

**FILED**

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**COMMISSION ON  
JUDICIAL PERFORMANCE**

**STATE OF CALIFORNIA  
BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE**

**INQUIRY CONCERNING  
FORMER JUDGE  
BRUCE CLAYTON MILLS,  
No. 201**

**DECISION AND ORDER IMPOSING  
PUBLIC CENSURE AND BAR**

**I.**

**INTRODUCTION AND PROCEDURAL BACKGROUND**

This disciplinary matter concerns Judge Bruce Clayton Mills, a former judge of the Contra Costa County Superior Court. Judge Mills was a judge of the Contra Costa County Municipal Court from 1995 to 1998, and a judge of the Contra Costa County Superior Court from 1998 until his retirement on May 30, 2018.

The commission commenced this inquiry with the filing of its Notice of Formal Proceedings (Notice) on October 13, 2017. The Notice charged Judge Mills with: (1) in the matter of *Evilsizor v. Sweeney* (hereafter *Sweeney*), modifying a contempt sentence to deny good time custody credits to the defendant, Joseph Sweeney, based on an ex parte communication and without providing notice or an opportunity to be heard; and then later granting good time credits, even though the judge did not believe it was necessarily required by law; and (2) in the matter of *People v. Jeffers* (hereafter *Jeffers*), engaging in an improper ex parte communication with the deputy district attorney while the jury was deliberating.

The Notice also charged Judge Mills with the following prior discipline:

- 2013 public admonishment for engaging in out-of-court communications about his son's infraction with a court clerk and the pro tempore (pro tem) judge handling the case;

- 2011 advisory letter for allowing his son to accompany a police officer in executing a search warrant the judge had signed, without going through the application process for going on a ride-along;
- 2008 advisory letter for improperly conditioning a defendant's release in a misdemeanor probation revocation proceeding on posting bail for the improper purpose of collecting restitution;
- 2006 public admonishment for engaging in a series of ex parte communications in a criminal case; assuming the role of the prosecutor in another criminal matter; and engaging in a pattern of making discourteous, demeaning, and belittling comments in criminal cases;
- 2001 private admonishment for remarks suggesting a lack of impartiality and for attempting to obtain a guilty plea from a defendant despite statements from the defendant indicating he wanted counsel.

Judge Mills filed an Answer to the Notice (Answer) on October 30, 2017, in which he denied engaging in misconduct as to either count.

On October 19, 2017, Judge Mills filed a letter demanding the dismissal of the Notice on the grounds that the entire commission, the commission's staff and the Director-Chief Counsel had conflicts of interest, were disqualified from undertaking an investigation of Judge Mills and filing charges, and were disqualified from future adjudication or involvement in these proceedings.<sup>1</sup> In a written order, dated November 13, 2017, the commission denied Judge Mills's demand for disqualification. On November 30, 2017, Judge Mills filed in the California Supreme Court a petition for writ of prohibition/mandate with request for stay of proceedings and disqualification of the commission and commission staff. On December 20, 2017, the Supreme Court denied the judge's petition for writ of mandate and application for stay of the proceedings.

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<sup>1</sup> Judge Mills contended that disqualification was required because Joseph Sweeney was a public critic of the commission and was allegedly instrumental in convincing the California State Auditor to conduct an audit of the commission. The commission explained the reasons for denying the judge's demand in an eight-page public order issued November 13, 2017.

The Supreme Court appointed three special masters who held an evidentiary hearing and reported to the commission. The masters are Hon. Victoria G. Chaney, Associate Justice of the Court of Appeal, Second Appellate District, Division One; Hon. Jennifer R.S. Detjen, Associate Justice of the Court of Appeal, Fifth Appellate District; and Hon. Paul A. Bacigalupo, Judge of the Los Angeles County Superior Court. Judge Mills is represented by James A. Murphy, Esq., Janet L. Everson, Esq., and Joseph S. Leveroni, Esq., of Murphy, Pearson, Bradley & Feeney in San Francisco, California. The examiners for the commission are Mark A. Lizarraga, Esq., and Bradford Battson, Esq.

A two-day evidentiary hearing was held before the special masters commencing January 17, 2018. The masters' report to the commission, containing their findings of fact and conclusions of law, was filed on March 13, 2018. Oral argument before the commission was heard on July 11, 2018.

The masters found that the charges in the Notice were proven by clear and convincing evidence and concluded that Judge Mills engaged in three instances of willful misconduct, the most serious level of judicial misconduct. The masters also found, in aggravation, that Judge Mills gave evolving and inconsistent statements in response to the charges in the *Sweeney* matter. Upon careful review of the record in this matter, the commission has reached the same conclusions.

Given the seriousness of the misconduct, the judge's extensive history of discipline, his failure to appreciate the impropriety of his conduct, and his lack of candor as evidenced by his shifting explanations for his conduct, we conclude that there is a strong likelihood that Judge Mills will engage in subsequent misconduct if he were to serve in a judicial capacity in the future. In order to protect the public and maintain public confidence in the integrity and impartiality of the judiciary, the commission has determined to censure and bar former Judge Bruce Clayton Mills from seeking or holding judicial office, or accepting a position or an assignment as judicial officer, subordinate judicial officer or judge pro tem with any court in the State of California, or accepting reference of work from any California state court, at any time in the future. This is the most severe level of discipline that may be imposed on a retired judge. (Cal. Const., art. VI, § 18(d).)

## II. LEGAL STANDARDS

The examiner has the burden of proving the charges by clear and convincing evidence. (*Broadman v. Commission on Judicial Performance* (1998) 18 Cal.4th 1079, 1090 (*Broadman*).) “Evidence of a charge is clear and convincing so long as there is a ‘high probability’ that the charge is true. [Citations.]” (*Ibid.*) Factual findings of the masters are entitled to special weight because the masters have “the advantage of observing the demeanor of the witnesses.” (*Ibid.*; *Inquiry Concerning Freedman* (2007) 49 Cal.4th CJP Supp. 223, 232.) Legal conclusions of the masters are entitled to less deference because the commission has expertise with respect to the law of judicial misconduct. (See, e.g., *Broadman, supra*, 18 Cal.4th at p. 1090; *Adams v. Commission on Judicial Performance* (1995) 10 Cal.4th 866, 880 (*Adams*); *Fletcher v. Commission on Judicial Performance* (1998) 19 Cal.4th 865, 878 (*Fletcher*).)

A violation of the California Code of Judicial Ethics constitutes one of three levels of judicial misconduct: willful misconduct, prejudicial misconduct, or improper action. (Cal. Const., art. VI, § 18, subd. (d).) Willful misconduct is (1) unjudicial conduct that is (2) committed in bad faith (3) by a judge acting in his judicial capacity. Failure to comply with the canons of the judicial ethics is generally considered to constitute unjudicial conduct. (*Adams v. Commission on Judicial Performance* (1994) 8 Cal.4th 630, 662.)

A judge acts in bad faith by “(1) performing a judicial act for a corrupt purpose (which is any purpose other than the faithful discharge of judicial duties), or (2) performing a judicial act with knowledge that the act is beyond the judge’s lawful judicial power, or (3) performing a judicial act that exceeds the judge’s lawful power with a conscious disregard for the limits of the judge’s authority.” (*Broadman, supra*, 18 Cal.4th at pp. 1091-1092.)

The second most serious level of misconduct is prejudicial misconduct, “conduct prejudicial to the administration of justice that brings the judicial office into disrepute.” (Cal. Const., art. VI, § 18, subd. (d).) The least serious level of misconduct, improper



action, occurs when the judge's conduct violates the canons, but the circumstances do not rise to the level of prejudicial misconduct and do not bring the judiciary into disrepute. (*Inquiry Concerning Saucedo* (2015) 62 Cal.4th CJP Supp. 1, 82; *Inquiry Concerning Ross* (2005) 49 Cal.4th CJP Supp. 79, 89 (*Ross*), citing *Adams, supra*, 10 Cal.4th at pp. 897-899.)

### III.

#### FINDINGS OF FACT AND CONCLUSIONS OF LAW

##### A. COUNT ONE – EVILSIZOR V. SWEENEY

###### 1. Findings of Fact

###### August 16 Order

On August 12, 2016, Judge Mills presided over a hearing on an order to show cause regarding contempt stemming from Joseph Sweeney's (Sweeney) violation of a protective order entered in divorce proceedings between Sweeney and Keri Evilsizor (Evilsizor). After the judge found Sweeney in contempt for violating the protective order, Evilsizor's attorney, Michelene Insalaco (Insalaco), requested that the maximum sentence be imposed. In response, Judge Mills told Insalaco "he's also going to get good time[] credits. You don't do criminal. But he's also going to get one day good time for each day that he serves, probably. . . . [¶] . . . [¶] So the reality is he'll only serve half of it to begin with." A discussion ensued about whether Sweeney was entitled to good time credits on a civil contempt sentence. The judge did not resolve the issue, but continued the matter for sentencing to August 16, because he thought Sweeney was entitled to a 72-hour stay before sentencing.

At the sentencing hearing on August 16, Judge Mills sentenced Sweeney to 25 days in jail, and remanded him to the custody of the sheriff's department.<sup>2</sup> During that hearing, Evilsizor's attorney argued that Sweeney was not entitled to good time credits, and asked the judge to make an explicit finding in this regard. Sweeney's attorney,

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<sup>2</sup> At his appearance before the commission, Judge Mills urged the commission to read the transcript of the sentencing hearing. The transcript of the hearing was admitted at the hearing before the special masters and carefully reviewed by the commission.

James Morrison (Morrison), responded that denial of good time credits would be illegal. Following a discussion of other unrelated legal issues, Judge Mills stated he was in concurrence with the order drafted by Insalaco. The order prepared by Insalaco did not address good time credits. The written order the judge signed outlining the sentence was silent regarding good time credits. Judge Mills did not rule on the issue of whether Sweeney was entitled to good time credits.

Later the same day, the sheriff's department returned the sentencing order to Judge Mills's court, questioning whether the sentence included good time credits. After consulting with Judge Mills, his clerk, Lori Bogdan (Bogdan), handwrote on the order, "No good time credits to be given," and Judge Mills initialed the notation. Bogdan sent the form back to the jail, but did not serve it on the parties.

#### August 25 Order

On August 25, 2016, Sweeney's mother contacted Morrison concerned about the release date. Morrison then investigated and learned of the revised order when he received a copy from the jail. Morrison sent a letter to Judge Mills, copied to Insalaco, requesting that the judge correct the order and notify the sheriff. Insalaco sent a letter to the judge urging Judge Mills to leave the "no good time credits" order intact.

Upon receiving the parties' letters, Judge Mills consulted with his supervising judge, Judge John Kennedy. In his March 16, 2017 written response to the commission's preliminary investigation, Judge Mills stated that he and Judge Kennedy concurred that Sweeney was not entitled to good time credits on a civil contempt, but decided to avoid a "'constitutional crisis' and afford [Sweeney] the credits which he may not have actually been entitled to receive," because of "Sweeney's past litigation history of filing appeals, motions, as well as complaints against the Commission ... and others." On August 25, Judge Mills issued another order, this time granting Sweeney good time credits. For reasons discussed below, we adopt the masters' finding that Judge Mills issued the order because of Sweeney's past litigation history and complaints against the commission and others, rather than for any lawful purpose.

Findings on Disputed Facts and Credibility Determinations

The masters found that Judge Mills gave conflicting accounts and explanations concerning the foregoing events to suit his evolving defense to the charges. We concur. Although the judge did not testify at the hearing before the special masters, he personally verified his Answer to the charges and submitted numerous written statements through his attorney during the course of the commission's preliminary investigation and formal proceedings. Pursuant to Rules of the Commission on Judicial Performance, rule 106, all statements made through counsel in a commission proceeding are deemed to be the statements of the judge.

The main issue of contention at the hearing before the special masters was whether Judge Mills's notation on the August 16 order denying good time credits, made after the sentencing hearing without notice to the parties, was an improper ex parte modification of his previous order, or a clarification of the order he had already made in the presence of the parties, which would not be improper. For the reasons discussed below, we find that Judge Mills modified, rather than clarified, his previous order, and that he knew he was modifying the order.

In his response to the preliminary investigation and in his Answer to the Notice, Judge Mills did not claim that he decided the issue of good time credits at the sentencing hearing. Rather, he stated that when he received the inquiry from the sheriff's department on August 16, he reviewed Penal Code section 4019 to determine whether Sweeney was entitled to good time credits and determined he was not.<sup>3</sup> If Judge Mills was merely clarifying an order he had made in court, there would be no need to research the law.

As noted by the masters, "[W]hen Judge Mills's objective was to curtail the Commission's supplemental investigation, he claimed that good time credits 'are usually available,' and that '[t]he sentencing minute order accompanying Mr. Sweeney to the jail is silent on the issue, as are all sentencing orders.'" The judge also stated in his written

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<sup>3</sup> In fact, Penal Code section 4019, subdivision (a), subsection (3) specifically states that good time credits are applicable to civil contempt.

response to the preliminary investigation that it is up to the sheriff's department to determine the amount of credits allotted. If, as the judge explained, credits are usually available and the amount is determined by the sheriff's department, Judge Mills would have specified "no credits allowed" in the initial sentencing order if that had been his intent.

By the time Judge Mills filed his prehearing briefs to the special masters, his explanation for amending the August 16 order had changed. There, he claimed that he was clarifying "the order by specifically writing what the [sentencing] order already provided – no good time credits applied." Apparently realizing that this defense was inconsistent with his earlier statements that he researched the law to determine if Sweeney was entitled to good time credits *after issuing his sentencing order*, Judge Mills's attorney argued before the masters that the judge's memory of having researched the law was "erroneous."

The masters found that the judge did not make an order concerning good time credits when he imposed sentence on August 16. Rather, the masters found, the judge denied good time credits without notice to the parties later that day, after the sheriff's department questioned whether good time credits were to be given. We adopt this finding, which we conclude is supported by clear and convincing evidence.

The best evidence of whether Judge Mills ruled on the issue of credits at the August 16 sentencing hearing is the transcript of that proceeding. The transcript reflects that Evilsizor's attorney argued a number of legal issues regarding sentencing, including her contention that Sweeney was not entitled to good time credits, citing Penal Code section 1191.3. Judge Mills never responded to that particular issue or addressed good time credits at the August 16 hearing or in his sentencing order. He sentenced Sweeney to 25 days in custody without reference to good time credits.

At his appearance before the commission, Judge Mills suggested that he ruled Sweeney was not entitled to good time credits at the August 16 sentencing hearing when he stated that he was "in concurrence with the order as drafted by Ms. Insalaco." That order did not address good time credits. The judge's comment about concurring with the

order followed a long discussion of other unrelated legal issues, which were expressly included in the order prepared by Insalaco. We find that the aforementioned comment cannot reasonably be interpreted to constitute an order that Sweeney was not entitled to good time credits.

The only on-the-record indication of whether Judge Mills intended to grant or deny good time credits is his statement in court on August 12 that Sweeney would be entitled to good time credits. That statement is inconsistent with his current position that his silence constituted a denial of good time credits.

Judge Mills objects to the masters' rejection of Bogdan's testimony that she recalled the judge making an order in court on August 16 denying good time credits. The masters made no general finding regarding Bogdan's credibility, but found that her memory that the judge issued a ruling on this issue was faulty and therefore not credible. We agree. Her testimony is not supported by the transcript of the proceeding, or the testimony of Morrison, Sweeney's attorney. Morrison recalled Judge Mills indicating on August 12 that Sweeney would get good time credits, but did not recall the judge saying anything about good time credits at the sentencing hearing on August 16.

Moreover, Bogdan's testimony on this issue was not definitive or consistent. She testified that she was "under the assumption" that they had discussed the issue of good time credits in court and that "no credits were to be given." Later, she testified that she recalled a discussion about whether Sweeney was entitled to good time credits but that she could not "tell you for sure which way it went."

The masters also concluded that the judge lacked candor in his shifting explanations about the circumstances of his August 25 order granting Sweeney good time credits. In his response to the preliminary investigation, Judge Mills claimed that when Sweeney's attorney objected to the handwritten order denying credits, he decided, in consultation with Judge Kennedy, to change the August 16 order and afford Sweeney good time credits because of Sweeney's litigation history and public complaints against the commission and to avoid a constitutional crisis, even though both judges were of the opinion that Sweeney was not entitled to good time credits in connection with a civil

contempt. By the time Judge Mills filed his Answer to the Notice, his explanations had changed. He stated that he conferred with Judge Kennedy who “also opined that the application of the criminal statute to a civil contempt incarceration wasn’t clear.” In his prehearing brief to the special masters, Judge Mills shifted even more responsibility onto Judge Kennedy. He stated that he “conferred with Judge John Kennedy, [who] *advised* that if there was ambiguity with respect to the application of the criminal statute to a civil contempt incarceration, he ought to allow for the credit.” (Italics added.) Judge Mills stated that he followed Judge Kennedy’s advice in issuing a new minute order allowing for good time credits to be applied.

As did the masters, we find that the version of the conversation with Judge Kennedy Judge Mills gave the commission in his March 16, 2017 response to the preliminary investigation contains indicia of reliability and is supported by clear and convincing evidence. In the same response, Judge Mills stated that, after receiving an inquiry from the sheriff’s department, he reviewed Penal Code section 4019 and concluded that Sweeney was not entitled to good time credits. This, of course, is inconsistent with his later statements that he decided to grant Sweeney good time credits because the law on the issue was not clear.

We share the masters’ particular concern “with Judge Mills’s attempt to justify his own misconduct by reference to his consultation with Judge Kennedy and Judge Kennedy’s advice.”

As did the masters, we find that that the judge’s evolving explanations and defenses concerning the *Sweeney* matter portrayed a lack of candor and honesty.

## **2. Conclusions of Law**

### August 16 Order

The masters concluded that by changing the August 16 order to reflect “no good time credits,” Judge Mills modified an earlier order based on an ex parte communication with the sheriff’s department in violation of canon 3B(7) of the California Code of Judicial Ethics (all references to a canon are to the California Code of Judicial Ethics)



["A judge shall not initiate, permit, or consider ex parte communications, that is, any communication to or from the judge outside the presence of the parties concerning a pending or impending proceeding, and shall make reasonable efforts to avoid such communications ..."] We concur. Judge Mills's modification of the August 16, 2016 order, which he transmitted to the sheriff's department through Bogdan, is a communication from the judge outside the presence of the parties and concerning a pending proceeding. While there is an exception to the prohibition on ex parte communications for consulting with court personnel, the sheriff's department is not court personnel. (Canon 3B(7)(a) [court personnel does not include employees of other governmental entities].)

Judge Mills took action based on the communication from the sheriff's department without promptly notifying the parties and offering them an opportunity to respond. The masters concluded that Judge Mills's failure to set the matter for hearing upon determining that the credits issue remained undecided was an independent violation of canon 3B(7), which requires a judge to accord to every person who has a legal interest in the proceeding, or that person's lawyer, the full opportunity to be heard according to law. We concur.

Judge Mills contends that he did not violate canon 3B(7), because he was simply correcting the written order to reflect the order he made in court in the presence of the parties on August 16, 2016. As previously discussed, the masters made a factual finding that the judge did not previously make an order concerning good time credits in court in the presence of the parties, and we adopt that finding.

In addition to a violation of canon 3B(7), we conclude that the same conduct violated canons 1 [judge shall uphold the integrity and independence of the judiciary], 2 [judge shall avoid impropriety and the appearance of impropriety], 2A [judge shall respect and comply with the law and act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary], and 3B(8) [a judge shall dispose of all judicial matters fairly, promptly and efficiently and manage the courtroom in a manner that provides all litigants with the opportunity to have their matters fairly



adjudicated in accordance with the law], as charged in the Notice. Issuing an order affecting a litigant's liberty interest without providing notice and an opportunity to be heard creates an appearance of impropriety, undermines public confidence in the integrity of the judiciary, and denies the litigant an opportunity to have his matter fairly adjudicated in accordance with the law.<sup>4</sup>

The masters concluded that Judge Mills's ex parte modification of the sentencing order constituted willful misconduct because he engaged in unjudicial conduct in a judicial capacity that exceeded his lawful power and that significantly impacted Sweeney's liberty interest and did so with *at least* a conscious disregard for the limits of his authority. (See *Broadman, supra*, 18 Cal.4th at p. 1092.) We reach the same conclusion.

Once Judge Mills signed the contempt and sentencing order, he had no authority to modify it. (Code Civ. Proc., § 1222; *In re Baroldi* (1987) 189 Cal.App.3d 101, 111, disapproved on other grounds in *Boysaw v. Superior Court* (2000) 23 Cal.4th 215, 221; *County of Lake v. Superior Court* (1977) 67 Cal.App.3d 815, 817-818.) Judge Mills was an experienced judge and ex-prosecutor. He has not suggested that he did not know that he could not modify an order; rather, he asserted that he was only clarifying the order. As previously discussed, we find that he knew he was modifying the order, an act that was beyond his judicial authority.

Further, Judge Mills consciously disregarded the limits of his authority by issuing an order involving a deprivation of liberty based on an ex parte communication and without providing the parties with an opportunity to be heard. (See *Broadman, supra*, 18 Cal.4th at p. 1092.) Judge Mills has been disciplined more than once in the past for engaging in improper ex parte communications.

Judge Mills contends that his conduct constitutes improper action, at most, since he erroneously accepted the law as presented by Attorney Insalaco in determining that

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<sup>4</sup> We do not find clear and convincing evidence that the judge violated canon 3B(5) [judge shall perform judicial duties without bias or prejudice] in count one or count two, as charged in the Notice.

Sweeney was not entitled to good time credits.<sup>5</sup> Judge Mills misses the point. It is not his interpretation of the law or his legal ruling that is at issue, it is the fact that he issued an ex parte modification of an order involving a deprivation of liberty without providing the parties an opportunity to be heard.

August 25 Order

The masters concluded that by again changing the sentencing order on August 25, 2016, to grant good time credits because of Sweeney's litigation history, and not because he believed Sweeney was legally entitled to the credits, Judge Mills violated canons 1 [judge shall uphold integrity and independence of the judiciary], 2 [judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities], 2A [judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary], 3B(2) [judge shall be faithful to the law and maintain professional competence in the law] and 3B(8) [judge shall dispose of all judicial matters fairly, promptly, and efficiently and manage the courtroom in a manner that provides all litigants the opportunity to have their matters fairly adjudicated in accordance with the law]. The masters stated: "Deciding an issue for reasons unconnected to the merits displays no compliance with the law, undermines the integrity and independence of the judiciary, and deprives litigants the opportunity to have their matters adjudicated in accordance with the law. Moreover, Judge Mills's attempt to deflect his decision to Judge Kennedy indicates a readiness to abdicate his own responsibility to adjudicate the matters that come before him." We concur.

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<sup>5</sup> Judge Mills objects to the fact that the masters did not include Insalaco's testimony regarding Penal Code section 1191.3 in their findings of fact. Insalaco testified that section 1191.3, pertaining to the award of good time credits, applies to felonies, and was not applicable to Sweeney because he was sentenced on a civil contempt. In fact, that statute was not apposite to the issue before the masters. Section 1191.3 requires the court to make an oral statement at the time of sentencing in felony cases that statutory law permits the award of conduct and worktime credits. Penal Code section 4019 is the statute that governs when good time credits are available and that applies to Sweeney's sentence. (Pen. Code, § 4019(a)(3) [good time credits apply to persons confined to jail for "contempt pursuant to a proceeding other than a criminal action or proceeding"].)

The masters determined that Judge Mills engaged in willful misconduct by issuing the August 25, 2016 order even though he believed it was not a lawful order and thus was beyond his lawful judicial power. (See *Broadman, supra*, 18 Cal.4th at p. 1092.) We concur.

Judge Mills contends that he made the August 25, 2016 order because of the complexity of the law, and therefore, his conduct was, at most, improper action. Judge Mills ignores that he informed the commission of his reason for issuing the August 25 order in his response to the preliminary investigation, and his stated reason was not based on a legal analysis. He admitted that he concluded Sweeney was not entitled to good time credits, but decided to grant the credits because of Sweeney's litigation history and to avoid a constitutional challenge. This is the explanation the masters found to be true and that finding is supported by clear and convincing evidence. As discussed by the masters, the problem with the judge's August 25 ruling was not that it was legally erroneous, but that the judge decided "an issue for reasons unconnected to the merits . . . ." A judge who issues an order for a purpose other than the lawful discharge of judicial duties engages in willful misconduct. (*Broadman, supra*, 18 Cal.4th at p. 1092.)

For these reasons, we adopt the legal conclusions of the masters with regard to the August 25, 2016 order.

**B. COUNT TWO – PEOPLE V. JEFFERS**

**1. Findings of Fact**

Judge Mills presided over a driving under the influence jury trial (DUI) in *People v. Jeffers*. At trial, the defense presented an expert witness who challenged the accuracy of the breath machine. On March 23, 2016, as the jury was deliberating and Deputy District Attorney (DDA) William Moser (Moser) was gathering his papers to leave the courtroom, Judge Mills engaged in a conversation with Moser outside the presence of the defendant and defense counsel.

Judge Mills asked Moser, in the context of the *Jeffers* trial, “[D]o you want to know what I would have done?” and talked to him about an argument that might have “defeat[ed] the defense theory,” or words to that effect. Judge Mills then offered Moser advice about how he could have countered the expert presented by the defense.

The jury in *Jeffers* deadlocked, resulting in a mistrial.

The next day, Moser reported the conversation to his supervisor, Nancy Georgiou, who reported the conversation to Jeffers’s defense attorney and to Judge Kennedy, supervising judge of criminal courts. Judge Kennedy explained that he understood “from Ms. Georgiou’s description of the conversation it did include suggestions of things that Mr. Moser could have done to be more effective in his performance, such as eliciting particular evidence and so forth.”

On March 29, 2016, Presiding Judge Steven Austin learned of the conversation and met with Judge Mills. Judge Austin told the Judge Mills that the matter was “potentially serious,” and that he (Judge Austin) might have to report it the commission.

On April 1, 2016, Judge Mills disclosed the conversation on the record before both parties, and recused himself from any further involvement in the case.

As Judge Austin was seeking an ethics opinion on his obligation to report the matter to the commission, Judge Mills self-reported to the commission.

Judge Mills’s position at the hearing before the special masters was that he was simply sharing a “war story.” The masters rejected this defense and instead found that the judge offered Moser advice about how he should have handled a specific part of the case, while the case was still pending.

Moser testified he did not recall exactly what advice the judge gave him, but thought the judge was giving him a suggestion on what he could do in trying this type of case in the future. In reliance on this testimony, Judge Mills maintains there is no clear and convincing evidence that he offered Moser advice about how he would have handled the case. But, while Moser did not recollect many details of the conversation or the exact words used, he was certain that Judge Mills was inquiring whether Moser wanted to know what he would have done if he were the prosecutor in the case. This is

corroborated by the fact that Moser felt the need to report the conversation to his supervisor.<sup>6</sup>

Regardless of Moser's lack of recollection as to the specific advice he was given, Judge Mills's own disclosure statement in court supports the masters' finding that the judge offered Moser advice about how he could have responded to the defense expert. Judge Mills reported the conversation as follows:

"After the jury went out, and here is the disclosure I want to make, Mr. Moser remained in court, as [*sic*] I am prone to do, I often work in court through inbox matters and whatnot . . . while I am awaiting the jury decision. I never ever discussed anything with Mr. Moser in chambers. Everything was out in open court. We discussed a number of matters, including innocuous things, such as where did he go to school, and what did he do before he came to the DA's office, and those types of things.

"At one point – and this is where it may become an issue. I made the observation *in relation to the expert witness that was presented by Mr. Smith [defense counsel]* . . . [¶] . . . that 29 years ago, when I last tried a DUI case that there had been an expert at the Contra Costa Crime Lab . . . named Grady Goldman, who actually tracked the accuracy of the breath machine.

"And what I disclosed to Mr. Moser was that Mr. Goldman over a protracted period of time actually monitored the limited numbers of cases where there was actually a breath sample and a blood sample taken in the same case, and what I advised him was that they were able to have a known blood result in a small number of cases because sometimes you get a breath sample taken and they take a reference blood sample, and that they monitored in those limited number of cases where the breath machine measured at or below the actual blood sample so that they can tell in the real world,

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<sup>6</sup> The masters found Moser's testimony credible. We adopt this finding in deference to the masters' ability to observe the demeanor of the witness, and because Moser's testimony is corroborated by the fact that he reported the conversation to his supervisor the day after it happened.

back in the day, whether or not the machines were actually testing properly. [¶] . . . [¶]

*“And I said, ‘But if there really is a problem with these machines that the defense expert suggests, then in the future someone may have to look at that because if the theory is that – because our machines here in our county don’t have a temperature regulator, and that causes inaccurately high results of some type being registered, then somebody may[]be ought to take a look at that issue.’ [¶] . . . [¶]*

*“But in terms of what went on 29 years ago, and the fact that that used to be tracked – and frankly, if you had that data, Mr. Smith, it could potentially counter the defense that you presented in this case, but that data, to my knowledge, hasn’t been monitored in 29 years, and it is not available.”*  
(Italics added.)

Based on our own independent review of the record, we adopt the masters’ finding that Judge Mills’s conversation with Moser was related to issues raised during the *Jeffers* trial, and that he offered Moser advice about how to handle a specific part of the case.

## **2. Conclusions of Law**

The masters concluded that Judge Mills’s conversation with Moser outside the presence of defense counsel constituted an improper ex parte communication in violation of canon 3B(7), and willful misconduct. As did the masters, we conclude that “Judge Mills’s April 1, 2016 on-the-record disclosure version of the conversation *alone*” establishes a violation of canon 3B(7). That canon prohibits a judge from initiating, permitting, or considering ex parte communications, “that is, any communications to or from the judge outside the presence of the parties concerning a pending or impending proceeding.” The jury was deliberating in *Jeffers* when Judge Mills engaged in an ex parte communication with Moser. Further, a case remains pending through any period during which an appeal may be filed. (Cal. Code of Judicial Ethics, Terminology.) By his own admission, Judge Mills described to Moser, “in relation to the expert witness that was presented by” the defense in *Jeffers*, how when he last tried a DUI case 29 years ago

there was an expert witness who tracked the accuracy of a breath machine by looking at the cases in which both breath and blood samples had been taken to determine if the results matched. A reasonable person would interpret these comments as suggesting that the prosecution use an expert to track the accuracy of the Draeger machine (used in the *Jeffers* case) in the same manner.

Offering advice to an attorney in a case before the judge outside the presence of opposing counsel and while the matter is pending constitutes an improper ex parte communication. (*Public Admonishment of Judge Stuart Scott* (2016); see Rothman et al., *Cal. Judicial Conduct Handbook* (4th ed. 2017) § 2.24, pp. 90-93; Cal. Judges Assn., *Judicial Ethics Update* (2000) p. 2 [“If a judge is asked by trial attorney to critique attorney’s performance after trial, judge may do so only after the matter is finally resolved so as to avoid any appearance of impropriety”].)

Judge Mills contends that he was simply sharing a “war story” that had no relation to the *Jeffers* case. There is no “war story” exception to the prohibition against ex parte communications. Further, Judge Mills admitted in his April 1, 2016 disclosure that he made his “observation in relation to the expert witness that was presented by [Jeffers’s defense attorney] . . . .”

In addition to violating the prohibition against ex parte communication, we conclude that Judge Mills’s conduct created an appearance of impropriety and undermined public confidence in the integrity of the judiciary in violations of canons 1, 2, and 2A.

The masters concluded that Judge Mills committed willful misconduct by engaging in an ex parte communication with a prosecutor and giving him advice while the case was still pending. We concur. His conduct took place in his judicial capacity and was “unjudicial,” the first two elements of willful misconduct. Judge Mills acted in bad faith, the third element of willful misconduct, by engaging in the conversation with a conscious disregard for the rules prohibiting ex parte communications and for a purpose other than the faithful discharge of judicial duties. (See *Broadman, supra*, 18 Cal.4th at pp. 1091-1092.) As stated by the masters:



“Judge Mills has been disciplined in the past for ex parte communication. (Ex. 24.) The leading treatise on California judicial ethics repeatedly refers to Judge Mills’s earlier public admonishment in its discussion of improper ex parte communications. (See, e.g., Rothman et al., Cal. Judicial Conduct Handbook, *supra*, § 5.3, pp. 264, fn. 62, 265, fn. 65.) Judge Mills *should* have been well versed about ex parte communications. *If* he was not, we can only conclude it is because he chose not to be, and we conclude that is conscious disregard for the limits of his authority.”

We reach the same conclusion.

#### IV.

#### APPROPRIATE LEVEL OF DISCIPLINE

The commission has identified various factors that are relevant in determining the appropriate level of discipline, including (1) the number of acts of misconduct, (2) the existence of prior discipline, (3) whether the judge appreciates the inappropriateness of his or her conduct, (4) the judge’s integrity, (5) the likelihood of future misconduct, and (6) the impact on the judicial system. (*Ross, supra*, 49 Cal.4th CJP Supp. at pp. 137–138; *Inquiry Concerning Van Voorhis* (2003) 48 Cal.4th CJP Supp. 257, 295; see also Policy Declarations of Com. on Jud. Performance, policy 7.1<sup>7</sup> [nonexclusive factors relevant to sanctions].)

In this matter, Judge Mills has engaged in three acts of willful misconduct. (Policy declaration 7.1(1)(a) [number of acts of misconduct], (1)(b) [nature and seriousness of misconduct].) The Supreme Court has stated: “‘The number of wrongful acts is relevant to determining whether they were merely isolated occurrences or, instead, part of a course of conduct establishing “lack of temperament and ability to perform judicial functions in an even-handed manner.” [Citation.]’” (*Fletcher, supra*, 19 Cal.4th at p. 918, quoting *Wenger v. Commission on Judicial Performance* (1981) 29 Cal.3d 615, 653.) Especially when viewed in conjunction with Judge Mills’s prior discipline, the

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<sup>7</sup> Hereafter, Policy Declarations of the Commission on Judicial Performance are referred to simply as policy declaration.

misconduct reflects an inability or unwillingness to perform judicial functions in an even-handed manner that comports with the rigorous standards of conduct expected of the judiciary.

Judge Mills has been previously disciplined five times over the course of his 23-year judicial career. (Policy declaration 7.1(2)(e) [history of prior discipline].) Between 2001 and 2013, he received two public admonishments, one private admonishment, and two advisory letters. (See *ante* at pp. 1-2.) Particularly troubling is the similarity between some of his prior misconduct and the misconduct in this matter. He was publicly admonished in both 2006 and 2013 for engaging in improper ex parte communications, and yet, again engaged in improper ex parte communications in both the *Sweeney* and *Jeffers* matters. In his 2006 public admonishment, Judge Mills was disciplined for multiple incidents of misconduct, including ex parte communications. He spoke privately with a represented defendant about the no contest plea she had just entered and the possibility of diversion; discussed the case with defense counsel and then the probation officer and set aside the plea and granted diversion in the absence of any prosecutor; and he spoke to a supervising attorney from the district attorney's office about the case in the absence of defense counsel.

In 2013, he was again publicly admonished for engaging in out-of-courtroom communications about his son's infraction case with a court clerk and the pro tem judge handling the case. In an in-chambers meeting, he convinced the pro tem judge to give his son credit for time served in an out-of-state residential rehabilitation program in lieu of previously ordered volunteer work.

Further, his conduct in *Jeffers* bears similarity with other conduct resulting in his 2006 public admonishment. In multiple cases included in the 2006 public admonishment, Judge Mills crossed the line from a neutral judicial officer to an advocate. In one matter, he assumed the role of a prosecutor by criticizing the DDA in strong and disparaging language for charging the defendants with a misdemeanor and instructed the DDA to "go back to the drawing board, have this reviewed by somebody that can intelligently assess what ought to have been charged, and I would think that it would be more likely than not

that an amended pleading would come down the pike, charging, among other things, a violation of Section 182 of the California Penal Code, felony criminal conspiracy, between the two charged co-defendants.” In another matter, he accused the deputy public defender of malpractice and incompetence because the defendant would not accept a plea bargain. The same public defender was accused of malpractice in another matter for filing a peremptory challenge against Judge Mills. In the *Jeffers* case, Judge Mills similarly blurred the boundaries between judge and advocate by counseling the prosecutor on how to try a DUI case.

Another important factor in our determination is the judge’s lack of candor in these proceedings. (Policy declaration 7.1(2)(b) [whether the judge has cooperated fully and honestly in the commission proceedings].) As a factor in aggravation, the masters concluded that “Judge Mills’s candor and honesty is placed in direct question” by his shifting explanations for his conduct in the *Sweeney* matter to suit his evolving defenses. (See *ante*, pp. 7-10, for discussion of conflicting defenses.) We concur.

While Judge Mills did not testify at the hearing before the special masters, he submitted numerous written communications to the commission and a personally verified Answer to the charges in the Notice. There were multiple inconsistencies and misrepresentations in these submissions and statements. Honesty is a “minimum qualification” that is expected of every judge. (*Kloepfer v. Commission on Judicial Performance* (1989) 49 Cal.3d 826, 865.) Written communications of counsel are deemed to be the written communications of the judge. (Rules of Com. on Jud. Performance, rule 106.) As such, a judge must take care to ensure that written submissions during commission proceedings are accurate and truthful, even when submitted through counsel.

Judge Mills’s shifting defenses not only portray a lack of candor, they also reflect a failure to accept responsibility and acknowledge the impropriety of his conduct. (Policy declaration 7.1(2)(a) [whether the judge acknowledged the acts occurred and has shown an appreciation for the impropriety of his acts].) As emphasized by the masters, with his lengthy years of judicial experience and history of discipline, Judge Mills should

recognize that he engaged in improper ex parte communications. (Policy declaration 7.1(2)(d) [length of service in judicial capacity].) Nonetheless, he continues to deny that any of his conduct was improper. Moreover, as were the masters, we are troubled by Judge Mills's attempt to justify his own misconduct by reference to the advice he received from Judge Kennedy.

"A judge's failure to appreciate or admit to the impropriety of his or her acts indicates a lack of capacity to reform." (*Inquiry Concerning Platt* (2002) 48 Cal.4th CJP Supp. 227, 248; see Policy declaration 7.1(2)(a).) Judge Mills's failure to appreciate or acknowledge the impropriety of his conduct, his willingness to give disingenuous explanations and shift blame to a judicial colleague, and his lengthy history of discipline suggest a high probability that he would reoffend if he were to serve in a judicial capacity in the future.

Judge Mills's misconduct had a negative impact on others and undermined public respect for the judiciary. (Policy declaration 7.1(1)(f), (h) [whether the conduct is injurious to others or undermines respect for the integrity of the judiciary or administration of justice].) Although Sweeney ultimately received the good time credits to which he was entitled, the judge's changing and conflicting orders required his lawyer to expeditiously file papers to prevent the unlawful denial of conduct credit and most likely caused stress to Sweeney. In *Jeffers*, Judge Mills's initiation of an ex parte communication put DDA Moser in the uncomfortable position of having to report the communication to his superiors who in turn had to report the conduct to Judge Mills's superiors. Additionally, when a judge who has been disciplined five times by the commission engages in subsequent misconduct, public confidence in the integrity of the judiciary and the administration of justice is undermined.

The masters found no mitigating factors. Judge Mills urges the commission to consider his dedication and service to the Contra Costa community over the past three decades in "determining whether or not to impose discipline." Judge Mills, however, presented no evidence of his asserted service to the community.

Judge Mills retired during the pendency of these proceedings. Article VI, section 18(d) of the California Constitution provides that the commission may “censure a judge or former judge ... for action ... that constitutes willful misconduct in office, ... or conduct prejudicial to the administration of justice that brings the judicial office into disrepute . . . .” The commission may also bar a former judge who has been censured from receiving an assignment, appointment, or reference of work from any California state court. (Cal. Const., art. VI, § 18(d).)

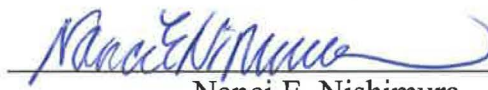
As stated by the Supreme Court, the purpose of judicial discipline “is not punishment, but rather the protection of the public, the enforcement of rigorous standards of judicial conduct, and the maintenance of public confidence in the integrity and independence of the judicial system.” (*Broadman, supra*, 18 Cal.4th at pp. 1111-1112, quoting *Adams, supra*, 10 Cal.4th at p. 912.) For the reasons discussed above, the commission concludes that these purposes are best served by the imposition of a public censure and bar.

### ORDER

Good cause appearing, the commission hereby censures former Judge Bruce Clayton Mills and bars him from seeking or holding judicial office, or accepting a position or an assignment as judicial officer, subordinate judicial officer or judge pro tem with any court in the State of California, or accepting reference of work from any California state court, at any time in the future.

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; Ms. Sarah Kruer Jager; Ms. Pattyl A. Kasparian; Dr. Michael A. Moodian; Mr. Adam N. Torres; and Hon. Erica R. Yew voted to issue this decision and order imposing a public censure and bar.

Dated: August 28, 2018



Nanci E. Nishimura  
Chairperson