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FILED
MAY 29 2018
COMMISSION ON
JUDICIAL PERFORMANCE

THE STATE OF CALIFORNIA
BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

INQUIRY CONCERNING JUDGE
STEVEN C. BAILEY

No. 202.

**RESPONDENT'S ANSWER TO
AMENDED NOTICE OF
FORMAL PROCEEDING**

Comes now the Respondent, Judge Steven C. Bailey, retired, and answers the Notice of Formal Proceedings as follows:

INTRODUCTION

This inquiry was timed to coincide with the Republican candidacy of retired Judge Steven Bailey's campaign for Attorney General 2018. This Commission is largely comprised of Democrats appointed by Governor Jerry Brown or by his appointees on other legislative/court agencies, who have appointed their choices to this commission – six public members, three judges, and two lawyers.

The commission's press release "Judicial Performance Commission Institutes Formal Proceedings Concerning Judge Steven C. Bailey" was released on February 21, 2018, approximately six (6) months after Judge Bailey's retirement.

Notice should be taken that the press release date falls within the Key Dates and Deadlines Statewide Direct Primary Election – June 5, 2018, according to the CA Secretary of State website. According to the Secretary of State, the Declaration of Candidacy and Nomination Paper Period is February 12 to March 9, 2018.

Pursuant to the California Constitution, article VI, section 17: "...A judge of a trial court of record may, however, become eligible for election to other public office by taking a leave of absence without pay prior to filing a declaration of candidacy. ..."

Prior to filing a declaration of candidacy, Judge Steven Bailey retired from the El Dorado County Superior Court on August 31, 2017. He then filed his Declaration of Candidacy with the Elections Department of El Dorado County on February 26, 2018 thereby becoming eligible for election to public office. Any other campaign forms the commission refers to prior to February 21, 2018 are moot.

Judge Bailey denies that he committed 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 censure or admonishment of a former judge.

COUNT ONE

Judge Bailey admits that he engaged the Redd Group to assist in connection with a judicial election campaign, preparing a public opinion survey. At the request of David Cooper, Judge Bailey agreed to provide a statement regarding the Redd Group's services. Mr. Cooper drafted a statement which was submitted to Judge Bailey for approval. Judge Bailey approved the statement, which was in his name as an individual and did not identify him as a judge. The statement was subsequently published on the Redd Group website and included a photograph of Judge Bailey in his judicial robe without Judge Bailey's knowledge or approval and was linked to a website maintained by Judge Bailey.

Judge Bailey admits in part and denies in part due to the lack of personal knowledge the factual allegations set forth in count one of the Notice of Formal Proceedings and denies that he engaged in any conduct that constituted a violation of the Code of Judicial ethics, canons 1, 2, 2A, 2B(2), 4(A), and 4D(2).

COUNT TWO

A. Judge Bailey admits that his son was employed by CHI Monitoring, LLC (CHI) as operations manager for the company during the years in question. During the years 2009 to 2012, El Dorado County had one approved active alcohol monitoring provider. CHI Monitoring was based in Placerville, California. In 2012, at the request of Judge Bailey, a second company was approved to provide alcohol

monitoring within the county. Both of these providers were approved through the El Dorado County Probation Department, as required by California statute.

Knowing that his son worked for CHI, Judge Bailey consulted with Presiding Judge Suzanne N. Kingsbury concerning the propriety of making appointments or orders for defendants to be electronically monitored through CHI devices. Presiding Judge Suzanne Kingsbury instructed that Judge Bailey seek an ethics opinion from the California Judges Association (“CJA”). Judge Bailey contacted CJA Ethics Hotline and was provided the name of Judge Robert A. Glusman, a member of the Ethics Committee and future president of CJA. Judge Glusman prepared the following ethics opinion advising Judge Bailey that he was not required to disclose this relationship unless his son were called to testify in a hearing before Judge Bailey, at which point, Judge Bailey would be required to make a full disclosure.

The Confidentiality Policy of the California Judges Association Ethics Committee protects the identity of the Inquiring Judge and the text of the individual inquiries. The identity of the Inquiring Judicial Officer is known only to the Ethics Committee member directly responding to the inquiry and the Vice-Chair of the Committee. Except as compelled by law, or with the consent of the inquiring judge, no member of the Ethics Committee, the member's staff or the staff of the California Judges Association may disclose the text of an Informal Response in a manner which identifies the inquiring judicial officer or the subject matter thereof. Disclosure of the inquiry on the part of the inquiring judicial officer to anyone other than a member of the Ethics Committee or the member's staff may constitute a waiver of this policy.

Inquiry: Newly appointed J's adult son is a commissioned salesperson with a company that provides monitoring ankle bracelets for J's county jail. The defendants utilizing this company's services all reside out of county. Son's company comes in contact with defendants when they are referred by the county probation department. Company assesses whether or not defendant meets the financial criteria to obtain the monitoring bracelet and if so, provides the bracelet and performs the monitoring function. Son occasionally comes in personal contact with a defendant. Neither J nor son has an ownership interest in Company. J asks whether there is anything about this arrangement that requires J to disqualify, disclose, or take any other action.

Informal Response: No. However, J should disclose if son were to testify in J's court on an issue of violation of the terms and conditions of use of the bracelet by a defendant.

Citations: Canons(s): 2B(2); 3E(1),(2)

Ethics Update: 1997 p.3 F. 6

Informal Response:

Opinion(s):

Rothman 3rd Ed. Handbook §: 7.30

Other: CCP Sec. 170.1(a)(3)(A), 170.1(a)(3)(B)(i) and 170.5(b)

Category: Conduct Inside the Courtroom - Disclosure and Disqualification

Vice-Chair Comment:

Judge Bailey agrees he ordered the defendants in Count 2A 1-5 to be hooked up to SCRAM. He did so consistent with the above ethics opinion that he received from CJA.

Judge Bailey denies his conduct violated Cannons 1, 2, 2A, 3B(7) or 3E(2) of the Code of Judicial Ethics.

B. In 2009, Jason Dennis Jacobsen was a participant in the Adult Felony Drug Court. He relapsed by using alcohol, violating his probation. As a consequence, after consultation with the collaborative drug treatment team, it was agreed that Mr. Jacobson would be placed on the SCRAM program. As a participant in the Adult Felony Drug Court, Mr. Jacobson was responsible for all aspects of his life including, fines, fees and other debts. As part of his probation violation, he was specifically ordered to take care of the CHI debt.

Although Judge Bailey referred to the debt as restitution, CHI was not technically eligible to recover restitution. While it may have been a poor choice of words the effect was to have Mr. Jacobson take responsibility for his life and family.

Judge Bailey denies his conduct violated Cannons 1, 2, 2A, 2B(1) or 3B(2) of the Code of Judicial Ethics.

C. Judge Bailey can neither admit nor deny the allegation that he attended two “meetings” in 2008 with Bradley Clark and Charles Holland as he has no present recollection of the two alleged meetings. However, Judge Bailey disagrees with the Commission’s classification of the meetings as campaign strategy

meetings since Judge Bailey did not have a formal campaign committee and neither gentleman had any real involvement in his judicial campaign. Judge Bailey admits that Mr. Holland is the owner of CHI and a professional acquaintance, whom Judge Bailey met during his time as a criminal attorney. However, as discussed above, at the time in question, CHI was the only SCRAM provider in El Dorado County. Judge Bailey denies that his alleged relationship with Mr. Holland amounted to the type of relationship necessitating disclosure on the record. Moreover, Mr. Holland never appeared Judge Bailey's courtroom as a representative of CHI.

Judge Bailey denies his conduct violated Cannons 1, 2, 2A, 2B(1) or 3E(2) of the Code of Judicial Ethics.

COUNT THREE

Judge Bailey admits that he appointed Bradley Clark as a Special Master in the case of *Dorcich v. Tahoe Keys Property*. It was apparent to Judge Bailey that the legal community in South Lake Tahoe picked sides relative to the dispute and an independent referee, that is someone from outside of Lake Tahoe, would be necessary to resolve this matter.

Judge Bailey knows Mr. Clark and considers him to be a friend through his practice of law for 19 years in Placerville before election to the bench. Judge Bailey admits that he officiated over Mr. Clark's wedding and that Mr. Clark contributed to his judicial campaign. Mr. Clark was never anything but a supporter – never a consultant. Judge Bailey's nephew, Brian Briggs, worked as an independent

contractor from July 2010 until December 2012 in Mr. Clark's office in Placerville. A firewall was erected on the *Dorcich* case and Mr. Briggs had no contact with the file and did not work on the case.

Judge Bailey was informed and believes that Mr. Clark applied and was approved to be on the list of approved discovery referees in 2009 by Presiding Judge Suzanne Kingsbury.

Upon information and belief, Mr. Clark was appointed as a referee in the case in late May or June 2011. Mr. Clark was relieved of his duties as a Special Master because the case settled on July 27, 2011. The parties did not object to Mr. Clark's fee and it was approved by Judge Bailey.

Judge Bailey denies his conduct violated Cannons 1, 2, 2A, 2B(1) 3E(2) or former Cannon 3C(4).

COUNT FOUR

Judge Bailey admits that he was an invited guest, and often times an event speaker, to several events benefitting MORE and CASA between September 2009 and January 2012, and although his "fee" may have been paid by others, given the nature of the events and Judge Bailey's position as the Presiding Juvenile Judge, Judge Bailey honestly believed the invitation, participation and corresponding payment or waiver of the event fees were permitted "gifts" under Canon 4.D or Code of Civil Procedure § 170.9.

It is alleged that on January 29, 2011, Judge Bailey received \$200 tickets to a Lake Tahoe event. Judge Bailey attended this event on behalf of Presiding Judge Suzanne Kingsbury because she asked Judge Bailey to deliver her speech, which she wrote, and Judge Bailey presented her speech to the organization on her behalf.

Judge Bailey denies that he received a \$42 gift of golf at Cold Springs from Mr. Clark. Brad Clark, Kevin Brown and Judge Bailey played a round of golf at Mr. Clark's golf course. Mr. Clark paid the green fees for all three players, as he was the course member. Judge Bailey inadvertently failed to reimburse Mr. Clark for the fees but has subsequently done so.

Lincoln Law School is located in Sacramento, California. They have an annual event to honor students, faculty and alumni. Judges from the Sacramento area are routinely invited to this event. As an alumnus and a judge, Judge Bailey was one of the honored guests at this event. Judge Bailey did not believe the invitation or his participation in the event constituted an improper "gift" under Canon 4.D or CCP § 170.9.

Judge Bailey denies his conduct violated Canons 1, 2, 2A and 4D(6) of the Code of Judicial Ethics.

COUNT FIVE

A. Judge Bailey admits that he attended the Economics Institute for Judges offered by the Northwestern Law Judicial Education Program. The program is for judges to learn economics, statistics and other academic subjects to better

prepare judges to handle complex civil, business and tort law cases. Because he believed this to be a valid educational program for which he had approval from Presiding Judge Suzanne Kingsbury to attend, Judge Bailey treated it as an educational program. Incorrectly, Judge Bailey thought this did not need to be reported on his Form 700. Judge Bailey did not report the travel expenses that he received from the program. In good faith, Judge Bailey believed he was entitled to reimbursement pursuant to Civil Code section 170.9(e)(1) and Canon 4D(6)(b) since the paid travel met the requisite test pursuant to the relevant rules. If he was wrong, his error was inadvertent.

B. Judge Bailey admits that he attended the EconFest for Judges offered by George Mason University School of Law Judicial Education Program on October 30 through November 1, 2011. The response set forth in Section 5(A) also applies to this allegation. Again, Judge Bailey did not report this as he believed that it constituted an educational program and did not require reporting on the 2011 Form 700.

C. In February 2015, Judge Bailey filed his Statement of Economic Interest. While preparing this statement, some information was missing regarding an educational conference he attended. Inadvertently, Judge Bailey forgot to go back and add this information. The FPPC sent Judge Bailey a letter in early March 2015 asking him to complete that information, which he proceeded to do and refiled the statement. Judge Bailey's error in this regard was inadvertent.

Judge Bailey denies his conduct violated Cannons 1, 2, 2A, 3 or 4A of the Code of Judicial Ethics.

COUNT SIX

While he does not recall his exact words and questions the accuracy of the quote, Judge Bailey takes exception with the suggestion the remarks cited by the commission reflect bias, were disparaging or pejorative. Judge Bailey spoke in positive terms of the Parisian sales associate who spent over an hour and a half educating Judge Bailey on fashion and assisting him on his purchase of the shirt that was the subject of the compliment. Judge Bailey appreciated the help the sales associate provided. On his own, Judge Bailey would never have been able to select those colors or styles. These are the facts: the salesman said he was gay and had the fashion skills to combine colors and styles that elude Judge Bailey. Judge Bailey has the utmost respect for this salesman and his ability to assist his customers so they look the best they can.

Judge Bailey denies his conduct violated Cannons 1, 2, 2A, or 3C(1) of the Code of Judicial Ethics.

COUNT SEVEN

Not only does Judge Bailey deny his conduct violated any canons of the Code of Judicial Ethics, he alleges that as the Commission attempts to apply the canons to political activity they are unconstitutional. Judge Bailey denies that he used his judicial title or lent the prestige of judicial office to raise funds for his campaign,

potential campaign, or exploratory committee to run as a candidate for California Attorney General in 2018. Judge Bailey further denies that a leave of absence from judicial office without pay was necessary prior to soliciting funds in support of his campaign for nonjudicial office and accepting campaign contributions for the nonjudicial office. There is no violation of California Constitution, article VI, section 17.

Judge Bailey denies his conduct violated Cannons 1, 2, 2A, 2B(2), 4A, 5 or 5A(3) of the Code of Judicial Ethics.

COUNT EIGHT

Judge Bailey acknowledges that the Candidate Intention Statement (Form 501) was filed on April 27, 2017. At the time, the campaign was still in the exploratory stage and the Form 501 was inadvertently not filed at the appropriate time. It was an unfortunate but insignificant oversight by the exploratory committee's then designated treasurer. Once the treasurer was replaced and the error identified, it was immediately rectified.

Any issues pertaining to Government Code section 85200 fall within the purview of the Fair Political Practices Commission ("FPPC"). It is within their purview to accept complaints, conduct investigations and make determinations which can range from a letter finding no violation, a warning letter or a finding of a violation with a penalty of up to \$5,000 per violation. Canon 5 specifically pertains

to judges and candidates for judicial office. Any concerns regarding the late filing of the Form 501 can be addressed by the FPPC.

Judge Bailey denies his conduct violated Cannons 1, 2, 2A, 4A or 5 of the Code of Judicial Ethics.

COUNT NINE

Judge Bailey admits the factual allegations set forth in count nine of the Notice of Formal Proceedings in that he did attend and participate in the events listed in sections A through Y.

Judge Bailey denies that he engaged in any conduct in violation of the California Constitution or Code of Judicial Ethics. It is alleged that Judge Bailey engaged in political and campaign activities without taking leave from judicial office apparently in violation of article VI, section 17 of the California Constitution.

As an initial matter, there is the threshold issue of the applicability of this section of the Constitution to judges who have not filed a Declaration of Candidacy. Article VI, section 17 of the California Constitution states "A judge of a trial court of record may, however, become eligible for election to other public office by taking a leave of absence without pay prior to filing a declaration of candidacy". The plain language of the California Constitution gives clear guidance that a Judge is not required to take a leave of absence just because a Judge might want to run or is thinking of running or tells someone (either verbally or in writing) that he may seek to be a candidate for a non-judicial office.

While the Commission or its staff might wish the Constitution to be different, it is not. The Constitution of the State of California is supreme and controlling over all conflicting rules, regulations or canons that might conflict. Article VI, section 17 governs only when a judge may take an unpaid leave of absence to run for non-judicial office.

Since there is clearly no violation of article VI, section 17 of the California Constitution, it appears that the remainder of the Commission's allegations boils down to Judge Bailey's choice in nomenclature in person and in written materials and his campaign activity.

Judge Bailey's alleged campaign activity did not violate the Judicial Code of Ethics. Attendance at specific events does not interfere with judicial impartiality, does not infer bias, nor in any way affect a judge's ability to perform the responsibilities of the office. Judge Bailey alleges the Commission's attempts to apply the canons to activity protected by the First Amendment are unconstitutional.

Judge Bailey denies his conduct violated Cannons 1, 2, 2A, 2B(2), 4A, 5 or 5(A) of the Code of Judicial Ethics.

COUNT TEN

It is alleged that Judge Bailey permitted Martha Romero to post the identified Facebook entries and share the post with others, without first taking a leave of absence without pay pursuant to article VI, section 17 of the California Constitution. It is also alleged that Judge Bailey violated his obligation to not lend the prestige of

the judicial office or use the judicial title in any manner to advance the personal interests of himself and to refrain from political or campaign activity that is inconsistent with the independence, integrity or impartiality of the judiciary.

Regarding the alleged constitutional violations, again there was absolutely no violation of article VI, section 17 of the California Constitution. At the time of the Facebook posts, Judge Bailey had not filed a declaration of candidacy, nor was he required to do so. The plain language of the California Constitution is quite clear on what must be done before an unpaid leave of absence must be taken and Judge Bailey complied with the California Constitution. However, this analysis is irrelevant because Judge Bailey did not control or administer that Facebook page.

Next, the Commission alleges that Judge Bailey violated his obligations not to use his judicial title that may create the appearance of impropriety or impartiality. Again, the Facebook page was created by a third party. Judge Bailey has no control over the political expression of private citizens. Judge Bailey was not, nor has he ever been, an administrator of the "Judge Steven Bailey" Facebook page. He does not have the log in information and did not have any contact with the page.

Judge Bailey denies his conduct violated Canons 1, 2, 2A, 2B(2), 4A, 5 or 5(A) of the Code of Judicial Ethics.

COUNT ELEVEN

It is alleged that somehow, Judge Bailey permitted Ms. Romero to post to Facebook references to Judge Bailey running for Attorney General, as well as Judge

Bailey's photograph. Judge Bailey admits that Ms. Romero made the Facebook posts in question but Judge Bailey was not aware of the Facebook posts at the time they were posted nor was he informed by Ms. Romero that she would be tagging Judge Bailey in a post.

The crux of the Commission's allegation is that Judge Bailey failed to force his will on a private citizen and force Ms. Romero to remove the identified entries. To do so would be a violation of Ms. Romero's First Amendment rights and suppression of her right to free speech. Contrary to the Commission's allegations, Judge Bailey did not permit Ms. Romero to post those entries for the simple fact that he had no control over her independent actions. To hold Judge Bailey accountable for the political speech of a third party on a social media application upon which he has no control would set a dangerous precedent and begin a journey down a very slippery slope.

Judges are not omnipotent and do not spend their time Googling their name or combing through other people's social media posts. This is an unrealistic and absurd expectation. Judge Bailey was under no obligation to direct an independent third party who created a Facebook page to remove any content on that page. He would never violate a person's First Amendment rights by doing so. Moreover, even if Judge Bailey had requested that Ms. Romero take down the posts, there is no guarantee that she would have obliged. The Commission cannot expect a judge to

control the speech and actions of a third party and there is nothing in the Judicial Canons that requires a judge to do so.

Judge Bailey denies his conduct violated Cannons 1, 2, 2A, 2B(2), 4A, or 5 of the Code of Judicial Ethics.

DATED: May 29, 2018

MURPHY, PEARSON, BRADLEY & FEENEY

By *Kristin Iversen*
James A. Murphy
Kristin L. Iversen
Attorney for Judge Steven C. Bailey, Ret.

VERIFICATION TO FOLLOW

1 **CERTIFICATE OF SERVICE**

2 I, Alice Kay, declare:

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

6 On May 29, 2018, I served the following document(s) on the parties in the within action:

7 **RESPONDENT’S OPPOSITION TO REQUEST TO AMEND NOTICE OF**
8 **FORMAL PROCEEDINGS**
9 **INQUIRY NO. 202**

10 X	VIA MAIL: I am familiar with the business practice for collection and processing of mail. The above-described document(s) will be enclosed in a sealed envelope, with first class postage thereon fully prepaid, and deposited with the United States Postal Service at San Francisco, California on this date, addressed as listed below.
13 X	VIA E-MAIL: I attached the above-described document(s) to an e-mail message, and invoked the send command at approximately 12:30 PM to transmit the e-mail message to the person(s) at the e-mail address(es) listed below. My email address is shasbun@mpbf.com
15 X	BY PERSONAL SERVICE I placed the original or a true copy thereof enclosed in a sealed envelope and delivered such envelope by hand to the office of the addressee.

17 Janice M. Brickley, Legal Advisor
18 Commission on Judicial Performance
19 455 Golden Gate Avenue, Suite 14400
20 San Francisco, CA 94102
21 filings@cjp.ca.gov

Via Electronic Filing Followed by Mail

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Via Email Followed by Mail

26 Presiding Special Master
27 Honorable Victoria G. Chaney
28 Court of Appeal, Second Appellate District

Proof of Service

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Honorable Louis R. Hanoian
San Diego County Superior Court

Honorable William D. Lehman
Imperial County Superior Court

Via Email Followed by Mail

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 May 29, 2018.

By 
Alice Kay