STATE OF CALIFORNIA

BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

IN THE MATTER CONCERNING JUDGE FRANK ROESCH	DECISION AND ORDER IMPOSING PUBLIC ADMONISHMENT

This disciplinary matter concerns Judge Frank Roesch, a judge of the Alameda County Superior Court since 2001. His current term began in 2015. Pursuant to rule 116 of the Rules of the Commission on Judicial Performance, Judge Roesch and his attorney, David S. McMonigle, appeared before the commission on October 7, 2020, to contest the imposition of a tentative public admonishment issued on July 17, 2020. Judge Roesch has waived his right to formal proceedings under rule 118 and to review by the Supreme Court. Having considered the written and oral objections and argument submitted by Judge Roesch and his counsel, and good cause appearing, the Commission on Judicial Performance issues this public admonishment pursuant to article VI, section 18(d) of the California Constitution, based upon the statement of facts and reasons set forth below.

As described below, in two cases, Judge Roesch displayed a lack of the dispassionate neutrality and the courtesy to others that is expected of judges. In a civil jury trial, he interrogated a witness in a hostile manner, made sarcastic remarks, and mishandled the witness's assertion of her Fifth Amendment privilege against self-incrimination. In a quiet title action, the judge questioned the parties and counsel in an injudicious manner. Although Judge Roesch believed, based on faulty assumptions, that his intervention in each case was justified, it is the misguided manner in which he attempted to address his misassumptions, and the discourteous way he comported himself toward those appearing in court before him, that is the basis for this discipline.

STATEMENT OF FACTS AND REASONS

I. *Victaulic Co. v. American Home Assurance Co.*

In 2015, Judge Roesch presided over a jury trial in *Victaulic Co. v. American Home Assurance Co.* (RG12642929) regarding Victaulic's claims against its insurers for breach of contract, bad faith, and punitive damages. After a three and one-half week trial, the jury awarded Victaulic $55,333,581.11. The Court of Appeal reversed the judgment due to Judge Roesch's misconduct and multiple errors during the trial. (*Victaulic Co. v. American Home Assurance Co*. (2018) 20 Cal.App.5th 948.)

During the trial, plaintiff Victaulic called Nancy Finberg, the director of complex claims for American Insurance Group (AIG), to testify as an adverse witness. The insurance defendants were members of AIG. Finberg had examined Victaulic's coverage claims and determined that there was potential insurance coverage. She had also verified, at the request of counsel, the insurers' responses to Victaulic's requests for admission (RFAs) regarding coverage, which the insurers denied on legal grounds. Victaulic's counsel questioned Finberg about the distinction between her role as a claims handler and the insurers' legal positions as reflected in their responses to the RFAs.[1] Finberg attempted to explain the difference. Judge Roesch intervened in counsel's questioning, as follows:

> Q. [MR. JEAN, counsel for Victaulic] So each of the seven cases at issue in this litigation presented a potential for coverage; right?
>
> A. [MS. FINBERG] Are you making a distinction between the handling of the claims or the coverage litigation? Because they're two separate things.

[1] The appellate court found that Judge Roesch erred in allowing Victaulic's counsel to question Finberg about the RFAs, which are not admissible, but the judge is not being disciplined for this error.

> Q. Well, I had not been because I didn't really think of them separately before you just gave that answer, but -- so are you saying that the coverage litigation -- or underlying claims handling -- I probably just mixed up words there, so let me just repeat myself. I'm sorry. [¶] So in the underlying claims handling, you make a determination as a potential for coverage one way, and then in the coverage case, this litigation, the potential for coverage is determined differently?
>
> A. They're two separate things.
>
> THE COURT: Answer his question. Are they determined differently?

Shortly thereafter, Jean asked Finberg a question on the same topic. When she answered, Judge Roesch interrupted, as follows:

> Q. [MR. JEAN] And I think where we left off, you had -- you started talking about that maybe you handled the potential for coverage one way in the -- when you handled claims, and perhaps in the litigation or this litigation maybe it's handled differently? [¶] Did I understand your testimony correctly?
>
> A. [MS. FINBERG] Well, there are two separate issues, two separate things.
>
> THE COURT: That was a yes-or-no question.
>
> THE WITNESS: I don't know if I can answer yes or no, Your Honor, the way --
>
> THE COURT: You don't know if you can answer that?
>
> THE WITNESS: The way he asked it. [¶] I'm sorry, would you ask it again.
>
> THE COURT: Why don't you rephrase the question. The witness doesn't understand it.

After further examination, Judge Roesch again intervened in the questioning of Finberg, as follows:

> [MR. JEAN]: . . . Now, do you handle the potential for coverage or make your assessments as a potential for coverage differently when you handle claims than as is done in this litigation?
>
> THE COURT: Do you understand the question?
>
> THE WITNESS: I understand what he's asked, but it's hard to answer yes or no to that question, Your Honor.
>
> THE COURT: Do you use the same analysis to determine if there's coverage in your claims handling as you would in responding to questions in this lawsuit?
>
> THE WITNESS: If it's yes or no, then I would have to say no.
>
> THE COURT: You don't?
>
> THE WITNESS: If I could qualify that.
>
> THE COURT: You use a different analysis to determine coverage in coverage litigation as in claims handling?
>
> THE WITNESS: May I --
>
> THE COURT: I'm just trying to get you to say yes or no. You'll be given plenty of opportunity to make your explanations.
>
> THE WITNESS: Okay. I'll say no then.
>
> THE COURT: So the answer is no. Mr. Jean, the answer is no.
>
> BY MR. JEAN: Q. All right. So is the answer -- I just want to make sure I'm clear. [¶] Do you treat the analysis for the potential for coverage as a claims handler the same as is done by AIG in connection with this litigation?

MR. GOINES [Counsel for AIG]: Objection. Vague, Your Honor.

THE COURT: Not vague.

WITNESS: No, not -- no.

BY MR. JEAN: Q. Okay. So -- okay. You asked for an opportunity to explain.\

A. Yes.

Q. Please explain.

A. Thank you. The claims handling I handle no matter what. In these claims that you -- the claims that are the subject of the litigation I've handled the same all along. Nobody's asked me to change the way I handle the claims or make any decisions differently than I normally would because of this coverage litigation.

Q. But then in connection with the litigation --

THE COURT: So how is it that your analysis is different if it's coverage litigation than if it's claims handling? Isn't the potential for coverage based on the facts that you find by the plaintiff in the underlying case? Isn't that where you get the concept of potential for coverage?

THE WITNESS: In the underlying case, yes, that's correct.

THE COURT: So how is that analysis different in a coverage case?

THE WITNESS: Because in this coverage litigation --

THE COURT: So what? The facts are the facts, aren't they?

THE WITNESS: We're taking a legal position in this coverage --

THE COURT: The facts of the underlying cases are the facts of the underlying cases.

THE WITNESS: Yes, correct.

THE COURT: Is that right? [¶] And is it an analysis of the facts of the underlying cases that lead you to a determination of whether there's a potential for coverage?

THE WITNESS: Yes.

THE COURT: And that's both in -- wherever you are and whenever you are, that's the rule; right?

THE WITNESS: That's correct.

THE COURT: Okay. Good luck, Mr. Jean.

MR. JEAN: Thank you, Your Honor.

Jean questioned Finberg further regarding the insurers' responses to the RFAs, and her verification of those responses under penalty of perjury. Judge Roesch intervened in this questioning, as follows:

Q. [MR. JEAN] So when you were -- I'm a little confused because how is it that you could sign these under oath under penalties [*sic*] of perjury and deny the potential for coverage when you knew as a claims handler that there was the potential for coverage?

A. [MS. FINBERG] I think I can clear up your confusion.

Q. Yeah. Please do. I mean, that was an open-ended question, so go ahead.

A. Okay. Thank you. These verifications, these requests for admissions were drafted and provided to me by coverage counsel, Mr. Eads' office.

Q. Yes.

A. These are legal documents. I'm not an attorney. I'm just an adjuster. And I read them, and I reviewed them with Mr. Eads and his partners and was told, "This is a legal position that we're taking in the coverage litigation. We're preserving legal issues. We're asking the court for guidance, if you will." [¶] It had nothing to do with the way I handled my claims. Nobody ever asked me to withdraw a defense or stop handling or change the way I was handling. I signed these as the person most knowledgeable, the legal position asking the Court for guidance.

THE COURT: So you knew it was false when you verified it under penalty of perjury based on your own understanding of the underlying facts? Is that what you're telling us?

THE WITNESS: What was false, Your Honor?

THE COURT: It's false that there was, in fact, a potential for coverage under all of those seven. You told us that already today. [¶] And what you're telling me is that you signed this under penalty of perjury, and you knew it was false?

THE WITNESS: No, Your Honor. This is not false. I was handling my claims because there was a potential for coverage under all those claims. But these verifications, RFAs, were legal positions that were being taken in this coverage litigation, so . . .

THE COURT: So you knew that the underlying facts were that it was true that there was a potential for coverage, and yet you write in your verification that you declare under penalty of perjury that the foregoing responses are true and correct?

THE WITNESS: Right, because that was true and correct to the legal position that was being taken.

THE COURT: Oh, okay.

THE WITNESS: So I wasn't being inconsistent.

> THE COURT: I understand now. The facts don't matter. [¶] Is that what you're telling me?
>
> THE WITNESS: The facts don't matter in this litigation.
>
> THE COURT: All right.
>
> BY MR. JEAN: Q. So --
>
> THE COURT: May I see counsel in my chambers.

After the judge and counsel had a discussion in chambers, they returned to the courtroom, and the judge announced:

> THE COURT: Ladies and gentlemen of the jury, we are going to take an early lunchtime today. We're going to come back at one o'clock, and we are going to proceed. [¶] We'll have a different witness this afternoon, and we'll be dealing with things that are outside of your purview during that time, all right? Outside of your purview during that time. [¶] So you're excused to go to lunch.

The judge asked Finberg to "step outside," which she did. He summarized the chambers conversation that had just occurred, as follows:

> THE COURT: All right. Well, I will try to summarize. We've had a conversation, counsel and I, in my chambers regarding the testimony of the current witness, and the admission that she perjured herself in her verification. [¶] And at the conclusion of our conversations, it was determined at Mr. Goines' request that the witness be allowed an opportunity to obtain private counsel and either take the Fifth Amendment and refuse to respond to questions or not. [¶] Consequently in our questioning we're going to have a different witness this afternoon starting at one o'clock, and Ms. Finberg will be back tomorrow at nine o'clock for continued examination.

The insurers' counsel moved for a mistrial on the ground that the judge's treatment of Finberg conveyed that he did not believe her. Judge Roesch denied the motion without explanation.

The next day, Finberg appeared with personal counsel, who informed the court and counsel that Finberg would assert her Fifth Amendment privilege against self-incrimination in response to all substantive questions from either side. Judge Roesch responded, "Either side and me too, I'll bet."

Judge Roesch then ordered that, when Finberg asserted the Fifth Amendment privilege against self-incrimination, she was to take the witness stand and do so in front of the jury. This was contrary to law. Requiring a witness to invoke the privilege in front of the jury invites the jury to draw an improper inference and violates Evidence Code section 913 (forbidding judges and attorneys from commenting on the assertion of the privilege, and forbidding juries from drawing any inference from it). (*People v. Frierson* (1991) 53 Cal.3d 730, 743; *People v. Holloway* (2004) 33 Cal.4th 96, 130; *Victaulic, supra*, 20 Cal.App.5th at p. 981.)

Judge Roesch also permitted Finberg to assert a blanket claim of privilege against self-incrimination as to all questions that would be asked of her. This, too, was contrary to law. A witness claiming this privilege against self-incrimination must do so with specific reference to particular questions asked, and the trial court must undertake a particularized inquiry with respect to each specific claim of privilege to determine whether the claimant has sustained his burden of establishing that the testimony or other evidence sought might tend to incriminate him." (*Warford v. Medeiros* (1984) 160 Cal.App.3d 1035, 1045.)

After Finberg took the witness stand and asserted the Fifth Amendment privilege in a blanket fashion as to all substantive questions from either side, Judge Roesch excused her, without allowing the insurers to cross-examine her. Her testimony remained in the case, and the insurers were denied their fundamental right to examine Finberg on subjects about which she had testified before

she asserted the Fifth Amendment. The insurers had a statutory right to cross-examine Finberg. (Evid. Code, § 776, subd. (b).) Cross-examination is also a due process right that is fundamental to a fair proceeding. (*Fost v. Superior Court* (2000) 80 Cal.App.4th 724, 735.) "[T]he right to cross-examination cannot be defeated by a valid claim of privilege, even a privilege as strong as that embodied in the Fifth Amendment." (*Ibid*.) Although the scope of the insurers' cross-examination would have been limited to topics on which Finberg had testified during Victaulic's questioning, she had testified to multiple topics other than the RFAs.

Judge Roesch's handling of *Victaulic,* described above, constituted misconduct in multiple ways. His questioning of Finberg was inappropriately aggressive and conveyed to the jury that he questioned her credibility. As stated by the appellate court, "[A]ny fair reading of the record reveals that the court acted in a way that from every indication was hostile to Finberg—and that it did not believe her." (*Victaulic, supra,* 20 Cal.App.5th at pp. 974-975.) Judge Roesch's improper treatment of Finberg included sarcastic and gratuitous remarks related to her (e.g., "Good luck, Mr. Jean," and "Either side and me too, I'll bet"). A trial court commits misconduct if it persists in making discourteous and disparaging remarks to a witness and utters frequent comment from which the jury may plainly perceive that the judge does not believe the witness's testimony. (*Victaulic*, at p. 975.) The appellate court found that Judge Roesch's questioning of Finberg violated these principles, was improper, and constituted misconduct. (*Ibid*.) The commission agreed.

It is also misconduct for a trial court to act as an advocate for either side, due to the significance of the court in the eyes of the jury. (*Victaulic, supra,* 20 Cal.App.5th at p. 975.) The appellate court found that Judge Roesch improperly acted as an advocate for Victaulic by intervening in the case and cross-examining Finberg as he did. (*Ibid*.) The commission agreed.

Judge Roesch's handling of Finberg's assertion of her Fifth Amendment privilege against self-incrimination was also improper. The judge lacked the judicial discretion to require Finberg to assert the Fifth Amendment in front of the jury. (*Victaulic, supra,* 20 Cal.App.5th at p. 982.) The appellate court found this ruling "hard to comprehend, in light of the authorities." (*Ibid.*) The insurers' counsel brought to the judge's attention that it was wrong to make Finberg invoke the privilege in front of the jury, but he nevertheless informed Finberg's counsel that Finberg would take the stand to invoke the privilege. When Finberg was getting ready to take the stand, the insurers' counsel said that they would request that she be questioned outside the presence of the jury, but that they understood that their request was going to be denied. Judge Roesch confirmed that it would be denied. Requiring Finberg to assert the Fifth Amendment in front of the jury without the discretion to do so constituted an abuse of authority.

Judge Roesch admitted knowing that a witness cannot assert a blanket claim of the Fifth Amendment privilege and that each question and potential answer must implicate the witness in a criminal act in some way. Counsel for Victaulic brought to the judge's attention his understanding that the Fifth Amendment needed to be evaluated on a question by question basis and that a blanket invocation was not proper. The insurers' counsel moved for a mistrial on the ground that a blanket assertion of the privilege denied them a fair trial. Judge Roesch denied the motion. Despite knowing the law on this issue, the judge allowed Finberg to invoke the privilege on a blanket basis and declined to conduct the particularized inquiry required by law. He asserted that he did this because he believed he had "buy-in" from counsel. Having attorneys agree to something the law does not permit does not obviate the judge's duty to respect and comply with the law. The judge's action in this regard constituted an intentional disregard of the law.

The insurers also raised the issue of the right to cross-examination, which is a fundamental right. They told the judge that it was unfair to allow Finberg to

invoke the privilege against self-incrimination in the middle of her testimony without giving them the opportunity to rehabilitate her or give her a chance to explain her prior testimony, and they moved for a mistrial on this basis. Judge Roesch denied the motion without explanation. The judge's handling of this issue reflected a disregard for the insurers' fundamental right to cross-examination. The appellate court found that allowing Finberg's testimony to remain in the case, rather than excluding it, had a "devastating effect." (*Victaulic, supra,* 20 Cal.App.5th at p. 980.)

Judge Roesch's conduct also reflected embroilment. According to the California Judicial Conduct Handbook (Rothman et al. (4th ed. 2017) § 2:1, p. 58), embroilment can manifest itself when a judge is "attempting to see to it that a certain result prevails out of a misguided perception of the judicial role." In *Victaulic*, Judge Roesch believed—erroneously—that Finberg had testified falsely, and he inserted himself into Victaulic's examination of her in an effort to establish that for the jury. Rather than acting as an impartial jurist, he persisted in questioning her in an overly forceful manner, required her to assert the Fifth Amendment in front of the jury, and did not permit her to be questioned by the insurers, who repeatedly asked him for the opportunity to do so. Judge Roesch acknowledged that he overstepped his role as a trial judge and that his course of conduct related to Finberg's testimony was misguided. His interaction with Finberg, and the issues that presented themselves in connection with her testimony, reflected a loss of neutrality that is the hallmark of embroilment.

Judge Roesch's conduct violated canon 2A (a 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); canon 3 (a judge shall perform the duties of judicial office impartially, competently, and diligently); canon 3B(4) (a judge shall be patient, dignified, and courteous to those with whom the judge deals in an official capacity); and canon 3B(7) (a judge shall accord to

every person who has a legal interest in a proceeding, or that person's lawyer, the full right to be heard according to law).

II. *Westlake Trust v. Testate and Intestate Successors of Regete Gruhn*

In July 2017, Judge Roesch presided over a hearing in *Westlake Trust v. Testate and Intestate Successors of Regete Gruhn* (RG16820169). Attorney Caroline Gegg appeared for plaintiff Alvin Cox as trustee of the Westlake Trust. Cox was seeking a quiet title judgment. There was no opposition. Gegg explained that Regete Gruhn left the property to Barbara Blumberg in a 2005 will, that Gruhn died on December 23, 2008, and that Blumberg decided not to probate the will and entered into a purchase agreement with Cox in March 2016. Gegg also informed the court that Cox had paid the back taxes on the property, paid the arrearages to the homeowners association and to the mortgage lender, and was making payments on the loan. Judge Roesch indicated that he would need Blumberg to authenticate the copy of the will Gegg was attempting to introduce into evidence, and a certified copy of a quitclaim deed, and that he wanted to know whether there was a supplemental tax assessment, based on Gruhn's death in 2008, and whether the taxes had been paid. The hearing was continued to permit Gegg to present this evidence.

At the subsequent hearing on July 28, 2017, Blumberg testified that she was present at Gruhn's attorney's office when Gruhn signed her will. Judge Roesch asked her, "And you are the principal beneficiary under this will and the lawyer permitted you to be present when it's signed?" Blumberg responded, "No. He made me leave the room at some point." Judge Roesch then made the following statement:

> THE COURT: I used to write wills for a living. That -- for a lawyer to have permitted the principal beneficiary of a will to come with the person who made the will and to be in the same building or on the same block at the time of the signing absolutely opens the door for a challenge based on undue influence. Now, maybe it's

> true, maybe it's not. Nobody is raising that issue, but . . . .

Judge Roesch's comment implied that Blumberg's conduct may have been subject to a claim of undue influence, even after Blumberg testified that she was not in the room when Gruhn signed her will.

Judge Roesch then aggressively questioned Cox, and engaged in argument with Gegg, about the payment of property taxes. During the examination of Cox, Gegg offered to provide to the court certified copies of a Notice of Proposed Escape Assessment concerning property taxes on the subject property. Gegg asked Cox to identify the "event date" on the document, which she indicated was in the upper right-hand corner. Cox identified that date as December 23, 2008 (the date of Gruhn's death). The following exchange occurred:

> THE COURT: Isn't it more important the date in the upper left-hand corner, which is the date it was mailed to -- evidently was mailed to Mr. Cox? June 8th, 2017, so you received this on -- sometime after June 8th?
>
> THE WITNESS: Yes.
>
> THE COURT: All right. So had the taxes and the escape assessment that is listed here been paid before the last hearing?
>
> MS. GEGG: Your Honor, we are getting to that, and I would like to set a foundation for you, Your Honor, will understand how this process works.
>
> THE COURT: Well, you told me last time that these taxes had previously been paid prior to that hearing. Now --
>
> MS. GEGG: No.
>
> THE COURT: -- it turns out that may not be true.

> MS. GEGG: No, Your Honor. What I did say is all the back property taxes have been paid and the taxes are current. What Your Honor asked about were the supplemental taxes that are reassessed, and we have that information here and I would like to present that.

Shortly thereafter, Gegg asked Cox if there were additional assessments due on the property, and he answered that there were. Judge Roesch stated that the date of the notice was June 22, 2017, and said: "Well, the escape assessment was due subsequent to June the 22nd. It hadn't been paid before then." The following exchange occurred:

> MS. GEGG: Q. Mr. Cox, do you know if it's possible to pay these assessments for supplemental taxes now?
>
> A. It's not possible.
>
> Q. Why is that?
>
> A. Because they haven't given us the bill. We can't get the bill until October.
>
> Q. Did you attempt to pay the bill for the supplemental taxes?
>
> A. Believe me, we did.
>
> Q. Are these assessments secured by the property?
>
> A. Yes.
>
> THE COURT: Really?
>
> MS. GEGG: Yes.
>
> THE COURT: With who as the owner?
>
> MS. GEGG: They are secured by the property. The owner is not personally liable for these assessments. Although, Mr. Cox is willing to become personally liable for these assessments.

THE COURT: I'll tell you my opinion of what I think the law is. I believe that the law is that if the property is transferred from the heir who obtained it through somebody's death prior to supplemental taxes or escape assessments being levied on the -- whoever bought the property, either through a probate process or some other process, does not have the obligation of paying the supplemental taxes except to the date of their deed. If they bought the deed -- if the person died on January 1st, the property was transferred on July the 1st, if the county doesn't get around to assessing escape taxes until December 1st, the individual who owned the property between the date of death of January 1st and date of sale of July the 1st or June the 1st, whatever it was, is personally liable, but it's an unsecured obligation and the property becomes liable from the date of the new deed.

MS. GEGG: I --

THE COURT: I'm sorry. Your client doesn't have a deed to this property yet. If the property is transferred into his name -- well, he does have a deed. I don't remember whether it was recorded or not.

MS. GEGG: It has been recorded, yes.

THE COURT: Any escape assessment that was due prior to the date of his -- of the deed naming him as the owner becomes the unsecured obligation of the Estate of Regete Gruhn.

MS. GEGG: Q. Mr. Cox, are you willing to pay the supplemental tax assessments when they are generated in October of 2017?

A. Yes, I am.

Cox then testified that an exhibit was a first and second installment of taxes for Alameda County, and that the exhibit reflected that he had paid the taxes on the subject property, and that they were current. Judge Roesch

directed Cox to language that stated, "Assessed to Gruhn, Regete, Heirs of Estate," with an address. Judge Roesch asked Cox whose address that was, and he replied that it was his address. Judge Roesch asked Cox to state the date of the second to the last page of the exhibit. Cox confirmed the date was July 17, 2017. Judge Roesch stated, "That was just a few days ago. . . . Eleven days." Gegg resumed questioning Cox.

> MS. GEGG: Q. Mr. Cox, are you willing to agree to a judgement [*sic*] that you will be personally liable for the supplemental taxes?
>
> A. Yes.

Judge Roesch then examined Cox, as follows:

> THE COURT: How many pieces of property do you own, Mr. Cox?
>
> MS. GEGG: Your Honor, I object on the basis of privacy. I'm not quite sure whether Mr. Cox wants to --
>
> THE COURT: Well, I'm looking for -- what is your experience in the world of buying and selling real estate?
>
> THE WITNESS: Extensive.
>
> THE COURT: Extensive. All right. [¶] So you knew what an escape assessment was before I brought it up at the last hearing.
>
> THE WITNESS: No.
>
> THE COURT: Really? And you didn't know what a supplemental tax assessment was after the death of an individual?
>
> THE WITNESS: None of it concerned me.
>
> THE COURT: All right.

When Gegg was giving her closing statement, Judge Roesch interrupted her, as follows:

> THE COURT: You're not -- you're not going to argue that the county's supplemental tax assessment has expired, are you?
>
> MS. GEGG: No.
>
> THE COURT: Okay.
>
> MS. GEGG: And that will be paid, as Mr. Cox promised, when generated.

Gegg summarized the actions that had been taken regarding the subject property, including that the deed from Blumberg to Cox had been recorded, that Cox had paid Blumberg for her interest in the property, that the back taxes had been paid and were current, that the arrearages due to the homeowners association had been paid and were current, that Cox had brought a loan to a bank current, that he was waiting for the supplemental tax bill, which would not be generated until October 2017, and that all the back taxes were paid during Blumberg's possession of the property. The following exchange occurred:

> THE COURT: Except for the supplemental taxes.
>
> MS. GEGG: Which haven't been generated yet.
>
> THE COURT: Well, that's not my fault. It is the obligation of somebody, whoever wants to own a piece of property, to give notice to the county that they own the property so that the property can be reassessed to its current value. What you're telling me is that Ms. Blumberg did not pay the supplemental taxes and left the county begging.
>
> MS. GEGG: No.
>
> THE COURT: And then she transferred the property over to Mr. Cox's trust. And now the debt is going to be

assessed by the county, but they haven't got around to doing it.

MS. GEGG: What I'm saying is that --

THE COURT: So all the taxes haven't been paid.

MS. GEGG: No.

THE COURT: Some of the taxes have been paid.

MS. GEGG: Correct. And the supplemental taxes haven't been paid only because they haven't been generated yet. Mr. Cox --

THE COURT: Oh -- oh, listen. I'm sitting here and I -- you were here a month ago or a little bit more than a month ago and at that point in time the representation was that all the taxes had been paid. I raised the question about the supplemental assessment. There was a suggestion that, yes, it had been paid and that we need to bring Ms. Blumberg in to tell us about it. Ms. Blumberg's testimony is she never made any effort to notify the assessor or tax collector, whoever it is, that's supposed to get notification by the person who's [*sic*] has been nominated executor on the will. She took the property. She didn't rent it out. She didn't pay homeowners association. And then Mr. Cox got involved and Mr. Cox paid those while the property -- before the property was transferred to him by deed from Ms. Blumberg. [¶] Nobody ever said a word about supplemental taxes, and if I had, in fact, approved your request at the last hearing and given Mr. Cox his qui[et] title deed, if you will, order of qui[et] title that he could record, then the county would have nothing more than an unsecured obligation on Mrs. Blumberg perhaps, but really on the Estate of Regete Gruhn. And nobody is going to probate that estate. And so when is the county going to get their money?

MS. GEGG: The county --

THE COURT: If the answer is if you had gotten the deed at the last hearing, the county would never get its money.

MS. GEGG: I beg your pardon?

THE COURT: The county would never have gotten its money.

MS. GEGG: No, Your Honor. The --

THE COURT: We would have an unsecured --

MS. GEGG: When the deed was recorded, that triggered the reassessment, and the county has said that that bill, the supplemental bill, would not be generated until October 2017, and at the last hearing, I need to correct you, because what was represented was that all the back taxes had been paid. You asked about the supplemental assessment. We showed you there was a showing on -- actually, Mr. Cox, was on his phone, showing that the supplemental assessments were -- had there been notice of the escape assessment, but again, they -- Mr. Cox had been unable to pay them, and he's tried to, because it hasn't been generated yet.

THE COURT: Well, how do you explain the fact that all the correspondence about the state [*sic*] assessment is subsequent to the last hearing?

MS. GEGG: I don't -- I don't understand.

THE COURT: Well, 11 days ago -- Exhibit R, was it? 11 days ago Exhibit R shows that they were mailing correspondence to Mr. Cox regarding the supplemental taxes. Well, why don't we have something going back to 2008. The county does not wait forever, certainly not 10 years or nine years, to assess supplemental taxes. They assess them as soon as they know about it.

MS. GEGG: Right. And --

THE COURT: Nobody --

MS. GEGG: -- what happened is recordation of the deeds triggered at the reassessment, and Mr. Cox is willing to pay the supplemental taxes. There is no issue there. The county has --

THE COURT: Your willingness to pay them is fine.

MS. GEGG: But he can't because they haven't been generated yet.

THE COURT: Well, if you asked them to generate them last week, what do you expect?

MS. GEGG: No.

THE COURT: You expect --

MS. GEGG: This was a matter of course they won't be generated until October 2017.

THE COURT: Well, if you had given them notice when Regete Gruhn died, they would have issued them in October of -- or whatever year it was that she died. She died in December 2008, so they would have been processed in 2009, but they didn't know that she was dead. All they knew was nobody was paying the taxes.

MS. GEGG: Your Honor, is the issue here that Your Honor's concerned the taxes won't be paid?

THE COURT: No. My concern is that it appears to me that you are seeking a qui[et] title judgment that has the effect of cheating somebody.

MS. GEGG: No.

THE COURT: Well –

MS. GEGG: No.

THE COURT: -- it sure looks like it to me.

MS. GEGG: As Mr. Cox has testified that he has attempted to pay the supplemental taxes. That the problem is they haven't been generated yet.

THE COURT: What was the date that you were here last?

MS. GEGG: July 14th.

THE COURT: You were here two weeks ago.

MS. GEGG: Yes.

THE COURT: All right. And he -- had he paid the supplemental taxes then?

MS. GEGG: Again, he couldn't, because they hadn't -- the bill had not been generate [*sic*] yet.

THE COURT: Well, why can't --

MS. GEGG: They aren't generated until October.

THE COURT: When did you file this lawsuit?

MS. GEGG: It was in, I believe, last year, 2016.

THE COURT: It was in 2016?

MS. GEGG: Yes.

THE COURT: Well, in 2016 when you filed this lawsuit, had all the taxes been paid? The answer is no.

MS. GEGG: And, again --

THE COURT: In your lawsuit did you say, well, whoopsie, there's some escape assessment that hasn't been made yet and we haven't paid those, but we will pay those? Don't you worry.

> MS. GEGG: No. That's because they hadn't been triggered yet. It hadn't been triggered, and what the --
>
> THE COURT: No. No. It was triggered on the death of Regete Gruhn.
>
> MS. GEGG: Right. Well, actually, this is what it says here. It says here that the event date is December 23rd, 2008.
>
> THE COURT: There are two assessment dates here. One is the date of reassessment on the date of death of Regete Gruhn. And then there is a second reassessment, and that's on the recording of the deed from Ms. Blumberg to Mr. Cox. So there is [*sic*] two assessments here. Two reassessments according to Prop 13. Nobody paid any attention at all to the reassessment based on the December 2008 date. None.
>
> MS. GEGG: Your Honor, that is not true. Again, Mr. Cox has attempted to pay the supplemental taxes, but cannot because they won't be generated until October of 2017. Now, what we are willing to propose is that in October 2017 when Mr. Cox pays the supplemental taxes that Your Honor issue a qui[et] title judgment on this property. Everything has been done. All the administration, all the things that Regete Gruhn wanted to have done in her will has been done.

In response to Judge Roesch's concerns, Gegg asked that the hearing be continued until October, when the supplemental tax bill generates, and Cox could pay the supplemental taxes. Judge Roesch denied the request. The following exchange occurred:

> THE COURT: That's denied.
>
> MS. GEGG: I see. On with [*sic*] grounds?
>
> THE COURT: Because it's denied. Actually, you should have finished your trial when you were here two weeks ago.

MS. GEGG: But, Your Honor --

THE COURT: You didn't finish it two weeks ago.

MS. GEGG: But Your Honor wanted to hear information about supplemental taxes and Mrs. Blumberg's testimony.

THE COURT: Oh, I don't mind the two weeks, but you're going to finish your presentation today. If you're not able to demonstrate your case today, I have to deny it. We've continued this case before, and we are not going to continue it again.

MS. GEGG: It's only been continued once.

THE COURT: That's right. We continued it before and we are not going to continue it again. [¶] Anything more?

MS. GEGG: Only one other matter, Your Honor. We are willing to offer that Mr. Cox will be personally liable for the supplemental taxes which will be included in the judgment.

THE COURT: How in the world could I issue a judgment saying that the plaintiff in a qui[et] title case has an obligation to pay money when -- he can have the title now, but he's got a personal obligation to pay the money later? There is no authority for me to give that kind of conditional judgment.

MS. GEGG: The only other thing I could suggest, Your Honor, is that -- and, again, the problem is that the bill won't be generated until October of 2017. Mr. Cox could provide an estimated amount and -- as proof that the supplemental taxes have been paid, and then any additional balance would be returned to him or billed to him, but that might be one of the ways to allay your concerns about supplemental taxes.

THE COURT: You know, the supplemental taxes were an example that I thought off the top of my head of an obligation that should have gone along with the estate. I don't know if there are others because I don't know that I'm smart enough to think of everything all at once. But it turned out that that hit a sore spot. The sore spot being between the last time you were here and now you've gone through considerable effort to try to get the tax assessor to assess the supplemental taxes that hadn't been paid.

MS. GEGG: Correct.

THE COURT: My reading of what I understand the law to be is that the supplemental taxes are the debt for the period of time between the death of Regete Gruhn and the date that the deed in favor of Mr. Cox, your client, was filed. The supplemental taxes that were due between that period of time are on the Estate of Ms. Gruhn. [¶] Now, I've heard testimony today that Ms. Blumberg claims she owned the property during that period of time, and so perhaps they are her personal debt. They are not Mr. Cox's personal debt.

MS. GEGG: But he's willing to pay and be liable for that debt.

THE COURT: Well, I understand that, but from the evidence it would appear that nobody has ever paid that debt to this day even though the lady died nine years ago -- well, almost nine years ago, a little less.

MS. GEGG: But that debt will be paid. That debt will be paid. Mr. Cox has been trying to pay that debt, again, just because the bill has not been generated.

THE COURT: He's been trying to since two weeks ago. [¶] Mr. Gressel, would you make holes in the document, please.

THE COURT ATTENDANT: Sure.

> THE COURT: Is there anything more that you would like to add?
>
> MS. GEGG: Yeah. I'd actually object to the characterization my client is trying to avoid paying the debt, paying the supplemental taxes. That certainly has never been his intent or never been his actions. He would like to pay, but, again, that information has -- is not provided yet.
>
> THE COURT: All right. Anything more?

Judge Roesch dismissed the case with prejudice. Cox appealed. The Court of Appeal reversed the judgment based on the uncontroverted facts established in the record and remanded the matter for entry of an order quieting title to the property, subject to the obligation to pay any supplemental real property tax that may be assessed. The appellate court stated: "The fact that real property taxes had gone into arrears while Barbara Blumberg owned the property can hardly be attributed to plaintiff [Cox], who paid all back taxes that were due, nor can plaintiff be faulted for not yet having paid a supplemental assessment that had not yet been made." (*Cox v. Blumberg* (Apr. 16, 2018, A152198) [nonpub. opn.], p. 8.)

Judge Roesch displayed poor demeanor in the *Westlake* matter. His discourteous comments include: "What you're telling me is that Ms. Blumberg did not pay the supplemental taxes and left the county begging"; "If [the] answer is if you had gotten the deed at the last hearing, the county would never get its money"; "Well, if you asked them to generate them last week, what do you expect?"; "Well, if you had given them notice when Regete Gruhn died[.] . . . All they knew was nobody was paying the taxes"; and "My concern is that it appears to me that you are seeking a qui[et] title judgment that has the effect of cheating somebody."

Judge Roesch's conduct in *Westlake* also reflected embroilment, which occurs when a judge "surrenders the role of impartial factfinder/decisionmaker."

(Rothman, Cal. Judicial Conduct Handbook, *supra*, § 2:1, p. 58.) Rather than remain neutral, the judge repeatedly engaged the parties and counsel in a manner that conveyed his concern that the parties were "cheating somebody." But the appellate court found that "the circumstances certainly do not evince an intent to cheat or negate [Cox's] entitlement to an order confirming the trust's ownership of the property." (*Cox, supra,* (April 16, 2018, A152198) [nonpub. opn.], p. 8.) The commission agreed.

Judge Roesch argued that he was merely exercising his "gatekeeping" function because he believed there should have been a probate proceeding to transfer the property to Blumberg before the sale to Cox, rather than a quiet title action, and that a supplemental assessment would not be enforceable if the petition to quiet title were granted. But the appellate court found that there were ways to protect the county's right to a future supplemental assessment. (*Cox, supra,* (April 16, 2018, A152198) [nonpub. opn.], p. 8.) And even if the judge had been correct about his concerns, he could have conveyed those concerns to the parties and counsel without resorting to unduly harsh language.

Judge Roesch's actions violated canon 2A (a judge shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary) and canon 3B(4) (a judge shall be patient, dignified, and courteous to those with whom the judge deals in an official capacity).

Judge Roesch's conduct in both cases was, at a minimum, improper action.

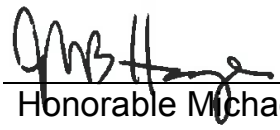
The commission considered Judge Roesch's prior discipline to be an aggravating factor. (Policy Declarations of Com. on Jud. Performance, policy 7.1(2)(e).) In 2011, he received an advisory letter for making discourteous remarks to a self-represented litigant, who told the judge he was an attorney in another state, but was a teacher in California. During a colloquy about whether the litigant's service of process was proper, Judge Roesch remarked, "Well, I can see why you don't practice law. You don't bother to read the law." When the

litigant asked Judge Roesch if he needed to do anything else for the judge to read his motion, Judge Roesch responded, “Well, I don’t mean to be insulting, but that’s an idiotic question.” When the litigant asked Judge Roesch for an explanation, he responded, “It’s not my job to explain something to somebody who says they are a lawyer.” Judge Roesch also remarked, “I sure hope you teach elementary school better than you practice law.” Judge Roesch’s treatment of the litigant violated canon 3B(4), which requires judges to be patient, dignified, and courteous to those with whom they deal in an official capacity. Judge Roesch argued that his prior discipline is not relevant. The commission disagreed because it concerns the judge’s discourteous treatment of those appearing before him, which also occurred here.

Commission members Hon. Michael B. Harper; Dr. Michael A. Moodian; Hon. William S. Dato; Mr. Eduardo De La Riva; Hon. Lisa B. Lench; Nanci E. Nishimura, Esq.; Victor E. Salazar, Esq.; Mr. Richard Simpson; and Mr. Adam N. Torres voted to impose the public admonishment. Ms. Kay Cooperman Jue would have imposed a private admonishment. Ms. Sarah Kruer Jager did not participate.

Date: 10/15/2020

On behalf of the
Commission on Judicial Performance,



Honorable Michael B. Harper
Chairperson