

STATE OF CALIFORNIA
BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

**IN THE MATTER CONCERNING
JUDGE LISA A. NOVAK**

**DECISION AND ORDER IMPOSING
PUBLIC ADMONISHMENT**

This disciplinary matter concerns Judge Lisa A. Novak, a judge of the San Mateo County Superior Court. Pursuant to rule 116 of the Rules of the Commission on Judicial Performance Judge Novak and her attorney, Janet L. Everson, appeared before the commission on May 16, 2018, to object to a notice of intended public admonishment issued on December 21, 2017. Judge Novak has waived her right to formal proceedings under rule 118 and to review by the Supreme Court. Having considered the written and oral objections and argument submitted by Judge Novak and her counsel, and good cause appearing, the Commission on Judicial Performance issues this public admonishment pursuant to article VI, section 18(d) of the California Constitution, based on the following statement of facts and reasons.

STATEMENT OF FACTS AND REASONS

Judge Novak has been a judge of the San Mateo County Superior Court since 2005. Her current term began in 2013.

As set forth below, the commission found that Judge Novak failed to be patient, dignified, and courteous to a criminal defense attorney, and made remarks that could reasonably be expected to impair the attorney-client relationship; failed to disclose improper ex parte communications received from her bailiff; and made improper remarks at a judges' meeting.

I. Comments to Attorney in *People v. Golden*

On August 19, 2015, Judge Novak presided at a preliminary hearing in *People v. Leon Allen Golden* (No. SF399441A/SM397700A). After Judge Novak called the case and Deputy District Attorney Ashish Bhatt stated his appearance, defense counsel Mara Feiger said, “Mara Feiger on behalf of Mr. Golden. There is a defense motion to exclude any witnesses.” (R.T. 3:20-22.) Judge Novak did not address this, and instead discussed with Ms. Feiger where each party should sit in the courtroom. In her response to the commission, Judge Novak explained that she did not hear the motion to exclude because the parties and counsel were realigning their positions in the courtroom at the time.

The prosecutor then called the alleged victim as the first witness. During cross-examination, the witness testified that he was aware of an allegation that he had taken money from Mr. Golden, and denied that his father had told him that Mr. Golden was unhappy that the witness had taken Mr. Golden’s money. Ms. Feiger then asked the witness, “In addition to taking Mr. Golden’s money, you were aware --” (R.T. 16:2-3.) Judge Novak interrupted, said that the question was inappropriate because it assumed facts not in evidence, and admonished Ms. Feiger to avoid asking questions that might force the witness to incriminate himself. Judge Novak said she would not allow a question that assumed the witness had committed a crime, despite the absence of an objection by the prosecution, because she had a duty to protect the witness’s rights. Ms. Feiger continued with the question: “You were accused by Mr. Golden of slashing his tires right after you were accused of stealing his money, right?” (R.T. 16:20-22.)

Later during Ms. Feiger’s cross-examination, the witness referred to another individual who was in the courtroom, and Ms. Feiger said to the prosecutor, “I guess you are not calling him as a witness today?” (R.T. 17:22-23.) The prosecutor responded that he was not planning to call the individual as a witness, and the following exchange occurred:

THE COURT: There was no motion to exclude.

MS. FEIGER: There was. That was the very first motion that I made.

THE COURT: No.

MS. FEIGER: You can ask your court reporter.

THE COURT: I didn't grant a motion. I didn't hear a motion. [¶] Was there a motion to exclude?

THE REPORTER: I'll have to check my notes.

THE COURT: I didn't hear one, and I didn't grant one.

MS. FEIGER: It's the very first thing I did.

THE COURT: If you made one, I didn't rule on it. There is no motion to exclude. Sounds like it's irrelevant because the Deputy DA indicated to you that he is not calling a person. [¶] Your next question.

MS. FEIGER: Well, if there is any other witnesses in the courtroom, then I'm going to renew my motion to exclude witnesses.

THE COURT: That motion at this point is denied because it's not timely, Ms. Feiger. [¶] Your next question.

(R.T. 17:25-18:21.)

After Ms. Feiger asked the witness another question, Judge Novak again stated that counsel had not made a motion to exclude witnesses and quoted a portion of the transcript beginning after Ms. Feiger's reference to a motion to exclude witnesses and the discussion of where the parties should sit. Ms. Feiger stated that she had made the motion before the quoted discussion. Judge Novak disagreed, stating, "I am just looking at the record, which is consistent with my recollection...." (R.T. 19:15-17.) Ms. Feiger completed her cross-examination and the prosecutor called two additional witnesses.

After the parties indicated that they had no further evidence to present, Judge Novak stated that Ms. Feiger could present argument, and the following exchange occurred:

MS. FEIGER: Well, I'm not going to miss an opportunity like to exclude witnesses when I'm not on the record.

THE COURT: Ms. Feiger, those comments are unprofessional. I appreciate that you think you made a motion to exclude witnesses.

MS. FEIGER: I know I did.

THE COURT: Don't interrupt me. You have been extremely unprofessional this afternoon. You have been disparaging of the witness, irrespective of the Deputy DA not objecting. You have been unprofessional to the witness. You have been unprofessional to this court. I have been very patient. My patience has ended with your behavior this afternoon. You can have your temper tantrum outside of my courtroom. [¶] If you didn't make a motion to exclude witnesses and it's brought to your attention, live with it and learn from it. I'm sure you thought that you had made a motion to exclude witnesses because you probably do in every hearing. When we do things out of habit and custom, we think that we always do them. You didn't make the motion. I pointed that out to you. You were disrespectful to the court. I let it slide. [¶] I then reviewed the record corroborating the fact that you didn't make the motion. You were again disrespectful to the court, and I let it slide. I'm not letting it slide any longer. Let it go. [¶] Argue any issues that you have on the evidence of this case. Act like the professional that you are. [¶] Do you have any argument on the evidence in this case?

(R.T. 26:20-27:24.)

The commission found that Judge Novak's comments were discourteous and demeaning toward Ms. Feiger and constituted a violation of the judge's duty to be patient, dignified, and courteous to lawyers and others who appear before the judge. (Canon 3B(4).) Moreover, several of the judge's remarks, made in open court and in the presence of Ms. Feiger's client, were of a nature that could reasonably be expected to

impair the attorney-client relationship. Judge Novak remarked that Ms. Feiger was “disparaging of the witness” and “unprofessional to the witness.” Ms. Feiger’s questioning of the witness about whether he was aware that the defendant had previously accused the witness of uncharged crimes was arguably relevant to the witness’s bias and state of mind. If the judge thought the line of questions was irrelevant, she could have made that ruling and advised the witness of his Fifth Amendment rights without disparaging Ms. Feiger, particularly in the presence of her client.

Judge Novak’s statements that Ms. Feiger was “extremely unprofessional,” “unprofessional to this court,” “disrespectful to the court,” and having a “temper tantrum”—which appear to have been based, at least in part, on exchanges resulting from the judge’s mistaken belief that Ms. Feiger had not made a motion to exclude witnesses, and later claimed that she had—also constituted improper accusations of professional misconduct. Even if Ms. Feiger had acted unprofessionally, as Judge Novak states was the case here, the extent to which Judge Novak criticized Ms. Feiger in open court and in front of her client was conduct that could reasonably be expected to impair the attorney-client relationship. A judge has the option of calling counsel to the bench or into chambers if the judge feels that an attorney has acted unprofessionally, particularly if the judge feels that more than a brief, corrective comment is necessary.

II. Failure to Disclose Unauthorized Ex Parte Communications in *People v. Quintana*

On January 4 and 5, 2017, Judge Novak heard a motion to dismiss in *People v. Rachel Quintana* (No. 16-SM-001677). The hearing largely concerned whether Sergeant Michael Otte had recorded with a cell phone the events surrounding the arrest of defendant Rachel Quintana, which resulted in additional misdemeanor charges of battery on an officer and resisting arrest. Sergeant Otte had earlier denied that such a recording existed. On the first day of the hearing, the defendant’s mother testified, and the defense introduced a cell phone video taken by a family member from inside the house that showed Sergeant Otte outside the house holding a cell phone horizontally and appearing to record the interactions between officers and the defendant. On the second day of the

hearing, Sergeant Otte testified that he did not record the incident, but only held his phone up to make it appear that he was recording in an effort to get the defendant to comply with the officers' orders.

Judge Novak's bailiff approached her outside of the presence of the prosecutor and defense counsel and said, "I think I may have seen that video," or words to that effect. Judge Novak told her bailiff she could not discuss the matter. Judge Novak recalled the communication taking place in the hallway while waiting for the proceeding to begin. Judge Novak did not disclose the communication from her bailiff to the parties.

At the end of the hearing, Judge Novak stated that she was troubled by Sergeant Otte's testimony that he had not made a recording of the arrest of Ms. Quintana. Judge Novak said, "It is evident that the man was recording this incident, and I am very troubled that his testimony was proffered because it was not honest." (R.T. 75:2-4.) Judge Novak also made a finding of bad faith, stating, "Knowing that he recorded a video, knowing that he misrepresented under oath that he recorded a video, knowing that the video no longer exists, one is reasonable in inferring that it was not preserved in bad faith. So I have no problem finding that." (R.T. 75:5-9.)

The commission found that Judge Novak's failure to disclose her bailiff's remarks regarding the video constituted a failure to promptly notify the parties of unauthorized ex parte communications, as required by canon 3B(7)(d), and a failure to disclose information relevant to the question of disqualification (canon 3E(2)(a)).

The central issue before Judge Novak was whether Sergeant Otte, who was her bailiff's colleague at the sheriff's office, had video-recorded the defendant's arrest, as he appeared to have done in the video taken from inside the defendant's home. The bailiff's statement that he may have "seen that video," bore directly on the question before the judge and constituted an unauthorized ex parte communication. It also raised a question as to whether the bailiff was a potential witness in the proceedings before the judge. In her response to the commission, Judge Novak stated that when her bailiff said he "may have seen that video," she was not certain whether he was referring to the video recorded by Sergeant Otte or to the video played in court of Sergeant Otte holding his cell phone

that was recorded by a family member. She also said that her bailiff had been seated in a location where he could not see the recording played for the court. Nevertheless, the judge knew it was possible that her bailiff was referring to the video taken by Sergeant Otte. Therefore, she had an obligation to disclose that information to the parties.

If a judge receives an unauthorized ex parte communication, the judge must promptly notify the parties of the substance of the communication and provide them with an opportunity to respond. (Canon 3B(7)(d).) Judge Novak's conduct was inconsistent with her duties under canon 3B(7), regardless of whether she considered the bailiff's statement in her ruling.

As noted, Judge Novak recalls the conversation with her bailiff taking place during the proceeding. The judge's bailiff reported that he recalled the conversation taking place after the hearing on the motion concluded. Judge Novak contends that if her bailiff's recollection is correct, she did not have an obligation to inform the parties. The judge's failure to disclose the ex parte communication constitutes misconduct regardless of whether the communication occurred during the proceeding or following her ruling on the motion. A matter or proceeding continues to be pending through any period during which an appeal may be filed and any appellate process until final disposition. (Cal. Code of Judicial Ethics, Terminology.) Even if Judge Novak had already ruled on the motion, the district attorney's office could file an appeal and there could be future motions concerning the recording. Thus, the matter was still pending and Judge Novak had a duty to promptly notify the parties of the substance of the communication. (Canon 3B(7).)

III. Improper Comments at Judges' Meeting

After the hearing in *People v. Quintana*, Judge Novak attended a judges' meeting on January 20, 2017. There, Judge Novak informed the court's judges that she had made a finding that Sergeant Otte perjured himself. Judge Novak described the motion hearing, stating that Sergeant Otte had testified that he never made a recording of the defendant's detention, despite a second video recording depicting him doing so. Judge

Novak informed the court's judges that she had granted the motion because she found Sergeant Otte's testimony to be not credible. She told the judges that she was providing this information to them as an "FYI" and that they could do with it what they wished.

Because this was a meeting for all judicial officers, the judges who would later hear *People v. Quintana* could be present, in addition to the judges of the court's appellate division, who would hear writ petitions or an appeal in *People v. Quintana*. Judge Novak contends that her comments were proper because she did not mention the case by name. The details she shared, however, were such as to make the matter identifiable to any judge who heard subsequent proceedings in the matter. Moreover, because Sergeant Otte could be called as a witness in other cases, Judge Novak's comments could bear on other cases before the judges at the meeting.

The commission found that Judge Novak's remarks to the judges at the meeting, made while *People v. Quintana* was pending and when Sergeant Otte was a potential witness in that case and in other pending and impending cases, constituted unauthorized ex parte communications not permitted by the exception allowing judges to consult with other judges (canon 3B(7)), and also constituted comments that might substantially interfere with a fair trial or hearing (canon 3B(9)). Although judges are permitted to consult with each other and assist each other in their adjudicative responsibilities, Judge Novak was not consulting with other judges and seeking their advice, but was instead informing them of her evaluation of the evidence in a pending case and potentially impairing their independence and impartiality. Judge Novak's remarks may have interfered with the ability of the other judges present to avoid receiving factual information that is not a part of the record or an evaluation of that factual information (canon 3B(7)(a)). Further, canon 3B(7) expressly prohibits a judge from engaging in discussions about a case with another judge who may participate in appellate review of the matter. (Canon 3B(7)(a).)

Judge Novak's remarks also called into question her impartiality and gave an appearance of bias and embroilment. (Canons 2A, 3B(5).) Judge Novak stated that she did not intend to suggest to the other judges that Sergeant Otte should not be trusted when

called as a witness in other hearings. She also stated, however, that her findings bore directly on the sergeant's credibility as a witness and so her disclosure of these findings to other judges on the bench was "mandated." She noted the close relationship between the sheriff's office and the court and cited the need to have an unqualified trust relationship with this partner.

Judge Novak did not have a duty to report her findings to her judicial colleagues, and her conduct in doing so at a judges' meeting was improper. If Judge Novak's finding that Sergeant Otte committed perjury constituted exculpatory evidence in cases where the sergeant is a witness, it would be the duty of the district attorney's office to disclose that evidence to the defense, not the judge's duty to disclose that evidence to other judges. (See *U.S. v. Bagley* (1985) 473 U.S. 667, 676; *Brady v. Maryland* (1963) 373 U.S. 83, 87.)

Judge Novak's conduct as set forth above was, at a minimum, improper action.

In determining that a public admonishment is the appropriate sanction, the commission took into consideration that Judge Novak has been previously disciplined. (Policy declaration 7.1(2)(e).) In 2011, Judge Novak received an advisory letter for raising a defendant's bail and remanding him into custody after granting his request for a substitution of counsel on the day of trial, a request she considered untimely. The commission found that Judge Novak's conduct, which included her remark that she had a means by which she could ensure the case proceeded in a timely fashion, gave the appearance that she was punishing the defendant for seeking new counsel or causing a delay in the case, neither of which is a valid reason for raising bail, and violated her duty to avoid the appearance of impropriety and to act at all times in a manner that promotes public confidence in the impartiality of the judiciary.

The commission also took into consideration that in this matter, Judge Novak engaged in three different incidents of misconduct, reflecting a lack of proper judicial demeanor and a failure to understand and appreciate the requirements and restrictions imposed upon judges by the canons. (Policy declaration 7.1(1)(a), (b).)

Commission members Nanci E. Nishimura, Esq.; Hon. Michael B. Harper; Ms. Mary Lou Aranguren; Anthony P. Capozzi, Esq.; Hon. William S. Dato; Mr. Eduardo De La Riva; Dr. Michael A. Moodian; and Mr. Adam N. Torres voted for this public admonishment. Commission members Ms. Sarah Kruer Jager, Ms. Pattyl A. Kasparian, and Hon. Erica R. Yew voted to impose a private admonishment.

Dated: May 30, 2018



Nanci E. Nishimura
Chairperson