

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

**IN THE MATTER CONCERNING  
JUDGE MATTHEW J. GARY**

**DECISION AND ORDER IMPOSING  
PUBLIC ADMONISHMENT  
PURSUANT TO STIPULATION  
(Commission Rule 116.5)**

This disciplinary matter concerns Judge Matthew J. Gary, a judge of the Sacramento County Superior Court. Judge Gary and his counsel, James A. Murphy, Esq., have entered into a stipulation with commission trial counsel Mark A. Lizarraga, Esq., pursuant to commission rule 116.5, to resolve the pending preliminary investigation involving Judge Gary by imposition of a public admonishment. The Stipulation for Discipline by Consent (Stipulation) was approved by the commission on May 6, 2020, pursuant to the following terms and conditions and stipulated facts and legal conclusions.

**TERMS AND CONDITIONS OF AGREEMENT**

1. This agreement resolves the matters alleged in the commission's preliminary investigation involving Judge Gary and the Notice of Intended Public Admonishment, dated September 13, 2019.

2. The commission shall issue a public admonishment based on the agreed Stipulated Facts and Legal Conclusions, set forth therein.

3. If the commission accepts this proposed disposition, the commission's decision and order imposing public admonishment may articulate the reasons for its decision and include explanatory language that the commission deems appropriate.

4. Judge Gary waives any further proceedings and review in this matter, including further formal proceedings (Rules of Com. on Jud. Performance, rule 118 et seq.), and review by the Supreme Court (Cal. Rules of Court, rule 9.60).

5. Failure to comply with the terms and conditions of this agreement may constitute additional and independent grounds for discipline.

6. Judge Gary agrees that the facts set forth herein are true and correct, and that the stipulated discipline, recited herein, is appropriate, given those facts.

7. The commission may reject this proposed disposition and resume the proceedings. If the commission does so, nothing in this proposed disposition will be deemed to be admitted by Judge Gary.

Accordingly, it is hereby stipulated and agreed that the commission shall issue a public admonishment on the above Terms and Conditions of Agreement, and based on the following Stipulated Facts and Legal Conclusions.

#### STIPULATED FACTS AND LEGAL CONCLUSIONS

##### A. FACTS

###### History and case procedure

Judge Gary has been a judge of the Sacramento County Superior Court since June 2007. His current term began in January 2017. He was a court commissioner from 2002 to 2007. Judge Gary presided over *In re Marriage of Battilana* (No. 16FL04193) from January 2017 to December 2018.

The *Battilana* case involved the mother's Request for Order (RFO), filed December 16, 2016, seeking permission to relocate with the parties' minor child to Medford, Oregon, and attorney fees. Judge Gary presided over a series of short cause hearings on the mother's RFO, including on January 30, 2017, June 19, 2017, July 24, 2017, and July 31 – August 1, 2017, and a long cause hearing on January 11, 12, 16, 18, and 19, 2018. On January 19, 2018, Judge Gary issued an oral tentative statement of decision. On March 15, 2018, after the father filed objections to the tentative statement of decision, Judge Gary

issued a formal Proposed Statement of Decision. Both parties subsequently lodged objections. On April 16, 2018, the matter was argued before Judge Gary. The judge bifurcated the issues of attorney fees and costs from the relocation/custody issues, re-opened evidence on attorney fees and costs, ordered both parties to file updated income and expense declarations (I&Es) and detailed attorney fee statements, and continued the hearing to June 1, 2018. On April 17, 2018, Judge Gary issued a Statement of Decision and Order After Hearing on the bifurcated relocation/custody issues.

On May 29, 2018, the father filed for bankruptcy. On June 1, 2018, because of the bankruptcy stay, Judge Gary continued the hearing on attorney fees and costs. On June 5, 2018, the mother filed an ex parte RFO concerning a summer visitation issue and an issue concerning the child's asthma medication. Judge Gary issued a temporary order on June 5, 2018, and the matter came back on for hearing on July 20, 2018. The bifurcated issues of attorney fees and costs, and the June 5, 2018 RFO, eventually came back on for hearing on December 7, 2018.

#### July 31, 2017 Hearing

On July 31, 2017, the *Battilana* matter was before Judge Gary for an ex parte hearing concerning the mother's request to move out of state pending a long cause hearing in December. During the proceeding, in response to the mother's claim that the father would not compromise, Judge Gary stated, "It's a battle. Your name is appropriate. Pretty close." (R.T. 17:7-8.)

Judge Gary accused the parents of damaging their child, as exemplified by the following:

And, more important, how bad do you want to ruin your child? (R.T. 15:21-22.)

She. She's going to get married and then she's going to get divorced. And your grandkid is going to go through

the same things she's going through because this is all she knows. (R.T. 16:7-10.)

Judge Gary also stated the following:

[I]n my opinion, the case is out of control, the fees are being churned. (R.T. 6:23-24.)

Once again, we don't even have an initial starting of your case and we're nearing \$100,000 in attorney's fees, with two people who say they don't have enough money to live on. [¶] I'm not buying it. It may be that you don't have any money; but I'm not buying that there is no solution. This is a self-created, self-inflicted wound that I'm ready to give up on. You can bleed out. It's not my responsibility anymore. (R.T. 7:1-9.)

What I would do in the meantime is, I would try to find a suitable place, or let her go without prejudice. She has a right to go – or a suitable place to live; or you can go and leave the child. Or because you can't do anything with your employment because of all of this, move to Oregon and get a job up there part-time. [¶] If you guys were really interested in your child, the solutions are many. And the one solution you keep coming back to, that is not the solution, is me. I'm the perpetuation of the problem. [¶] Grow up, figure it out, take matters into your own hands, come up with a reasonable solution, or you get what you get. (R.T. 16:15-17:2.)

I'm picking sides right now. I know where the problems lie; but I'll wait to see how it all plays out. (R.T. 17:14-15.)

Judge Gary continued the ex parte hearing to the next day, August 1, 2017.

#### August 1, 2017 Hearing

During the hearing, Judge Gary made the following comments:

Mr. Sagaria [the mother's attorney], you're about to come out of your underwear there. What do you need? (R.T. 21:15-16.)

We can look at prior transcripts where I've gone off on you guys about how crazy this is, how much fees have been churned, how far off track we are on all of this; how we've made such a huge, colossal, nuclear meltdown over all of this. [¶] You've got a two-year marriage, a two-year-old child, nobody has any property, nobody has any income; and we're exceeding \$100,000 in attorney's fees, and \$30,000 for -- or strike that -- \$11,000 for a 3111 eval, and we're off to trial, and we haven't even done our disclosures, and we're nowhere even near a divorce on a two-year-old marriage, with a two-year-old child. Way to go. Way to go. I'm done. [¶] Go off to trial, burn it all up. Good luck. [¶] And good luck to [the child], because it ain't going to turn out well for her. [¶] This is unbelievable. (R.T. 38:25-39:16.)

### January 2018 Trial

Judge Gary conducted the hearing concerning the mother's December 16, 2016 RFO on January 11, 12, 16, 18, and 19, 2018. Attorneys Scott Sagaria and Lauren Pruett appeared on behalf of the mother, and attorney Fredrick Cohen appeared on behalf of the father.

During the testimony of Mary Jo Battilana,<sup>1</sup> the paternal grandmother, the following exchange occurred:

THE WITNESS: If your child is sick more than a couple of days, I, as a mother, would always either make a phone call, be advised, or get your child into the doctor if she's running a fever.

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<sup>1</sup> Due to the similarity of names, Mary Jo Battilana is herein referred to as the "grandmother."

THE COURT: Sure. How do you think Jillian [the mother] got the prescription?

THE WITNESS: I have no idea, sir.

THE COURT: Do you know whether Jillian is a pharmacist?

(R.T. 620:23-622:3.)

The grandmother testified that she had heard disagreements between the mother and the father but she stayed out of them. Subsequently, during re-direct examination of the mother by Pruett, the following exchange occurred:

Q: The next message, can you read that out loud, his next message?

MR. COHEN: What page?

MS. PRUETT: Same page, Bates Stamp 67.

THE WITNESS: 67, after I said, "Again, please don't be mean," his next response is, "Your daughter is in the house by herself."

Q: Do you recall the incident surrounding that?

A: This is directly after he assaulted me.

Q: So why was [the child] in the house by herself?

A: Because he left, and I was at the next door neighbors, in front of her house.

Q: Had you -- you were -- you had already left for the neighbor's house while he's still there?

A: Yes, I left from the front door, went immediately next door while on the phone with 911.

THE COURT: Let me ask you this, you heard [the grandmother] testify earlier?

THE WITNESS: Yes.

THE COURT: She testified that she had heard disagreements between you and Will. She wanted to stay out of them.

THE WITNESS: Yes, I heard that.

THE COURT: It was the essence of her testimony, and that you had come to her to talk to her about Will. Did your wanting to go talk to her about Will have anything to do with this type of marital interaction?

THE WITNESS: Yes, she was there.

THE COURT: Was she – that was my next question. Was she ever in the same room with you and Will when Will talked and behaved like this toward you?

THE WITNESS: Yes. Yes. She was there the night that he threw the magazine at me while I was holding [the child].

THE COURT: How many times can you recall, let's say, within the last six months of your marriage, January of '16 through June of '16, would you guess or would you recall that [the grandmother] was present when you and Will had an oral confrontation in the same room with [the grandmother] or in a room where it's obvious that someone else can hear it where you were being belittled and treated like this?

THE WITNESS: Yes.

THE COURT: How many times?

THE WITNESS: At least once a week. At least once a week for -- when she got in her incident, she started to taper off to do therapy, so I would say at least 20 times she was there.

THE COURT: Today she suffered a bout of amnesia, I would guess?

THE WITNESS: Yes.

(R.T. 717:13 -719:6.)

Judge Gary also made comments about religion and death, and referenced a passage in the Bible. During the testimony of Terry Nichols, a retired licensed clinical social worker, Nichols testified that she heard the child say her father was going to die, and that a child that age does not understand death, when the following exchange occurred:

THE COURT: Who do you think planted -- how do you think the child got it in her head?

THE WITNESS: I don't know. I don't know how else to answer that.

THE COURT: Okay.

THE WITNESS: I can say developmentally that a child that age doesn't understand death. It's not permanent in their mind, and they see things on TV, and they see things on movies.

THE COURT: Well, sure. Adults don't understand death. One of the purposes of religion and culture is because people don't understand death.

WITNESS: But we do understand the permanence. And a two or three year old doesn't understand the permanence of death.

THE COURT: Well, sure, excepting that in religion, you take Western culture religion, almost all religions -- what is the purpose of the religion?

WITNESS: I'm just saying developmentally. I have nothing to say about the religious part, just developmentally where a child is at that age.



THE COURT: Okay. Without bickering with me, isn't it one of the purposes of religion for adults [*sic*] everlasting life so that you don't have to face death? Don't we all have perceptions of death?

MR. COHEN: Objection; relevance, Your Honor; argumentative, Your Honor.

THE COURT: Overruled. Overruled. It's not intended to be argumentative at all. The point is, and the two parents should understand this, and since one of the parents is pointing the finger at the other parent, and I'm looking for the evidence, Mr. Cohen, again, mountains made of molehills. [¶] Is it unhealthy for a child to face a death issue -- and this is not a question for the witness. The record will reflect I'm talking to the parties. And the answer to that question is obviously no, it's not unhealthy. In fact, it's healthy for a person, at least in this trier of fact's opinion since I'm having to rule on the best interest of your child. Death is part of life. In fact, it's one of the certainties of life. [¶] And the reason I raised religion is not to get into a deep philosophical religious discussion, but to address this witness's concern with these two parents that a child not understanding the permanence of death, that is true, but parents or adults also struggle with the permanence of death. And one of the ways they cope with the permanence of death is through religion, through the promise of when you die, somehow you will live again. [¶] The Christian religion -- I know dad goes to church, or at least I've heard testimony. The Christian religion, you will have everlasting life, John 3:16. If you go through that, what is the purpose for that for adults? This is all commentary on the side. It's so that you don't have to face the permanence of death. [¶] Well, the truth of the matter is we don't know. Some of us have strong opinions one way or the other on that. Wars have been fought over that, are continually fought over

religion. My concern is not as much the statement having been made unless there is solid proof that one of you is running around saying to the child your daddy's going to die soon. Your mommy is going to die soon. If that's happening, that is way, way out of bounds. [¶] But you should both understand that children pick up on things and say things that sometimes just totally come out of the blue. It could come from a Disney movie. It could come from something from a book. It could come from anywhere. My bigger concern is not the child's affect, whether she said it and the fact that she said it, that was easily addressed. [¶] Rather than lawyering up and litigating the issue – let me say that again. Rather than lawyering up and litigating the issue, you might want to sit down with your daughter, put her on your lap and say, sweetheart, I'm not going to die any time soon. I love you. I'm going to be around, but death is part of life. We have pets that die. We have flowers that die. [¶] Mr. Cohen, are you listening? What I want the parties to do i[s] in these situations, rather than blow this up and run to court and point fingers, the answer to this question, the answer to this issue was [to communicate].

(R.T. 598:16-601:26.)

Throughout the trial, Judge Gary made comments that the case was “contrived.”<sup>2</sup> Judge Gary stated that the parties were making “mountains out of a molehills,” and that it was a “nothing case” that should have settled.<sup>3</sup> Judge Gary also commented about the parties “lawyer[ing] up,” and accused the parties of

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<sup>2</sup> See R.T. 551:3, 563:27, 926:27, 927:13, 932:8, 938:1, 954:2-3, 961:18-19, 962:7-14, 963:5.

<sup>3</sup> See R.T. 551:1-2, 563:1-2, 599:19-20, 603:9-10, 919:27-28, 934:8-11, 960:16.

churning litigation and churning fees.<sup>4</sup> In addition, in responding to Cohen's argument that Family Code section 271 attorney fees were not before the court, Judge Gary made the following remarks:

No, I intended all [Family Code section] 271s. Because of the history of the case, I wasn't limiting it just to your motion. Because of what was going on in the case as a whole, because I was watching, and as I told you guys earlier, you went on my radar on January 30th of 2017. That is unusual. I see so many cases, but I saw this case come up. On January 30th you went on my radar. By the time we got to July, I thought about you after work, unusual. [¶] I was always watching for your case. I even kept your file in my chambers for a while, for a long while. When pleadings would come in, I would keep the pleadings. You were always on my radar. . . . And I had told you guys the path you're going down, you shouldn't be going down ad nauseam. And that in the end what I fully intended was that someone is going to win and someone is going to lose, and it will be big time. [¶] Judgment day is today. One of you will win. One of you will lose, and judgment day will be big time. All attorney's fees, including 271 for both sides, including 2030 for both sides, all of it will be decided before you leave this place today. All of it. This is the day. I'm not putting anything over for any further day. It's all -- it's all on the table.

(R.T. 901:1-25.)

On January 19, 2018, after taking evidence and hearing closing arguments, Judge Gary gave an oral tentative statement of decision and issued a tentative order after hearing on all issues. On January 29, 2018, the father filed objections to the statement of decision and requested a formal written statement

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<sup>4</sup> See R.T. 273:10, 601:2-3, 608:13, 723:6-7, 960:28.

of decision. On March 15, 2018, Judge Gary filed his Proposed Statement of Decision and Proposed Order. After both parties lodged objections, the matter was heard by Judge Gary on April 16, 2018. During the hearing, Judge Gary bifurcated the issues of attorney fees and costs, re-opened evidence, ordered the parties to file and serve updated I&Es with detailed attorney fee statements, and continued the hearing on the bifurcated issues to June 1, 2018. On April 17, 2018, Judge Gary issued an Order After Hearing on the relocation/custody/visitation issues. Judge Gary (1) granted the mother's request to relocate, (2) ordered sole legal and sole physical custody of the child to the mother, (3) ordered visitation to the father, and (4) made other miscellaneous orders concerning child custody.

June 1, 2018 Hearing

On this date, the case was set before Judge Gary for a hearing on the bifurcated issues of attorney fees and costs. The mother appeared at the hearing with attorney Sagaria, and Kayleigh Birks, an associate of Cohen's, appeared on behalf of the father. During the hearing, Judge Gary noted that the proceeding was stayed because of a bankruptcy petition filed by the father on or about May 29, 2018. Judge Gary also noted that the mother had filed her updated I&Es and attorney fee statements as ordered, but that the father had not.

Judge Gary made comments concerning the timing of the father's bankruptcy proceeding, and disparaged Cohen, as set forth below:

MS. BIRKS: Excuse me, Your Honor.

THE COURT: Yes.

MS. BIRKS: We do have a DVRO hearing or trial, excuse me, on the 24th of August.

THE COURT: A DVRO?

MS. BIRKS: Yeah, a DV hearing out of county.

MR. SAGARIA: Oh, out of county.

MS. BIRKS: On the 24th of August.

THE COURT: Well, here's my problem with it. I'll probably honor it, but I have honored -- and Ms. Birks, this is nothing personal to you.

MS. BIRKS: I know.

THE COURT: I really enjoy you. Every time you've come in, you're very -- you're just very professional, and I really enjoy you --

MS. BIRKS: Thank you.

THE COURT: -- but I do want this to be noted. Every turn I have offered Mr. Cohen the professional courtesy he's asked for, and at virtually every turn he has burned me every time he can. It's not appreciated. It's not professional. It's undignified. It detracts from the quality of the bar. I will offer him the courtesy again, but at some point I would appreciate professional courtesy in response, not just to me, but also to Ms. Battilana and Ms. Battilana's attorney. [¶] This -- dropping this, in my mind it is no accident. It is no coincidence that the filing of the bankruptcy occurred on the day before or the day before the day before the hearing after the deadline for the May 21st filing of the document. I had actually asked both parties to file as soon as they could. I gave May 21st as the deadline. If they could offer me the courtesy, to get them filed earlier, but no later than. [¶] Again, Ms. Battilana complied, and as you can see, once again, for the record, I meticulously went through every single entry on her billing statements looking for, well, should this have been done, is this appropriate, is that not appropriate, is this too much billing, is it not too much billing. I went through everything, how much was written off, how many times were there no charges for services. I noted everything. And then in the end to get nothing. [¶] And then to be hit with an e-mail that didn't even come directly to the department even though your

office -- and again, it's not you. Your office has called my clerk, the department, numerous times when it needed something. To send it to the place where it is least likely to be gotten on the day before the day before the hearing so that I would get it the day before the hearing, so that all of the work that I put in, all of the work Mr. Sagaria put in, all of the work Ms. Battilana put in, to continue this trial would be ambushed and for not [sic]. Those types of tactics do not go unnoticed by the Court.

(R.T. 11:8-13:3.)

June 5, 2018 Hearing

On June 5, 2018, Judge Gary presided over the mother's ex parte RFO concerning summer visitation and an asthma inhaler for the minor child that the father was allegedly refusing to administer. Judge Gary engaged in the following colloquy with father:

THE COURT: Because you are in such conflict, I have given one party already sole legal, sole physical custody, and that legal decision-making has been challenged when it shouldn't be. There is no legal authority to stand on he can question her call on the medical. He has no right to do that. That was taken away from him with the sole legal custody order to mom. And one of the reasons mom got sole legal custody is not just the domestic violence, not just the presumption, but because after all of the fighting, I knew at the end of the day these two would not be able to agree on anything. And it turns out that's the way it's turned out. It's not fun or happy for me to do something like this. For the State to step in and [d]o something like this, but we've left it that way, or you've left it that way. [¶] The proposed order is Respondent to administer the medications prescribed to the minor child, and I'm going to strike out and add as mother directs.

MS. PRUETT: Thank you, Your Honor.

THE COURT: Unfortunately for Mr. Battilana, he is not in a position to veto or question mom at this point.

RESPONDENT: So if she tells me not to follow the doctors [*sic*] orders, then I'm supposed to follow her orders instead of the doctors [*sic*]?

THE COURT: What part of that is hard to understand?

RESPONDENT: I'm just --

THE COURT: What you're doing is bickering. What that was, that was a challenge to my order now masquerading as some sort of valid question. No, it wasn't. It was just a challenge to the order. It was bickering. And this is the same thing I've watched you do to her in your texts. I've watched you belittle her. I am pretty convinced that what she said happened, the "yeah, right" is exactly what happened because I saw them in all of those text messages at trial, all of them.

(R.T. 15:8-24.)

July 20, 2018 Hearing

On July 20, 2018, the parties appeared before Judge Gary for a return on mother's June 5, 2018, ex parte RFO. The father was represented at the hearing by Daniel Lynch, an attorney with Gary, Till, Burlingham & Lynch. Lynch informed Judge Gary that a statement of disqualification (challenge for cause, pursuant to Code of Civil Procedure sections 170.1 and 170.3) had been served on both the clerk and opposing counsel. The statement of disqualification was based on the allegation that Judge Gary's clerk had made remarks reflecting lack of impartiality, and the allegation that the judge previously worked for the firm Gary, Till, Burlingham & Lynch, where his father was a founding member, and that Judge Gary had routinely recused himself when an attorney from that firm appeared on a case assigned to him.

Judge Gary then discussed the history of the case, informed Lynch of the issues at trial that the father's prior attorney had raised, and stated:

And here we are in the middle of a continuing trial. Every step along the way has been tortuous. I can't remember a case that has been like this in 30 years in family law, 16 of which has been on the bench. And now another 170.3 from my own firm -- my old firm. My old firm, not my own firm. My old firm. [¶] It is not surprising at all to me after everything that has happened in this case that Gary Till & Burlingham came into the case. No shot at all. None. And I sort of knew. I knew it would put that firm in a position of: Do we attack the judge or not? Do we take the case and attack the judge or not? And I didn't know which way it was gonna go, but it took the case, and it's attacking the judge. [¶] I'm not going to take it as a personal attack. I'm going to take it as a legal attack, but it is a tactic. It is a tactic.

(R.T. 16:16-17:7.)

Judge Gary then took a recess to "decide how to handle the 170.3," and directed the parties to look over the mediation report. Prior to doing so, Judge Gary accepted a responsive declaration from Lynch. Following the recess, Judge Gary asked whether the parties had come to an agreement, and Lynch explained that a partial agreement had been reached, but that the father preferred to have the matter continued. Pruettt objected, and she and Judge Gary discussed the issues that were preventing resolution, including Lynch's preference for the judge not to make any orders that day, when the following exchange occurred:

MR. LYNCH: That is correct. I don't think that can happen, Your Honor. I don't want to waive my challenge, so I object to any orders being made today.



THE COURT: I understand that. I'm not asking you to. I'm just trying to figure out what the dispute is. Not that I'm going to make an order. [¶] ... [¶] Here's my assessment. There is no Holy Grail in those reports. [¶] What I'm asking parties to do is just consider what the actual issues are. What I begged them to do for a year and a half is to get out of litigation mode. You're ruining your daughter. It does not surprise me one bit that she's not adjusted on these -- she's a four-year-old little girl. [¶] She's been suffering this for a year and a half to two years now. I just don't know why you can't come to some agreement that the issues are nominal. There was an emergency temporary order put in place that expires today unless the court makes an order, and the parties cannot seem to reach an agreement even on an inhaler. And counsel wants to bicker about it.

MR. LYNCH: Your Honor --

THE COURT: The parties want to bicker about it. It is so obvious. It is so obvious what the solution is aside from litigation. It is so entirely obvious.

(R.T. 20:1-21:10.)

The hearing on the mother's June 5, 2018 RFO was ultimately continued to December 7, 2018. The motion to disqualify Judge Gary was later denied by an out of county judge.

#### December 7, 2018 Hearing

On December 7, 2018, counsel and the parties in *Battilana* appeared before Judge Gary for the continued hearing on the mother's June 5, 2018 RFO. During the hearing, the parties reached a full agreement, which was read into the record. Judge Gary subsequently addressed allegations made by the father that he was wrongfully keeping the case and preventing the father from having access to the file. In responding to a question from the father's attorney about the availability of the case file, Judge Gary stated:

I hate it that I have been brought into this personally. I hate it. That is not the role of a judge, and frankly, it's not the role of parties to involve a judge like has happened here. The ball that we should be keeping our eye on is [the child]. I don't like being the object of it all.

(R.T. 42:11-16.)

## B. DISCIPLINE

1. Embroidment, bias, and prejudgment. “Embroidment is the process by which the judge surrenders the role of impartial factfinder/decision-maker, and joins the fray.” (Rothman, et al., Cal. Judicial Conduct Handbook (4th ed. 2017) § 2.1, p. 58.) Prejudgment can occur when a judge “drift[s] from professional distance and objectivity.” (*Id.* at § 2.19, p. 86.) Judges are required to respect and comply with the law and to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. (Canon 2A.) Judges are also required to perform judicial duties without bias or prejudice. (Canon 3B(5).)

Judge Gary remarked (prior to the January 2018 long cause hearing) that he was “picking sides,” “knew where the problems lie,” and that “the parties are going to find themselves with nothing in the end.” These remarks reflected, at a minimum, the appearance of prejudgment and embroidery in violation of canons 2A and 3B(5).

During the December 7, 2018 hearing, Judge Gary stated, “I hate it that I have been brought into this personally. I hate it. That is not the role of a judge, and frankly, it's not the role of parties to involve a judge like has happened here.” (R.T. 42:11-14.) During the January 2018 hearing, Judge Gary stated that the *Battilana* case went on his “radar” January 30, 2017, and by July 2017, he was thinking about the parties after work. He stated that he was always watching for the case, kept the file in his chambers for a long while, and kept the pleadings when they came in. He stated, “You were always on my radar. . . And that in the

end what I fully intended was that someone is going to win and someone is going to lose, and it will be big time. [¶] Judgment day is today. One of you will win. One of you will lose, and judgment day will be big time.” (R.T. 901:11-20.) During the August 1, 2017 hearing, the judge stated, “Way to go. Way to go. I’m done. [¶] Go off to trial, burn it all up. Good luck. [¶] And good luck to [the child], cause it ain’t going to turn out well for her. [¶] This is unbelievable.” (R.T. 38:25-39:16.) These comments exhibited embroilment and the appearance of bias in violation of canons 2A and 3B(5).

2. Comments accusing the parents of damaging the child. Throughout multiple proceedings, Judge Gary accused the parents of damaging their child (“[H]ow bad do you want to ruin your child,” “And good luck to [the child], because it ain’t going to turn out well for her,” and “[S]he’s going to get divorced. And your grandkid is going to go through the same things she’s going through because this is all she knows.”). Judge Gary’s remarks to and about the parents were undignified and discourteous (in violation of canon 3B(4)), could also be reasonably perceived as reflecting bias or prejudice (in violation of canon 3B(5)), and failed to promote public confidence in the integrity and impartiality of the judiciary (in violation of canon 2A).

3. Questioning witnesses. While judges may examine witnesses to elicit or clarify testimony, they must not become an advocate, comment on the evidence, or cast aspersions about, or ridicule, a witness. (*People v. Perkins* (2003) 109 Cal.App.4th 1562.)

Judge Gary made discourteous remarks to and about the grandmother (the father’s mother) during the long cause hearing in January 2018. While examining the grandmother, Judge Gary sarcastically asked her if she knew whether the child’s mother was a pharmacist. In addition, while questioning the mother, Judge Gary made a gratuitous remark about the grandmother “suffer[ing] a bout of amnesia.” Judge Gary’s conduct was undignified and discourteous (in

violation of canon 3B(4)), and could also be reasonably perceived as reflecting bias or prejudice (in violation of canon 3B(5)).

4. Comments concerning religion and death. Judge Gary initiated a discussion with Nichols over the purpose of religion, referenced the Bible (John 3:16), and discussed the promise of everlasting life. Judge Gary's comments at the *Battilana* trial improperly injected religion into court proceedings, and created an appearance of lack of impartiality contrary to canon 2A (requiring judges to conduct themselves at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary) and canon 3B(5) (requiring judges to perform judicial duties without bias or prejudice and to refrain from engaging in speech, gestures or other conduct that would reasonably be perceived as bias or prejudice, including but not limited to bias based upon religion). As the commission has previously stated, "The bench is not a pulpit nor soapbox for self-expression. A litigant is entitled to assume that a judge's attention will be focused entirely upon the relevant facts of his or her case, and that his or her cause will be judged dispassionately – without consideration of anyone's religion. . . ." (*Censure of Judge Jose A. Velasquez* (1997) pp. 9-10.)

5. Bankruptcy comments and comments disparaging the father's attorney. At the first hearing after the father filed a bankruptcy petition, Judge Gary stated that Cohen "burned [him] every time he [could]." The judge said Cohen's conduct was "not professional" and "undignified," and "detracts from the quality of the bar." The commission found these remarks undignified and discourteous, and reasonably likely to interfere with the attorney-client relationship, in violation of canons 2A and 3B(4).

6. Remaining remarks and conduct. The following comments and conduct of Judge Gary were discourteous and undignified: mocking the father's name ("it's a battle"), accusing the parties of engaging in excessive litigation and of "churning fees," remarking that an attorney was about to "come out of [his] underwear," commenting about the parties "lawyering up," telling the parties they

could “bleed out” and to “grow up,” repeatedly referring to the case as “contrived,” stating that it was a “nothing case,” and responding to the father’s question about whether he should follow the mother’s orders rather than the doctor’s, by stating, “What part of that is hard to understand?” and “What you’re doing is bickering. What that was, that was a challenge to my order now masquerading as some sort of valid question. No, it wasn’t. It was just a challenge to the order. It was bickering.” The judge’s remarks and conduct, as described, violated canons 2A and 3B(4).

Judge Gary’s conduct, as set forth above in paragraphs Nos. 1 – 6, constituted, at a minimum, improper action.

Judge Gary’s misconduct was significantly aggravated by the judge’s prior discipline. Judge Gary received an advisory letter in 2014 for misconduct in two family law matters. The commission stated, “The canons insist on appropriate demeanor even if a litigant has engaged in conduct a judge considers repugnant and detrimental to the litigant’s family and the court system.”

In the first matter, a mother was contemptuous toward Judge Gary. When she asked to be arrested, the judge responded, “If your desire here today is so that you can be taken down and play the martyr, I won’t give you that privilege.” Judge Gary continued with the hearing and later warned the mother of the possibility of direct contempt if she continued to interrupt. After making a custody ruling, Judge Gary stated that he was finding the mother in direct contempt and sentenced her to five days in jail “commencing forthwith.” The commission found that Judge Gary failed to provide the mother an adequate opportunity to respond and offer an excuse or an apology before adjudicating the contempt and sentencing her to jail. The judge’s conduct violated canons 2 and 2A.

In the second matter, Judge Gary treated a mother in a rude manner and appeared to become embroiled in the proceedings. He invited the father to file a motion seeking sole custody of the child, by saying, “So I’m willing to give him sole legal, sole physical custody. I am willing to do that. If he only files the

motion, that will be heard. . . . And if Mr. [A.] were to file a motion for sole legal and sole physical custody, given all that has happened, the Court would entertain it like it would entertain any other motion.” Judge Gary also remarked that the mother had “played” the males involved in the cases, and had played games with many people. The commission found that the judge’s treatment of the mother created the appearance of embroilment and prejudgment, particularly in light of his repeated invitations to the father to file a motion seeking sole custody. The judge’s conduct violated canons 2A, 3B(4), and 3B(5).

#### DISCIPLINE IMPOSED BY COMMISSION

Judge Gary’s multiple instances of misconduct while presiding over the *Battilana* family law matter failed to comport with high judicial standards and undermined public respect for the integrity and impartiality of the judiciary. Judge Gary’s loss of objectivity and neutrality, his lack of courtesy and dignity when addressing those appearing before him, and his improper comments about religion violated the canons of judicial ethics.

“The canons’ insistence on appropriate judicial demeanor rests on the idea that such demeanor is one of those things that is central to the appearance and reality of fairness and impartiality in judicial proceedings.” (Rothman et al., Cal. Judicial Conduct Handbook (4th ed. 2019) § 2:46, p. 116.) “Once a judge becomes embroiled in a matter, fairness, impartiality, and the integrity of decisions leave the courtroom.” (*Id.* at § 1:35, p. 27.)

Family law matters can be particularly fraught with emotion. These situations are when a calm and steady hand, a respectful demeanor, and the appearance of neutrality are especially needed. A judge may convey to family law litigants the judge’s concerns about the detrimental effects that high-conflict disputes may have on children, but may not do so by telling parents, in harsh terms, that the judge knows how their children will turn out. Judges may also express their concerns about counsel’s conduct, but may not do so in a

disparaging manner, or in a manner that is likely to interfere with the attorney-client relationship. Judges may also question witnesses, but must comply with the canons' mandates of patience, dignity, and courtesy when doing so.

The commission determined to accept the Stipulation and impose a public admonishment because Judge Gary has accepted responsibility for his multiple acts of misconduct and has acknowledged that his prior discipline in two family law matters is a significantly aggravating factor.

Commission members Hon. Michael B. Harper; Dr. Michael A. Moodian; Hon. William S. Dato; Mr. Eduardo De La Riva; Ms. Kay Cooperman Jue; Hon. Lisa B. Lench; Nanci E. Nishimura, Esq.; Victor E. Salazar, Esq.; and Mr. Richard Simpson voted to accept the Stipulation and to issue this public admonishment of Judge Gary. Commission members Ms. Sarah Kruer Jager and Mr. Adam N. Torres did not participate.

Date: May 14, 2020

On behalf of the Commission on  
Judicial Performance,



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Hon. Michael B. Harper  
Chairperson