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STATE OF CALIFORNIA

BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

INQUIRY CONCERNING JUDGE PETER J. MCBRIEN, NO. 185.	EXAMINER'S OPENING BRIEF TO THE COMMISSION (Rule 130(a))

Pursuant to Rules of the Commission on Judicial Performance, rule 130(a), the examiner submits the following opening brief.

I. PROCEDURAL STATUS

On June 23, 2009, the special masters filed their findings of fact and conclusions of law with the commission. (Rule 129.)

II. SUMMARY OF MASTERS' CONCLUSIONS

The masters concluded that Judge McBrien engaged in two instances of prejudicial misconduct (counts 1A(1) and 1A(3)), and two instances of improper action (counts 1A(2) and 1A(4)).

III. OBJECTIONS TO MASTERS' REPORT

A. Findings of Fact

With the exception of certain factors listed in mitigation (Nos. 4, 7), the examiner does not object to the masters' findings of fact. (Findings of Fact and Conclusions of Law of the Special Masters [hereafter "masters' rpt."], p. 142.) There were very few disputed facts in this matter and the masters resolved those disputes based on their evaluation of the credibility of the witnesses. Since the masters "had the advantage of observing the demeanor of the witnesses," their factual determinations should be given "special weight." (*Broadman v. Commission on Judicial Performance* (1998) 18 Cal.4th 1079, 1090.)

We object to the masters listing as a mitigating factor (concerning allegation 1A(3)) that "Judge McBrien had a good faith belief in his duty to report a criminal violation." (Masters' rpt., p. 142, No. 4.) This finding was part of the determination that the conduct constituted prejudicial rather than willful misconduct; it is not a separate mitigating factor.

We object to the masters listing as a mitigating factor Judge McBrien's statement in a letter to the commission that "I admit I acted badly and for which actions I deserve to be rebuked[]" as a mitigating factor. (Masters' rpt., p. 142, No. 7.) As set forth in the masters' report, Judge McBrien later explained that he meant only that he had left an incomplete record in the case, which led to a poor public perception of his actions, not that he had done anything substantively wrong. (R.T. 184; masters' rpt., p. 105; exh. 5, p. 62.) Judge McBrien continues to deny any significant wrongdoing.

B. Conclusions of Law

The special weight that is given to the masters' findings of fact is not extended to their conclusions of law. The Supreme Court has recognized the commission's "expertise in evaluating judicial misconduct" over that of the masters. (*Broadman v. Commission, supra,* 18 Cal.4th at p. 1090.)

1. Allegation 1A(1)

Examiner had argued that the judge acted in bad faith either out of hostility toward attorney Sharon Huddle and her client Ulf Carlsson or out of indifference to Carlsson's rights, and therefore the conduct constituted willful misconduct. Though it is not clearly stated in the masters' report, the masters evidently determined that Judge McBrien did not act in bad faith. The masters concluded that the judge's rulings and decisions did not reflect any bias or prejudice against either Huddle or Carlsson, and that the judge was instead "preoccupied with efficiency at the expense of ensuring a party's constitutional right to be heard." (Masters' rpt., pp. 123–124.) Given that factual finding, we do not object to the masters' conclusion that Judge McBrien's conduct in abandoning the *Carlsson* trial constitutes prejudicial rather than willful misconduct.

2. Allegation 1A(2)

The examiner objects to the masters' conclusion of law that the misconduct in count 1A(2) constitutes only improper action. At a minimum, the conduct constitutes prejudicial misconduct, which is defined as unjudicial conduct which would appear to an objective observer to lower public esteem for the judiciary. (*Broadman v. Commission, supra,* 18 Cal.4th at p. 1104, citing *Doan v. Commission on Judicial Performance* (1995) 11 Cal.4th 294, 312.) Conduct that violates the canons of judicial ethics is unjudicial conduct. (*Dodds v. Commission on Judicial Performance* (1995) 12 Cal.4th 163, 172; see also *Oberholzer v. Commission on Judicial Performance* (1999) 20 Cal.4th 371, 395.)

It was alleged in count 1A(2) that Judge McBrien improperly threatened Huddle with contempt if Carlsson failed to produce his Statements of Economic Interests, in violation of canons 2 and 3B(4). After Judge McBrien made a sua sponte request that Carlsson produce these documents, Huddle told the judge that she was advising Carlsson to assert his Fifth Amendment rights. Judge McBrien then engaged in an exchange with Huddle as to whether her client could properly

invoke the Fifth Amendment at that point, during which he stated, "I'm indicating that you need to send somebody to his employment to pick up those documents" and "Ms. Huddle, do you wish to ask your client to send somebody to get the records?" (Exh. 37, pp. 368:1–369:16.)

The judge then referred to the possibility that Huddle would be held in contempt if the Statements of Economic Interests were not produced, as alleged:

> MS. HUDDLE: I suppose -- this is all on the record. I don't know what to do in a situation like this when you're actually asking him to produce evidence which might incriminate him and it's not even the opposing side presenting it.
>
> **THE COURT: Ms. Huddle, am I to take that as a 'no' placing you in the possibility of contempt?**

(Exh. 37, p. 369:17-23, bold added.)

Huddle responded, "No," and said that she would tell Carlsson to go and get the records if the judge was ordering him to produce them. The judge reiterated that somebody else could retrieve the records for Carlsson. (Exh. 37, pp. 369:24–370:5.)

The masters found that Judge McBrien made a sua sponte request for the production of Carlsson's Statements of Economic Interests even though those documents were not relevant to the *Carlsson* case. They concluded that the judge violated canons 2 and 3B(4) during his lengthy exchange with Huddle concerning the failure to produce those documents and that "an attorney would perceive the language and tone used by Judge McBrien as threatening contempt." Judge McBrien admitted that there was no valid order on which to base a finding of contempt. Moreover, the masters concluded that the judge wanted these documents as a part of an improper investigation into whether Carlsson had violated the Fair Political Practices Act. (Masters' rpt., pp. 125–130.)

The masters did not apply the objective observer standard. Instead, despite their factual findings, they simply "conclude" without analysis that the conduct constituted improper action. (Masters' rpt., p. 127.) However, under the objective observer standard, the masters' factual findings, at a minimum, clearly support a finding of prejudicial misconduct – the judge threatened contempt when there was no valid order to support a contempt finding, for the purpose of obtaining documents irrelevant to the proceedings before him, in order to conduct an improper criminal investigation, and the conduct violated the canons. Such conduct lowers public esteem for the judiciary. (See *Kloepfer v. Commission on Judicial Performance* (1989) 49 Cal.3d 826, 846–858 [prejudicial misconduct found where judge threatened witness with contempt for continuing to answer a question after an objection raised, and threatened a defendant with contempt for whispering to his lawyer].)

3. Allegations 1A(3) and 1A(4)

We have no objections to the masters' legal conclusions.

IV. DISCIPLINE

The purpose of a commission disciplinary proceeding "is not punishment, but rather the protection of the public, the enforcement of rigorous standards of judicial conduct, and the maintenance of public confidence in the integrity and independence of the judicial system." (*Broadman v. Commission, supra,* 18 Cal.4th at pp. 1111–1112, quoting *Adams v. Commission on Judicial Performance* (1995) 10 Cal.4th 866, 912.) In determining the appropriate discipline, each case must be considered on its own facts:

> Proportionality review based on discipline imposed in other cases ... is neither required nor determinative. The factual variations from case to case are simply too great to permit a meaningful comparison in many

> instances. 'Choosing the proper sanction is an art, not a science, and turns on the facts of the case at bar.'

(*Broadman v. Commission, supra*, 18 Cal.4th at 1112, quoting *Furey v. Commission on Judicial Performance* (1987) 43 Cal.3d 1297, 1318.)

Based on Supreme Court decisions, the commission has identified several factors that are relevant to determining the appropriate discipline, including (1) the number of acts of misconduct, (2) the existence of prior discipline, (3) whether the judge appreciates the inappropriateness of the misconduct, (4) the judge's integrity, (5) the likelihood of future misconduct, and (6) the impact of the misconduct on the judicial system. (Decision and Order Removing Judge Jose Velasquez from Office, Inq. 180 (2007) p. 43; Decision and Order Removing Judge Kelly A. MacEachern from Office, Inq. 184 (2008) at pp. 18–24.) [I]n "many respects, these factors overlap one another." (Decision and Order Removing Judge Kevin Ross from Office, Inq. 174 (2005) p. 64.) Removal may be appropriate even when these factors do not each weigh against the judge. (Decision and Order Imposing Censure and Bar of Judge Patrick B. Murphy, No. 157 (2001) at p. 18[1].)

A. Number of Acts of Misconduct

The special masters found that Judge McBrien committed prejudicial misconduct in counts 1A(1) and 1A(3) and improper action in counts 1A(2) and 1A(4). Count 1A(3) involved several acts of misconduct including improperly investigating a potential criminal violation, sending evidence of that violation to Carlsson's employer, and continuing to preside over the case without disclosing his actions. These acts took place from March 2006 through September 2006.

[1] When it was later determined that Judge Murphy had resigned from judicial office the day before the order of removal was issued, the commission resolved that the decision "shall be considered a public censure ... and a bar from receiving assignments [etc.]." (CJP Minutes of Meeting, July 19-20, 2001.)

Count 1A(4) consisted of numerous discourteous remarks made to Huddle over the three days of trial.

B. Prior Discipline

In April 2002, the commission ordered Judge McBrien publicly admonished after his misdemeanor conviction for violating Penal Code section 384a. That section prohibits the willful or negligent cutting or mutilation of any tree growing upon public land or the land of another without permission. Judge McBrien's conviction arose out of the 1999 cutting of trees and removal of limbs from trees that were growing in a nature center located in a public park. As set forth in the admonishment, the trees included mature oaks, and were cut for the purpose of improving the view of a nearby river from the McBrien residence. His conduct violated canons 1 (a judge shall observe high standards of conduct so that the integrity and independence of the judiciary will be preserved), and 2 (a judge shall respect and comply with the law and act at all times in a manner which promotes public confidence in the integrity and the impartiality of the judiciary). His conduct was prejudicial to the administration of justice which brings the judicial office into disrepute. (Exh. 4, citing Cal. Const., art. VI, § 18, subd. (d).)

C. Appreciation of Misconduct

"A judge's failure to appreciate or admit to the impropriety of his or her acts indicates a lack of capacity to reform." (Decision and Order Removing Judge Michael E. Platt from Office, Inq. 162 (2003), p. 15 [*Platt v. Commission on Judicial Performance* (review den. Feb. 19, 2003, S111125)]; see also *Broadman v. Commission, supra*, 18 Cal.4th at p. 1111 [commission properly based disciplinary recommendation on judge's "unwillingness to accept responsibility for clearly established misconduct"].) In 2005, the commission removed Judge

Ross partly due to his "unceasing attempts to distance himself from his actions, including by casting blame and aspersions on others." (*Ross, supra*, p. 65.)

In his response to the commission's investigation letter, his answer, at his deposition and at the hearing, Judge McBrien has demonstrated no understanding of the impropriety of his conduct.

Though he walked out in the middle of a trial and never returned, Judge McBrien denies that he violated Carlsson's due process rights or his right to a fair trial (count 1A(1)). Nor does he think it was wrong for him to have threatened Huddle with contempt where there was no valid court order to support such a finding, and where the threat was made in an effort to obtain evidence irrelevant to the case before him so that he could conduct an improper investigation into a possible crime (count 1A(2)). The masters found that Judge McBrien became embroiled in the *Carlsson* case, engaged in an inappropriate investigation and failed to disclose his conduct to the parties, but he denies any wrongdoing (count 1A(3)). The masters found that Judge McBrien was discourteous and spoke to Huddle in a derogatory manner; the judge denies it (count 1A(4)). (R.T. 32:9-19, 184:8-13, 143:15–144:2, 179:3–181:12; exh. 5, p. 35:2-5.)

The only thing Judge McBrien believes that he did poorly was to leave an "incomplete" record which gave the public the misperception that he had done something wrong. When asked at the hearing about his admission in his letter to the commission that he "acted badly" for which he "deserved to be rebuked" (exh. 3), Judge McBrien explained that he failed to keep in mind "the need to appear to the public that I had completed everything." He was then asked:

> Q. So are you saying that the only thing you feel that you did wrong in this whole case is to leave a record that is misleading?
>
> A. Incomplete.
>
> Q. Incomplete. You did nothing else wrong?

A. I don't believe that I did.
(R.T. 184:8-13.)

D. Judge McBrien's Integrity

"Honesty is a minimum qualification for every judge. (*Kloepfer v. Commission on Judicial Performance* (1989) 49 Cal.3d 826, 865 (*Kloepfer*).) If the essential quality of veracity is lacking, other positive qualities of the person cannot redeem or compensate for the missing fundamental. (*Ibid.*)" (Decision and Order Removing Judge Diana Hall from Office, Inq. 175 (2006), at p. 26). Judge McBrien's shifting and often contradictory explanations for his actions and his misleading testimony demonstrate a lack of integrity.

In his response to the commission, in his answer, and again at his deposition, Judge McBrien claimed that the Emergency Protective Order (EPO) must have been lengthy and complex or he would have returned to the courtroom. This was disproven by the phone records which show that the call lasted for less than two minutes. (Exh. 2, p. 2; answer, p. 3; exh. 5, p. 62:5-17; exh. 15.) The truth is that he handled the brief call and left the courthouse.

Under oath at his deposition, Judge McBrien testified that he offered the attorneys additional time beyond the two-day estimate, but at the hearing he conceded that he had never offered more time. (Exh. 5, p. 17; R.T. p. 32.)

In his answer (p. 4), Judge McBrien claimed that Carlsson's expert witness had completely testified and was only providing surrebuttal testimony on matters to which he had already testified. The transcript shows that the expert was testifying about a large mathematical error he had made in his appraisal – a newly raised issue.

Judge McBrien testified at his deposition that he did not return to the courtroom after the EPO call because "there was nobody there." The masters instead found that, after the EPO call, the judge "left the courthouse while all the interested parties were still waiting for him to return to the courtroom" without

determining whether the parties were still present. (Exh. 5, p. 22; masters' rpt., p. 122.)

The judge claimed in his response that he wanted the Statements of Economic Interests in part because they would set forth an opinion from Carlsson regarding the value of the fourplex and the amount of rental income from it. But, during the hearing, "Judge McBrien conceded he was familiar with Statements of Economic Interests ... and that the documents he requested Mr. Carlsson to produce would not have contained any valuation or income information." (Exh. 1, p. 3; masters' rpt., p. 130.)

Judge McBrien testified under oath at his deposition and at the hearing that he wanted the Statements of Economic Interests because he thought the Fair Political Practices Commission (FPPC) might be able to place a lien on the property if Carlsson had not disclosed the fourplex. The masters rejected this testimony, pointing out that the judge later admitted that he had never heard that the FPPC had the power to place a lien on or confiscate property. Moreover, Judge McBrien ruled in the *Carlsson* case without the documents which, as the masters found, "refutes his assertion that he needed the documents, or that he believed that nondisclosure might have interfered with the disposition of the fourplex, which he ordered sold." (Masters' rpt., pp. 130–131.)

In his letter to the commission (exh. 3), Judge McBrien admitted that he wanted the Statements of Economic Interests because Carlsson's testimony indicated "possible criminal activity." At the hearing, however, Judge McBrien claimed that this statement in his letter was wrong "because at the time he wrote the letter he did not have the benefit of the trial transcript to refresh his recollection as to his reasons." (Masters' rpt., p. 57.) However, the letter itself contains citations to the trial transcript, so he clearly had access to it when he wrote the letter. (Exh. 3.)

In addition, Judge McBrien gave untrue and misleading testimony at the hearing about the facts underlying his prior discipline. He repeatedly claimed that

the incident involved only "one limb" from one tree and that the "real" reason it was cut was for fire safety, not view enhancement. He explained that he just wanted to let the public and the media know what actually happened. (R.T. 580:2–582:22, 606:20–613:1.) But his testimony was proven false by his prior sworn testimony and court documents from the tree cutting case. (Exhs. 45, 46.) In respondent's exhibit P, Judge McBrien tried to explain this away by claiming that he meant that he only "saw" one limb fall to the ground. But that is not what he had testified to at the hearing.

Attempts to mislead the commission are especially egregious. "There are few judicial actions in our view that provide greater justification for removal from office than the action of a judge in deliberately providing false information to the Commission in the course of its investigation into charges of wilful misconduct on the part of the judge." (*Adams v. Commission, supra*, 10 Cal.4th at p. 914.) "'[D]eception is antithetical to the role of a Judge who is sworn to uphold the law and seek the truth." (*In the Matter of Collazo* (1998) 91 N.Y.2d 251 [668 N.Y.S.2d 997, 691 N.E.2d 1021, 1023] [removing judge for deceitful conduct during investigation of initial wrongdoing].)

E. Likelihood of Future Violations

In 2002, Judge McBrien was publicly admonished for serious misconduct, but has now attempted to disavow much of the conduct on which that discipline was based. In the current case, after walking out on the trial, he had ample time to reconsider and correct his actions, but he did not. Moreover, he acknowledges no wrongdoing, but instead attempts to blame the attorneys. (R.T. 97:22–98:17, 111:6–113:8, 125:6–126:4, 128:4-15.) These factors make it likely that he would commit further misconduct if allowed to remain on the bench.

F. Impact of Misconduct on the Judicial System

Judge McBrien's misconduct has had a significant adverse impact on the judiciary. His conduct in walking out of a trial before completion with a witness testifying generated negative publicity and resulted in a reversal on appeal costing the parties substantial expense and delays. Such misconduct is particularly serious in family law cases since "[m]atters of domestic relations are of the utmost importance to the parties involved and also to the people of the State of California." (*In re Marriage of Carlsson* (2008) 163 Cal.App.4th 281, 291, citing *Elkins v. Superior Court* (2007) 41 Cal.4th 1337, 1357–1358.) His improper threatening of contempt, embroilment in the *Carlsson* case, sending evidence of a crime to Carlsson's employer, and continuing to preside over the case without giving notice of his actions to the parties, also significantly lower public esteem for the judiciary.

V. CONCLUSION

Given Judge McBrien's prior public admonishment and the seriousness of his current misconduct, he should, at a minimum, be publicly censured. His false and misleading testimony while under oath, his lack of understanding of the impropriety of his conduct, and the likelihood of future violations may warrant his removal from judicial office.

Dated: July 7, 2009.

Respectfully submitted,

Andrew Blum, Examiner for
Commission on Judicial Performance

PROOF OF SERVICE

I, the undersigned, am a citizen of the United Sates, over the age of 18 years, and not a party to or interested in the within action. My business address is 455 Golden Gate Avenue, Suite 14400, San Francisco, California 94102.

On July 7, 2009, I served the attached:

Examiner's Opening Brief to the Commission

on all interested parties in said cause, by delivering the original or a true copy thereof as follows:

☒ **(BY FEDERAL EXPRESS)** I sent the original or a true copy thereof enclosed in a sealed envelope to be delivered to Federal Express for overnight service to the office(s) of the addressee(s).

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BY HAND DELIVERY (July 8, 2009)
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on July 7, 2009, at San Francisco, California.

Kathleen A. Vota

Kathleen A. Vota