beltran's statements. Your conduct in independently investigating the facts in the case and arranging for Ms. Herrera to testify reflected bias against the prosecution and embroilment.

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

COUNT SEVEN

On April 30, 2004, you were assigned to preside over the case of *People v. Vondetrick Carr*, No. RIF 106245. The defendant was charged with murder, three counts of child endangerment, driving under the influence of alcohol (DUI) causing bodily injury, driving with a blood-alcohol level of over 0.08% causing bodily injury, driving with a suspended or revoked license, and various enhancements. The charges stemmed from an automobile accident which resulted in the death of a minor.

On May 3, 2004, during a discussion with counsel concerning jury instructions, you noted that the prosecutor, DDA Michael Dauber, had not requested any instructions for "lesser offenses." DDA Dauber told you (and defense counsel agreed) that the court could not instruct the jury on the offense of gross vehicular manslaughter because it was not a lesser included offense of murder. You then asked DDA Dauber whether he planned to charge vehicular manslaughter in the alternative. After DDA Dauber told you that his office was

not going to amend the charges, you requested that DDA Dauber ask the Assistant District Attorney (ADA) for the Southwest Division (Rodric Pacheco) "if the district attorney's office is not seeking to amend" the murder charge to allege an alternative offense of gross vehicular manslaughter. You also stated that you wanted the input of ADA Pacheco and Chief DDA Cregor Datig as to the current state of the law on how to instruct the jury if the jury were to find no "implied malice," but were to find other violations. That afternoon, Chief DDA Datig appeared in your department, explained the reasons for the filing decision in the case, and told you that the only lesser offense on which the jury could be instructed was *involuntary* manslaughter.

Prior to trial, the defendant pleaded guilty to driving with a suspended or revoked license. On May 27, 2004, following a jury trial, the defendant was convicted of three counts of child endangerment and one count of DUI. The defendant was acquitted of driving with a blood-alcohol level of over 0.08%. The jury deadlocked 11-1 in favor of guilt on the murder charge.

On May 27, 2004, after you dismissed the jury, you addressed several members of the decedent's family, including the decedent's grandmother and aunts, who were present in the courtroom. You told the decedent's family members that the defendant faced 27 years in prison on the charges on which he was convicted. You also said words to the effect that the murder charge should not be pursued on the ground that if the first jury had not found the defendant guilty of murder, another jury would not. You also said words to the effect that if the jury failed to convict the defendant of murder after a retrial, you could dismiss the murder charge and the defendant would not be found liable for the decedent's death. Your purpose was to persuade the decedent's family members to acquiesce in a manslaughter disposition and/or convince them to influence the district attorney to offer the defendant a manslaughter plea.

At a Trial Readiness Conference that took place on June 4, 2004, you urged the parties to resolve the case with a guilty plea to vehicular manslaughter. You

stated that if the second jury was unable to arrive at a decision in the case, you were "in the position of dismissing the charges altogether."

After the hearing, in a continuing effort to persuade the district attorney's office to dismiss the murder charge and resolve the case, you initiated a conversation with the decedent's mother in your department, outside of the presence of the parties. You asked the decedent's mother whether she communicated well and whether she had any influence with DDA Dauber as to whether the case would be retried. You also asked her whether she had spoken with DDA Dauber or anyone in the district attorney's office concerning a manslaughter plea relating to the death of her son. When the decedent's mother told you that she had not, you told her that you expected that DDA Dauber or ADA Pacheco would be discussing the matter with her.

You also told the decedent's mother that if she had any influence with DDA Dauber, you would highly recommend that the case not be tried again because it was simply a case of manslaughter. You told her that the defendant should have been charged with manslaughter instead of murder, that the defendant did not intend to kill her son but did so accidentally, and that the case should not be retried. You showed and read to the decedent's mother parts of the Penal Code, explained to her the relationship between second-degree murder and manslaughter, and discussed with her the available punishment for manslaughter. You told the decedent's mother that the defendant was facing a sentence of 27 years for the charges on which he had been convicted and that you could sentence him to an additional 13 years for gross vehicular manslaughter. Your conduct gave the appearance of putting pressure on the decedent's mother to agree that the case should be resolved as a manslaughter and to influence the district attorney's office to offer a manslaughter plea.

On or about July 9, 2004, you initiated a telephone conversation with Chief DDA Datig. You asked Mr. Datig whether, in light of the fact that the jury had deadlocked on the murder count, his office would consider resolving the case with

a plea to vehicular manslaughter. When Mr. Datig told you that he strongly felt that the case was properly charged as a murder based on the evidence, you told him that you had spoken with the victim's mother, and that she would not be opposed to the case being resolved as a manslaughter. Your comments were made in the presence of the defendant's attorney and DDA Dauber.

Your attempts to persuade the district attorney's office to charge the defendant with vehicular manslaughter and to drop the murder charge, and to persuade the decedent's family to acquiesce in a manslaughter disposition, reflected bias against the prosecution and embroilment.

On September 10, 2004, the People filed a Statement of Disqualification requesting that you recuse yourself or be disqualified from further action in the case. The case was assigned to Judge James Cloninger for the purpose of ruling on the Statement of Disqualification. On October 12, 2004, Judge Cloninger ordered you disqualified on the ground that a reasonable person aware of the facts might reasonably entertain a doubt that you would be able to be impartial in the case. Judge Cloninger found that you had taken "unusual steps" to try to influence the district attorney's office to exercise its discretion to prosecute the defendant for manslaughter and to offer the defendant a plea bargain for manslaughter. Judge Cloninger found that those steps included an ex parte communication with the decedent's mother that caused her "to believe that pressure was being applied to her to accede to the notion that the case is one of manslaughter and it would be best for her to try to get the District Attorney to offer the defendant a plea to" manslaughter.

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

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COUNT EIGHT

On July 14, 2005, pursuant to Rules of the Commission on Judicial Performance, rule 111, the commission sent you a preliminary investigation letter, through counsel, requesting that you respond to the allegations set forth in that letter. The letter notified you that August 3, 2005, had been set as a reasonable time for your response to be received in the commission office. Through counsel, you made three requests for extensions of time, each of which was granted. You were informed that the final extension, until November 8, 2005, was granted based on your counsel's representation that no further extension of time would be requested.

You never responded to the allegations set forth in the July 14, 2005 letter. Your failure to respond violated your duties under Government Code section 68725 and commission rule 104 to cooperate with and give reasonable assistance and information to the commission and its representatives during the course of a preliminary investigation, and to respond to the merits of preliminary investigation letters.

Your conduct violated the Code of Judicial Ethics, canons 1, 2 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 the California Rules of Court, rule 14(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: July 18, 2006

/s/
MARSHALL B. GROSSMAN
CHAIRPERSON