

## **PUBLIC ADMONISHMENT OF JUDGE DAVID A. MASON**

The Commission on Judicial Performance ordered Judge David A. Mason publicly admonished, pursuant to article VI, section 18(d) of the California Constitution and commission rule 115, as set forth in the following statement of facts and reasons found by the commission:

### **STATEMENT OF FACTS AND REASONS**

Judge David A. Mason has been a judge of the Modoc County Superior Court since May 1, 2009. His current term began in 2017.

According to Judge Mason, at the time he took the bench, he had a “personal and sustained” relationship with attorney Tom Gifford, including a “prior professional relationship,” and “ongoing social interactions in the community,” which continued after he took the bench. In 2013, Judge Mason went on a two-week trip to Italy with Mr. Gifford and their spouses as part of a celebration of the Giffords’ wedding anniversary, which “marked an escalation of the friendship.” Mr. Gifford made regular appearances before Judge Mason during this period. Mr. Gifford moved to Texas shortly after the trip to Italy, but this did not immediately impact their social relationship. Judge Mason traveled to Mr. Gifford’s home in Texas on two occasions, for about one week each time, including once over a Thanksgiving holiday. In or about April 2017, Mr. Gifford returned to Modoc County, and was awarded a contract to serve as Modoc County’s conflicts attorney for indigent defense. He resumed making regular appearances before Judge Mason, including appearances in at least 86 criminal cases between April and December 2017, and has continued to do so. According to Judge Mason, he and Mr. Gifford “maintained some form of friendship” in 2017, but it was “not as strong” as before Mr. Gifford moved to Texas. Judge Mason recalled only one dinner with Mr. Gifford in 2017.

In his response to the commission’s December 4, 2018 preliminary investigation letter, Judge Mason stated that there are only a few attorneys in Modoc County, that his friendship with Mr. Gifford had never influenced his handling of any case, and that, “I have always and routinely made full disclosures to all attorneys and litigants in every case where ethics and fairness made it necessary and expedient that attorneys and litigants be made aware of any possible grounds for disqualification.” In response to the commission’s March 25, 2019 supplemental preliminary investigation letter, Judge Mason stated, “[I]t is more appropriate for Judge Mason to recognize that his . . . prior response to the Commission may have overstated his diligence regarding disclosing specific information concerning his relationship with Mr. Gifford, on the record, in every matter. The fact is that he cannot stand by such definitive statements with absolute confidence.” He also stated that he made “appropriate disclosures” “regularly” during his first years on the bench, but could not make definitive statements about his practices ten years ago. Judge Mason did not provide any evidence that he had ever made any disclosure on the record in any case in which Mr. Gifford had appeared. Judge Mason stated that he is “willing to acknowledge lapses in diligence and formal statements on

the record regarding his relationship with Mr. Gifford.” Judge Mason expressed regret if his prior statements created confusion or were in any way misleading. Judge Mason provided a proposed disclosure that he will put on the record in Mr. Gifford’s cases in the future.

Judge Mason explained that he was aware of the need to disclose his relationship with Mr. Gifford when he took the bench, and that he and his presiding judge agreed disclosure was required, but not disqualification, because his interactions with Mr. Gifford were “fairly ordinary within the context of the Modoc legal community.” Judge Mason stated that he was confident he could be fair, that “local attorneys” knew about the relationship, and that they did not object to him presiding over cases in which Mr. Gifford appeared. Judge Mason also stated that the “political climate” in Modoc County is such that the “population expects that the judges will know many of the litigants and would view it as concerning if the judges sidestepped their responsibility so ‘outsiders’ could decide local legal matters.” In his supplemental response to the commission, Judge Mason stated that he “recognizes now that he may have erred by substituting the actual views of local attorneys for the more standardized, objective standard applicable to judges statewide, and that such an analysis may have required a different decision regarding disqualification.”

“By their terms, the canons impose uniform statewide standards. Whenever an assigned case involves a party the judge ‘knows,’ the judge must be particularly vigilant to ensure the appearance and reality of independence and impartiality. The situation may arise more frequently in a small town than a major metropolitan area, but the judge’s ethical duties are the same irrespective of population statistics.” (*Inquiry Concerning Former Judge David Wasilenko* (2005) 49 Cal.4th CJP Supp. 26, 46; Rothman, et al., *California Judicial Conduct Handbook* (4th ed. 2017) § 7.65.) Moreover, Judge Mason’s repeated references to “local attorneys” leaves out attorneys who are not local, and the parties, including self-represented parties.

When Judge Mason took the bench in 2009, canon 3E(2) of the Code of Judicial Ethics stated that judges “shall disclose on the record information that is reasonably relevant to the question of disqualification under Code of Civil Procedure section 170.1, even if the judge believes there is no actual basis for disqualification.” This requirement was renumbered as canon 3E(2)(a) effective January 1, 2013. Under Code of Civil Procedure section 170.1, subdivision (a)(6)(A)(iii), judges are disqualified when “[a] person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial.” This is an objective standard. The question is whether the “average person on the street” would harbor doubts as to the judge’s impartiality, not whether the judge is actually biased. (*United Farm Workers of America v. Superior Court* (1985) 170 Cal.App.3d 97, 104; *Flier v. Superior Court* (1994) 23 Cal.App.4th 165, 170.) Pursuant to this standard, even if Judge Mason was not disqualified from presiding over Mr. Gifford’s cases, he was required to disclose all facts about their relationship that were reasonably relevant to disqualification, on the record, in every case in which Mr. Gifford appeared. Judge Mason presented no evidence that he ever did so, and concedes that he did not make a disclosure in every case where he was

required to do so, and that he made “mistakes . . . regarding disclosures.” Judge Mason violated canons 3E(2) and 3E(2)(a) over an extended period by failing to make the required disclosures on the record.

Judge Mason’s conduct was, at a minimum, improper action.

Commission members Nanci E. Nishimura, Esq.; Honorable Michael B. Harper; Anthony P. Capozzi, Esq.; Honorable William S. Dato; Mr. Eduardo De La Riva; Ms. Sarah Kruer Jager; Honorable Lisa B. Lench; Dr. Michael A. Moodian; Mr. Richard Simpson and Mr. Adam N. Torres voted for the Notice of Tentative Public Admonishment. Commission member Ms. Kay Cooperman Jue voted for a Notice of Tentative Private Admonishment.

Date: December 3, 2019