

# CALIFORNIA JUDICIAL CONDUCT HANDBOOK

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**Part I**  
**INTRODUCTION**



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### I. THE CENTRAL PRINCIPLE OF BEING A JUDGE AND INTRODUCTION

#### § 1:1 Honesty and integrity of decisions

**Purpose of this book.** The *California Judicial Conduct Handbook*<sup>1</sup> is intended to assist judges—those who administer justice according to law in our democracy—in the performance of their duties by providing, in one place, a source of information on the standards expected of them and, most important, a basis for an understanding of the essence of what being a judge is about.

**The Central Principle of Being a Judge.** The Central Principle of Being a Judge (the Central Principle) is to ensure the honesty and integrity of the process of judicial decisionmaking and of the decisions of judges. It provides a single foundational idea unifying the elements of judging based on constitutional provisions, statutes, precedents, the rules on procedure, and the California Code of Judicial Ethics governing the conduct of judges in court and in private life.

The Central Principle is described in the Supreme Court’s Advisory Committee on the California Code of Judicial Ethics as follows:

“The basic function of an independent, impartial and honorable judiciary is

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**[Section 1:1]**

<sup>1</sup>The Authors refer to this fourth edition of the *California Judicial Conduct Handbook* as “the *Handbook*” or “*Handbook*”.

to maintain the utmost integrity in decision making, and this code should be read and interpreted with that function in mind.”<sup>2</sup>

The idea of a central principle derives from the long historic development of the idea that those who sit in judgment on the lives of others must render honest decisions.<sup>3</sup> The book of Deuteronomy contains this emphasis on the integrity of decisions expected of judges:

“18. Judges and officers shalt thou make thee in all thy gates, which the Lord thy God giveth thee, tribe by tribe; and they shall judge the people with righteous judgment. 19. Thou shalt not wrest judgment; thou shalt not respect persons; neither shalt thou take a gift; for a gift doth blind the eyes of the wise, and pervert the words of the righteous. 20. Justice, justice shalt thou follow, that thou mayest live, and inherit the land which the Lord thy God giveth thee.”<sup>4</sup>

In the Republican Period in Roman history (roughly 500 B.C. to 30 B.C.) the emphasis on honesty and integrity is made in the Law of the Twelve Tablets of that time, with a bit stronger language than Deuteronomy.

“How is it possible that these laws be considered harsh? Unless you think that a law is harsh that punishes a judge or arbiter with capital punish-

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<sup>2</sup>Advisory Com. com., Cal. Code Judicial Ethics, canon 1. In 1992 the Central Principle was included in the Code of Judicial Conduct. It remained in the Code of Judicial Ethics adopted by the California Supreme Court in 1996. The history of judicial ethics in California, including an explanation of how the Code of Judicial Conduct became the Code of Judicial Ethics, is discussed in the *Handbook*, section 1:2. Footnote 3 addresses the evolution of the Central Principle.

<sup>3</sup>The Central Principle of Being a Judge evolved from Judge Rothman’s writing of the *Handbook* beginning in the mid-1980s. He was stirred by a question posed by Leon Kass, a friend and professor at the University of Chicago, who asked whether there was an “inherent ethic” that is basic to judicial ethics (See Kass, *Toward a More Natural Science* (1985), pp. 224–246).

In the first edition of the *Handbook*, in 1990, Rothman viewed the idea of a central principle as the Central Principle of Judicial Ethics. When the California Judges Association amended the California Code of Judicial Conduct in 1992 the authors included the substance, but not the name, of the Central Principle of Judicial Ethics. In 1995, following the adoption of Proposition 190 (see *Handbook*, § 1:11), the Supreme Court Advisory Committee included the same substance of the central principle in the Advisory Committee Commentary to Canon 1 of the new Code of Judicial Ethics. In the third edition of the *Handbook*, in 2008, Rothman changed the title of the central principle to the Central Principle of Being a Judge based on the conclusion that judicial ethics are at the essence of what judging is about. (See *Handbook*, §§ 1:1, 1:2, 1:11.)

<sup>4</sup>Deuteronomy, 16:18-20. See Hertz, et al. *The Pentateuch and Hoftorahs* (2d ed. Sancino Press 1967), pages 820 to 821. The commentary to verse 19 includes these notes: “wrest” means pervert; “respect persons” is based on the Hebrew idiom “showing partiality”; and “gift” means a bribe. In the further explanation of this verse, the author points out that the judge was not to yield to a desire to render an unjust decision out of pity for a poor person, or of concern of shaming a rich man. In regard to verse 20 the author notes that the Prophet Isaiah used the one word Tzedakah, meaning “triumph of right in the world,” for “justice” and “victory.”

ment, if he had clearly been shown to have accepted money to influence his decision.”<sup>5</sup>

**Accomplishing the Central Principle.** Accomplishing the goal of ensuring the honesty and integrity of decisions is probably the most difficult and subtle of tasks. It is an activity that takes place in the privacy of a judge’s mind. Unless the judge says something revealing or provides a nonverbal clue, no one else would know whether the judgment was guided by fear of public opinion, desire for advancement, favoritism, or personal bias. Moreover, wrested judgment may also be influenced by unconscious factors.<sup>6</sup>

The fact that distortion in judgment may not be conscious makes it no less a breach of the Central Principle because part of the judicial responsibility is to know what is influencing one’s decision. In spite of the importance of this issue, there are instances, though rare, where disciplinary action has resulted from the decision-making process. To serve justice, the Central Principle needs to move to the top of one’s consciousness.

- Did I consciously or unconsciously allow the intrusion of insidious bias to command?
- Did I allow my caseload and time pressures to transcend justice?
- Have I pretended to hear when, in fact, I did not listen?
- Have I failed to throw off the role of advocate on assuming the bench?
- Have I bowed to popular opinion, reaching decisions to gain public favor, career advancement, electoral victory, or to please the powerful?

Part III of this chapter (sections 1:20 through 1:45) provides some helpful ideas, information, and tools to help accomplish the goal of maintaining and nurturing honesty and integrity—the Central Principle of Being a Judge.

This unifying idea of the Central Principle, of what judging is all about, not only provides a judge with a clear focus on the goal of what it means to be a judge, but also gives a judge a single guidepost when faced with any question, whether it be an ethics issue or any other issue where the judge must choose which path to take and what decision to make. It is the guide to doing what is right (see Pillar VII, *Handbook*, § 1:37).

As a judge you sit in judgment of disputes of others. You are responsible for protecting the interests of those who are not able to take care of themselves. In each of these areas, judges hold a position of enormous importance, as set out in the Federalist Papers:

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<sup>5</sup>Monahan, *The Problem of ‘The Judge Who Makes the Case His Own’: Notions of Judicial Immunity and Judicial Liability in Ancient Rome* (2000) 49 *Cath.U. L.Rev.* 429, 441.

<sup>6</sup>*Handbook*, § 2:15.

“Justice is the end [goal] of government. It is the end of civil society. It ever has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit.”<sup>7</sup>

Constitutions, statutes, rules, precedents, and so forth are tools that serve the judge’s ability to understand the Central Principle and guide the judge’s actions. But, the most important tools are in the judge’s mind, honor, and heart.

### § 1:2 Judicial ethics: the core of the Central Principle

When you are examining the application of a judicial ethics provision to an issue you face, the question is not whether it is good for *you*, serves *your* interests, or meets *your* needs. Understanding the intricacy of the ethical rules is sometimes a complex undertaking. The ultimate objective of ensuring the integrity and honesty of decisions, this single idea upon which all judicial ethics rest, provides clarity and solutions to complexities. As set out in the Advisory Committee Commentary to canon 1, “this code [of judicial ethics] should be read and interpreted” with “the utmost integrity in decisionmaking” in mind.

If judging is about the integrity and honesty of your decisions, what could be more important than the ethical principles that guide judges? In a sense, ethics is the whole of what judges do. On examining the provisions of the Code of Judicial Ethics, although a few of the canons could be seen as more narrowly directed, one finds that essentially all the provisions of the code are aimed at ensuring justice; i.e., ensuring the integrity and honesty of decisions.

**The nexus between ethics and the integrity of decisions.** The unifying principle of judging is simple as compared to contemplating the Unifying Principle of the Universe. A judge just needs to keep the Central Principle in the background as the judge goes about life in and out of court, like a sentry guarding thoughts. Judges must be aware of their conduct in practically every aspect of their lives—both public and private. Judges “must expect to be the subject of constant public scrutiny,” and “must accept restrictions on the judge’s conduct that might be viewed as burdensome by other members of the community and should do so freely and willingly.”<sup>8</sup>

Restraints on the conduct of a judge are justifiable where there is a rational nexus between the restraint, either in the courthouse or in private life, and the integrity of decisions and the decisionmaking process. Absent this connection, the conduct is permissible. Even if a connection exists, some conduct should not be restrained by the code because of significant overriding constitutional or other policy considerations.

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<sup>7</sup>The Federalist 51 No. 51, authored by Alexander Hamilton and/or James Madison, The Avalon Project, Yale Law School. Other sources attribute this paper to Madison.

[Section 1:2]

<sup>8</sup>Advisory Com. com., Cal. Code Jud. Ethics, canon 2A.

CODE OF JUDICIAL ETHICS

CENTRAL PRINCIPLE OF  
BEING A JUDGE

Judge’s conduct in court  
and judicial activities

and

NEXUS>

Honesty and integrity  
in decisionmaking in  
judicial proceedings

nonjudicial activities  
outside of court and  
in personal life

In the Advisory Committee Commentary to canon 1, the Code of Judicial Ethics reflects the concept underlying the Central Principle of Being a Judge as follows: “A judge shall uphold the integrity and independence of the judiciary.” The canon goes on to explain that “[a]n independent, impartial and honorable judiciary is indispensable to justice in our society,” and instructs that “[a] judge should participate in establishing, maintaining, and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary is preserved.”

**§ 1:3 Introduction to the *Handbook***

**Purpose of the *Handbook*.** The purpose of the *Handbook* is to introduce judges to the Central Principle of what it means to be a judge and provide an understanding of the standards and rules discussed in the *Handbook*, which are all part of this unifying principle.

Having set out the foundation to what judging is about and the importance of judicial ethics to that foundation, the remainder of this chapter includes: an overview of judicial conduct and misconduct using the Summary of Judicial Discipline Statistics (*Handbook*, §§ 1:20 through 1:23); the tools available for judges to ensure the honesty and integrity of the process of decision making and decisions, including the Eight Pillars of Being a Judge (*Handbook*, §§ 1:30 to 1:38); and additional tools in support of the Eight Pillars (*Handbook*, §§ 1:40 to 1:45).

The chapter concludes with an explanation of the application of all or some of the provisions of the Code of Judicial Ethics to persons serving in various judicial capacities, including retired and temporary judges (*Handbook*, §§ 1:60 through 1:66).

The balance of the *Handbook* (chapters 2 to 12) provides detailed discussions of the basic tools for judges to ensure the honesty and integrity of their decisions.

**Conduct and misconduct.** In the process of integrating the available materials related to judicial conduct and ethics in California, the *Handbook* includes the development of the law of judicial conduct and

ethics: the statutes relevant to judicial conduct and ethics; the Code of Judicial Ethics; decisions of the California Supreme Court and the Commission on Judicial Performance; opinions of the Ethics Committee of the California Judges Association and the California Supreme Court's Committee on Judicial Ethics Opinions;<sup>9</sup> and other materials.

The *Handbook* contains descriptions of public and private discipline from the Commission on Judicial Performance and the Supreme Court, as well as examples and guidance concerning ethical issues and conduct, both improper and proper. The *Handbook* also contains guidance from the authors on ethics issues that have not generated opinions from any of the above sources.

It is hoped that by examining the real issues judges have encountered, both in questions they have raised and discipline that has been imposed, the *Handbook* will foster understanding of the Code of Judicial Ethics and help judges meet the high expectations placed on them to render fair and impartial justice, and avoid judicial misconduct.

The California judiciary has a long history of attention to high standards of conduct and has been responsible for the creation and enforcement of these standards, including the obligation to avoid even the appearance of impropriety.

Since the early 1980's, judicial conduct and ethics education has become an integral part of the judicial education system in California and an element of practically every judicial education program. The Central Principle and the Eight Pillars have been integrated into California's judicial education.

### ***Handbook Appendices***

**Appendix A:** The Central Principle of Being a Judge and The Eight Pillars of Being a Judge, a summary of the material in sections 1:1 and 1:30 through 1:38.

**Appendix B:** Guide to Self-Control in the Courtroom (see *Handbook*, §§ 1:43, 4:5);

**Appendix C:** Direct Contempt Checklist;

**Appendix D:** Ex Parte Communications Guide (*Handbook*, ch. 5, I.);

**Appendix E:** Disqualification and Disclosure Guide to the Decision-making Process;

**Appendix F:** Disqualification and Disclosure Analysis of Code of Civil Procedure § 170.1, subdivision (a)(2);

**Appendix G:** Disqualification and Disclosure Analysis of Code of Civil Procedure § 170.1, subdivision (a)(6)(A);

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### **[Section 1:3]**

<sup>9</sup>Section 1:40 of the *Handbook* has a discussion of formal and informal opinions of the Ethics Committee of the California Judges Association and the California Supreme Court Committee on Judicial Ethics Opinions.

**Appendix H:** Gift Guide (*Handbook*, ch. 9, IV.);

**Appendix I:** Compensation and Honoraria Guide (*Handbook*, ch. 9, III.);

**Appendix J:** Travel Reimbursement Guide (*Handbook*, ch. 9, V.);

**Appendix K:** Wedding Checklist (*Handbook*, ch. 9, VI.);

**Appendix L:** Community Activity Guide (*Handbook*, ch. 10).

**Systems aimed at making processes clear.** All the appendices are designed as guides on important and complex subjects of ethics and conduct covered in the *Handbook*. Indeed many subjects discussed throughout the *Handbook* provide systematic processes. The purpose of the guides is to provide judges with a system for analyzing a variety of issues. If you are faced with any of the issues that has a guide or checklist, get the guide or checklist in front of you, along with the chapter or section in the *Handbook*.

**Section numbers of Fourth Edition.** The Fourth Edition of the *Handbook* follows the section numbers adopted in the Third Edition with some exceptions. It also has been necessary to rewrite and alter the structure of chapter 1 and thus change the content of the sections.

**Use of words and terms in the *Handbook*.**

*Judge.* The word “judge” in the *Handbook* refers to judicial officers who are bound by the Code of Judicial Ethics.<sup>10</sup>

*Code and canon.* Unless otherwise noted, the *Handbook* uses “code” or “canon” to refer to the California Code of Judicial Ethics and provisions therein.

*Discipline.* As used in the *Handbook*, “discipline” refers to any form of disciplinary action by the California Supreme Court or the Commission on Judicial Performance (advisory letter, public reproof, private and public admonishment, censure, removal from office, and bar from receiving judicial assignments).

## II. CALIFORNIA CODE OF JUDICIAL ETHICS

### § 1:11 History and evolution of the Code of Judicial Ethics

**The early development of an ethics code.** The first judicial ethics standards were developed by the American Bar Association (ABA) in 1924. Ultimately they were adopted by many state bar associations around the country, including the California State Bar in 1928, a year after the bar was created.

In 1949, the Conference of California Judges (precursor to the California Judges Association) adopted a voluntary, self-imposed, Code of Judicial Conduct.

The California Constitution was amended in 1960 to create the Com-

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<sup>10</sup>See *Handbook*, § 1:61.

mission on Judicial Qualifications (later renamed the Commission on Judicial Performance). Although the Constitution did not call for creation of a detailed set of specific rules of judicial conduct until 1995, the California Supreme Court in *Geiler v. Commission on Judicial Qualifications*<sup>11</sup> referenced the first two canons of the ABA's Code of Judicial Conduct, proposed in 1972, as support for the court's decision. These two canons contain practically the same language as the current Code of Judicial Ethics. In 1974, the Conference of California Judges adopted the ABA Standards of Judicial Conduct, with some modification, to take effect in 1975.

In the years following *Geiler*, provisions of the California Judges Association Code of Judicial Conduct were cited in judicial disciplinary decisions of the California Supreme Court, even though the grounds for discipline in the California Constitution were not based on provisions of the Code of Judicial Conduct. In *Spruance v. Commission on Judicial Qualifications*,<sup>12</sup> the Supreme Court noted its comments about the ABA's Code of Judicial Conduct that the canons "might usefully be consulted to give meaning to the constitutional standards," such as "willful misconduct" and "conduct prejudicial."<sup>13</sup> In *Cannon v. Commission on Judicial Qualifications*,<sup>14</sup> the Supreme Court "acknowledged the applicability of the code to any conduct we as judges participate in after its effective date." Finally, the Supreme Court further endorsed the California Code of Judicial Conduct by holding that "[w]e therefore expect that all judges will comply with the canons. Failure to do so suggests performance below the minimal level necessary to maintain public confidence in the administration of justice."<sup>15</sup>

**The California Supreme Court takes on the writing of the code.** In 1994, Proposition 190 was adopted to amend a number of provisions of the California Constitution related to the Commission on Judicial Performance. One of the provisions required the California Supreme Court to adopt a Code of Judicial Ethics,<sup>16</sup> which the Supreme Court did in 1995, effective January 15, 1996. The Code has been amended a number of times since being adopted. The process for amending the Code includes the development of recommendations to the Supreme Court from the Supreme Court Advisory Committee on the Code of Judicial Ethics.<sup>17</sup> That committee, with the Court's permission, usually submits its recommendations for public comment.

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[Section 1:11]

<sup>11</sup>*Geiler v. Commission on Judicial Qualifications* (1973) 10 Cal.3d 270, 281–282.

<sup>12</sup>*Spruance v. Commission on Judicial Qualifications* (1975) 13 Cal.3d 778, 796.

<sup>13</sup>See Cal. Const., art. VI, § 18, subd. (d).

<sup>14</sup>*Cannon v. Commission on Judicial Qualifications* (1975) 14 Cal.3d 678, 707.

<sup>15</sup>*Kloepfer v. Commission on Judicial Performance* (1989) 49 Cal.3d 826, 838, fn. 6.

<sup>16</sup>Cal. Const., art. VI, § 18, subd. (m).

<sup>17</sup>The Supreme Court Advisory Committee on the Code of Judicial Ethics has

Along with the Central Principle (*Handbook*, § 1:1), the California Supreme Court has set very high standards of conduct for California’s judges, including the following: “The ultimate standard for judicial conduct must be conduct which constantly reaffirms fitness for the high responsibilities of judicial office.”<sup>18</sup>

### § 1:12 Compliance is mandatory

Because the Constitution requires the California Supreme Court to “make rules for the conduct of judges,” compliance with such a code is mandatory.<sup>19</sup> Moreover, use of the word “shall” in the Code of Judicial Ethics mandates compliance.

### § 1:13 Uniform application throughout California

The provisions of the Code of Judicial Ethics are applied uniformly throughout the state, regardless of the size of the community in which the judge presides. It is not a mitigating factor that misconduct took place in a small community where contacts between judges and lawyers are closer than in a large community.<sup>20</sup>

In the case of *Inquiry Concerning Wasilenko*, the Commission on Judicial Performance reiterated this concept with absolute clarity:

“By their terms, the canons impose uniform statewide standards. Whenever an assigned case involves a party the judge ‘knows,’ the judge must be particularly vigilant to ensure the appearance and reality of independence and impartiality. The situation may arise more frequently in a small town than a major metropolitan area, but the judge’s ethical duties are the same irrespective of population statistics. In any case, the demographics of Marysville and Yuba County are irrelevant to the misconduct engaged in by Judge Wasilenko.”<sup>21</sup>

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continued to review matters concerning the Code of Judicial Ethics since the code was adopted in 1996. The first chair of this committee was Justice Charles S. Vogel, of the Second District Court of Appeal, now retired, who served from 1995 through 2003. Justice Richard D. Fybel, of the Fourth District Court of Appeal, has served as chair of the committee since 2004.

<sup>18</sup>*Geiler v. Commission on Judicial Qualifications*, *supra*, 10 Cal.3d at p. 281.

#### [Section 1:12]

<sup>19</sup>Cal. Const., art. VI, § 18, subd. (m); see Preamble, Cal. Code Jud. Ethics (“All members of the judiciary must comply with the code. Compliance is required to preserve the integrity of the bench and to ensure the confidence of the public”); see also Advisory Com. com., Cal. Code Jud. Ethics, canon 1.

#### [Section 1:13]

<sup>20</sup>*Fletcher v. Commission on Judicial Performance* (1998) 19 Cal.4th 865, 918–919, fn. 24. The dissent raised this issue. (*Id.* at p. 922 (dis. opn. of Kennard, J.).)

<sup>21</sup>*Inquiry Concerning Wasilenko* (2005) 49 Cal.4th CJP Supp. 26, 46. See *Handbook*, § 7:65 (discussion of small communities in relation to issues of disqualification and disclosure).

**§ 1:14 Structure and interpretation of the code**

The Preamble to the Code of Judicial Ethics provides guidance for interpretation of the canons: “The canons should be read together as a whole, and each provision should be construed in context and consistent with every other provision. They are to be applied in conformance with constitutional requirements, statutes, other court rules, and decisional law.”

**Advisory Committee Commentary.** The Preamble also explains that the Advisory Committee Commentary following each canon, “by explanation and example, provides guidance as to the purpose and meaning of the canons,” but the commentary “does not constitute additional rules and should not be so construed.”

**III. JUDICIAL CONDUCT AND MISCONDUCT****§ 1:19 Introduction to judicial conduct and misconduct**

Before discussing the tools to ensure the honesty and integrity of decisions, and understanding the detailed explanations of judicial conduct in the chapters that follow, it is useful to have a general look at the sorts of conduct on and off the bench that result in judicial discipline. The following sections examine data related to certain situational factors (judicial experience, age, size of court, election versus appointment, gender, and prior discipline) as they may affect judicial conduct.

The introduction to conduct and misconduct concludes with some thoughts on the causes of misconduct (*Handbook*, § 1:23) before moving on to the tools for ensuring the honesty and integrity of decisions.

**§ 1:20 Summary of discipline statistics**

The California Commission on Judicial Performance, created in 1960, was the first such disciplinary organization in the United States. The Commission on Judicial Performance published a Summary of Discipline Statistics, 1990–2009.<sup>22</sup> The following sections focus on the sorts of conduct that create ethical problems and include thoughts on the potential causes of judicial misconduct. For example, understanding that judicial misconduct related to demeanor is a recurring reason for judges being disciplined should encourage judges to find and understand how they may prevent conduct faults.

In examining the data from this 20 year study, it should be noted that the number of disciplinary actions by the commission decreased follow-

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**[Section 1:20]**

<sup>22</sup>The 20 year study was preceded by a 10 year study published in 2002. These studies can be found on the Commissions web site at <http://cjp.ca.gov/publications.HTM>.

ing the 1999 decision in *Oberholzer v. Commission on Judicial Performance*.<sup>23</sup>

**Avoiding judicial discipline is not an end in itself.** In the following material, and throughout the *Handbook*, there will be many references to judicial misconduct and suggestions on means for avoiding misconduct. As will be pointed out again in the *Handbook*, section 1:41, avoiding misconduct is an important goal. But the purpose of understanding the good sense and rationale of ethics-related rules and best practices and making them a part of one's life as a judge is to guarantee that judicial proceedings are conducted and decisions are rendered with honesty and integrity—the Central Principle of Being a Judge. The skill of avoiding misconduct is meaningless if it is not accompanied by an intention to ensure the goal of maintaining the honesty and integrity of decisions, i.e., the goal of being a judge.

With the above in mind, the *Handbook* contains detailed examinations of the provisions of the Code of Judicial Ethics and other guides to appropriate judicial conduct, as well as broad concepts for an understanding of the thinking processes required to meet the high standards expected of judges. As a beginning to this study, see the Eight Pillars and related tools in sections 1:30 through 1:45. Then move on to Chapters 2 through 12 to become familiar with the details of all the elements of judicial conduct, on and off the bench.

### § 1:21 Top ten categories of misconduct<sup>24</sup>

The Commission on Judicial Performance places judicial misconduct into 25 categories. Of these 25, the following chart shows the top ten types of misconduct in each of the 10-year periods included in the study.

<i>Type of Discipline Type</i>	<i>% of Discipline for Each Type</i>	
	<i>1990–1999</i>	<i>2000–2009</i>
Demeanor/decorum	12.73	7.18
Disqualification/disclosure/postdisqualification conduct	9.52	8.40
Bias/appearance of bias—not directed toward particular class	8.45	9.73
On-bench abuse of authority in performance of judicial duties	8.45	9.35

<sup>23</sup>In *Oberholzer v. Commission on Judicial Performance* (1999) 20 Cal.4th 371, the California Supreme Court ruled that advisory letters were a form of discipline rather than an informal action by the Commission on Judicial Performance. In the period 1990 through 1998, the commission issued a yearly average of 36.5 advisory letters, whereas the average from 2000 through 2009 was 17.5 per year. (Com. on Jud. Performance Ann. Rep. (2009), p. 12.)

[Section 1:21]

<sup>24</sup>Com. on Jud. Performance, Summary of Discipline Statistics, 1990–2009, p. 10.

<i>Type of Discipline Type</i>	<i>% of Discipline for Each Type</i>	
	<i>1990–1999</i>	<i>2000–2009</i>
Failure to ensure rights	8.85	7.25
Ex parte communications	7.24	6.30
Off-bench abuse of office/misuse of court information	6.43	5.73
Abuse of contempt and abuse of sanctions	6.30	3.44
Administrative malfeasance/improper comment, treatment	4.42	4.77
Decisional delay/false salary affidavits	4.96	3.24

**Most misconduct occurs when performing judicial duties.** All of the categories in the top ten involve misconduct or a form of abuse in performance of judicial duties on and off the bench. Some of the categories not in the top ten also relate to misconduct in the performance of judicial duty.<sup>25</sup> When these are combined with the top ten, they represent 88.51 percent of discipline actions in the 1999 to 2009 period. This means that 11.49 percent of judicial discipline actions relate to conduct in the judge’s private life.<sup>26</sup>

Although many of the Code of Judicial Ethics provisions relate to conduct in private life (see canons 2, 4, and 5), misconduct in private life represents a small percentage of discipline actions. Because the overwhelming majority of discipline actions relate to the performance of judicial duties, judges need to stay especially focused on what takes place in the courtroom and the courthouse (see Pillar II, *Handbook*, § 1:32). It is, of course, important that judges be attentive to all the provisions of the Code of Judicial Ethics, including canons 2, 4, and 5.

The performance of judicial duties means far more than complying with the Code of Judicial Ethics. Judges must manage the stresses inherent in overseeing court proceedings, along with exercising the care required in the performance of judicial duties. The court is the place

<sup>25</sup>The types of misconduct related to judicial duties that are not among the top ten are “bias/appearance of bias toward a particular class”, “commenting on a pending case”, “non-performance of judicial functions/attendance/sleeping”, “failure to cooperate/lack of candor with regulatory authorities”, “sexual harassment/inappropriate workplace gender comments”, “misuse of court resources”, and “inability to perform judicial duties/incapacity.” (*Id.*, Table A-8.2, Misconduct by Type, 1990–2009, p. A-15.)

<sup>26</sup>The eight types of misconduct that are not in the performance of judicial duties categories are: (1) “miscellaneous off-bench conduct”; (2) “gifts/loans/favors/ticket fixing”; (3) “improper political activities”; (4) “improper business, financial or fiduciary activities”; (5) “alcohol or drug related criminal conduct”; (6) “non-substance abuse criminal conduct”; (7) “substance abuse”; (8) and “pre-bench misconduct.” Ticket-fixing in the “gifts/loans/favors/ticket-fixing” category has a private life component, but is essentially a breach of judicial duties. Other than ticket-fixing, all of the “gifts/loans/favors” types of discipline are related to private life. (*Ibid.*)

where honesty and integrity are at the heart of what judges do. The pressures judges face in court are far greater than those faced by a judge in making decisions about private life activities. Consider the difference between deciding the question of whether you are disqualified in a case that arises halfway through a trial, versus contemplating whether to attend a political dinner next month. Both decisions are important and must be scrupulously examined, but the context in which the decisions are made is vastly different.

**Demeanor and decorum.** Demeanor and decorum have for decades been at the top of the list of judicial misconduct. Indeed, the number of cases of such judicial misconduct shown in the Summary of Judicial Discipline Statistics is probably significantly less than what actually takes place in the courtroom. How to avoid improper behavior in court, along with how to avoid “losing it,” should be a top priority for judges. The issue of demeanor and decorum is discussed at length in the *Handbook*, section 2:46, along with the tools set out in sections 1:30 through 1:45.

## § 1:22 Other circumstance and situational factors from the summary of discipline statistics

### a. Judicial Experience<sup>27</sup>

<i>Years on the bench at time of misconduct</i>	<i>Number of disciplinary actions per 100 judges</i>	
	<i>1990–1999</i>	<i>2000–2009</i>
0 through 2	3.09	1.46
3 through 6	3.67	1.51
7 through 11	3.40	1.93
12 through 16	3.15	2.13
17 or more	2.99	2.45

There seems to be relatively little difference in the number of discipline actions based on the number of years on the bench at the time of a judge’s misconduct in the 1990–1999 period, whereas this is not the case in the 2000–2009 period. The study of the 2000–2009 period raises a question as to whether length of time on the bench relates to incidence of misconduct.

There are all sorts of factors that might be at work, including mere happenstance, given that the number of cases involved is so small. It would, however, be in the judge’s interest, regardless of how long the judge has served, to review thought processes, get feedback (see *Handbook*, § 1:45), and keep a copy of the Central Principle and the Eight Pil-

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[Section 1:22]

<sup>27</sup>Com. on Jud. Performance, Summary of Discipline Statistics, 1990–2009, p. 10.

lars (Appendix A) under the bench blotter. Experienced judges might want to have a periodic look at the Eight Pillars and ask themselves: “Have I drifted into a pattern of conduct and decisionmaking based on ‘this is how I do things’ (i.e., ‘my way or the highway’)? Or, have I maintained a constant focus on and awareness of ‘the right way to do it’?”

**b. Age<sup>28</sup>**

The age of judges who have been disciplined show only minor differences in disciplinary actions.

<i>Years of age</i>	<i>Number of disciplinary actions per 100 judges</i>	
	<i>1990–1999</i>	<i>2000–2009</i>
30 through 39	3.43	1.50
40 through 49	3.14	1.47
50 through 59	3.48	2.07
60 or more	3.20	1.90

**c. Size of Court<sup>29</sup>**

The percentage of judges disciplined based on the number of judges in a county requires examination. It might be worth considering whether judges in smaller courts may be more prone to “the way we do things.” Consider the data below on the size of the court.

<i>Authorized positions of the court</i>	<i>Number of disciplinary actions per 100 judges</i>	
	<i>1990–1999</i>	<i>2000–2009</i>
1 through 2	4.87	4.56
3 through 9	5.07	2.74
10 through 42	4.01	2.30
43 through 428	2.85	1.62

In a smaller community, a judge is far better known, which may cause the judge to feel a greater sense of authority. If not well understood, this power, as with all power, has a potential for abuse. In addition, because the judge is so well-known, there is far more scrutiny of the judge’s conduct and decisions than one would expect in the relative anonymity of larger communities. Finally, the judge on a small court may be familiar with almost everyone who has business in the court. This creates greater potential for certain kinds of misconduct (e.g., *ex parte* com-

<sup>28</sup>*Id.*, p. 11.

<sup>29</sup>*Id.*, p. 12.

munications, disclosure and disqualification issues, and use and abuse of judicial office).

Small county judges need to remember that the Code of Judicial Ethics “impose[s] uniform statewide standards,” regardless “of population statistics.”<sup>30</sup>

#### **d. Appointment or Election**<sup>31</sup>

There is a notable difference in discipline between judges who are initially elected and those who are initially appointed.

<i>Status</i>	<i>Number of disciplinary actions per 100 judges</i>	
	<i>1990–1999</i>	<i>2000–2009</i>
Initially Appointed	3.15	1.65
Initially Elected	4.50	3.53

Although the appointment process for trial judges is not perfect, the fact that it involves two separate systems for gathering information about persons seeking judicial appointment provides a level of objectivity in determining the qualifications of a candidate that is missing in the electoral process. Moreover, the decision to vote for a candidate is usually devoid of objective information about the candidate’s possession of the qualifications needed to serve as a judge. Again, this does not guarantee that only the most qualified are appointed. Governors may be driven by factors other than the qualities necessary for being a judge, including the application of a political “litmus test” on issues that may come before the candidate if appointed.<sup>32</sup>

The above statistics on this subject are hardly so dramatic as to permit a generalized negative assumption about all elected judges. Elected judges, however, should be aware that data exist to indicate a greater likelihood of judicial misconduct, and this awareness will help in assuring attentiveness to the Central Principle and the Eight Pillars.<sup>33</sup>

#### **e. Gender**<sup>34</sup>

The Summary of Discipline Statistics found that “[m]ale judges were approximately twice as likely to be disciplined as female judges.” The following chart shows the percentage of female and male judges who were disciplined during each of the two ten-year periods.

<sup>30</sup>*Handbook*, § 1:13.

<sup>31</sup>Com. on Jud. Performance, Summary of Discipline Statistics, 1990–2009, p. 12.

<sup>32</sup>Canon 5B(1)(a) of the Code of Judicial Ethics addresses the impropriety of making commitments “with respect to cases, controversies, or issues that are likely to come before the courts.”

<sup>33</sup>See *Handbook*, § 1:30 et seq.

<sup>34</sup>Com. on Jud. Performance, Summary of Discipline Statistics, 1990–2009, pp. 11–12, appens. A-7, A-8.

<i>Gender</i>	<i>1990–1999</i>	<i>2000–2009</i>
% of women judges who were disciplined	1.71	1.23
% of male judges who were disciplined	3.64	2.12

#### **f. Prior Discipline**

Finally, of all the data in the Summary of Discipline Statistics, none is as compelling as the impact of prior discipline on the likelihood of further misconduct. It is enough to point out these striking findings: “From 1990 to 1999, 53.5 percent of all discipline was imposed on previously disciplined judges” and “[f]rom 2000 to 2009, 55.7 percent of all discipline was imposed on previously disciplined judges.”<sup>35</sup>

Given that more than half the discipline imposed was on previously disciplined judges, all judges owe it to their colleagues to help them avoid repeated misconduct.<sup>36</sup>

**Conclusion.** The purpose of this review of the commission’s Summary of Discipline Statistics over a 20-year period is not to bring on anxiety (see *Handbook*, § 1:41), but to illustrate the ways in which the tools discussed below provide a means for understanding the Central Principle and how to maintain a commitment to what being a judge is about.

#### **§ 1:23 Thoughts on the causes of misconduct**

**Standing in a roiling stream.** Imagine, there you are, black robe and all, standing in a raging stream. You see the water swirling around you, slippery algae-covered rocks under your feet, water splashing and vision blurred. You must stay focused on your mission: what am I supposed to be doing, or not doing. You must have constant awareness of what you see, hear, and feel. You must be cognizant of the need to remain poised, calm, balanced, aware of your reactions, and in total self-control in order to avoid being swept away by fear, anger, loss of mindfulness, and momentary distractions.

**“Why?”** The *Handbook* is not a psychoanalytic paper on why judges get in trouble, nor is it about the causes of judicial behavior. The circumstances and situational factors mentioned in the Summary of Discipline Statistics noted in the *Handbook*, section 1:22, are only a few of the possible factors that could be connected to conduct. They are not the cause of misconduct, but are something that a judge would want to be aware of.

The judicial ethics and conduct issues noted throughout the *Handbook*

<sup>35</sup>*Id.*, pp. 13–14.

<sup>36</sup>See Cal. Code Jud. Ethics, canon 3D(1); *Handbook*, § 1:45 (on “band of colleagues”).

show that judges face innumerable events and tasks in court and in private life that must be viewed in the context of what it means to be a judge. In any situation where the judge engages in misconduct, the question always follows: “What was he or she thinking?” Although one may feel the need to figure out the cause, the real issue is how the judge failed to perceive the problem and avoid the conduct. The challenge is not “the why” but “the how”: how did the judge fail in awareness, in not “seeing the ice on the road?”<sup>37</sup> Did the judge have the mental support system for productively negotiating hazards?

“**How?**” Sections 1:30 through 1:45 in particular and the rest of the *Handbook* in general provide the “tools” to help the judge respect the Central Principle of Being a Judge and observe the judicial conduct that is at the heart of being a judge. We begin with the Eight Pillars of Being a Judge, the first two pillars being mindfulness of who you are and mindfulness in the courtroom. These tools also include the “Notice-Reflect-Respond” system,<sup>38</sup> a methodology for dealing with conduct issues that arise in court proceeding, as well as in other aspects of being a judge—in court or in private life. This is a system for “seeing the ice on the road.”<sup>39</sup>

There are some judges, as with any group of people, who are unable to access self-awareness and mindfulness, and who lack the ability to avoid unproductive and damaging behaviors. Most people, however, have the capacity to be self-aware and are able to avoid missteps and can learn to do what is right. The goal of the *Handbook* is to provide information on what is expected of judges, and systems for dealing with the numerous issues and challenges of being a judge.<sup>40</sup>

**Ethics test for a judge.** When deciding whether a rule of judicial conduct or ethics applies in a particular circumstance, what test should you apply?

First of all, these are **not** the tests:

Will the rule serve MY interests?

Will the rule meet MY needs?

Will the rule make things more difficult for ME?

The only test that you, a judge, must follow is:

Will adherence to the rule ensure the Central Principle of Being a Judge and serve the public interest?

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[Section 1:23]

<sup>37</sup>See *Handbook*, § 1:43.

<sup>38</sup>See *Handbook*, § 1:43.

<sup>39</sup>Section 2:46 of the *Handbook* has a detailed discussion about developing the Notice-Reflect-Respond system. Section 2:46 also has a list of potential causes of improper demeanor, as well as signs and symptoms leading to improper demeanor.

<sup>40</sup>The appendices to the *Handbook* contain 12 guides and checklists on important subjects. The appendices are listed in section 1:3.

#### IV. THE EIGHT PILLARS OF BEING A JUDGE

##### § 1:30 The Eight Pillars of Being a Judge—Purpose<sup>41</sup>

Ensuring the honesty and integrity of decisions, i.e., following the Central Principle of Being a Judge, is a demanding task. It involves a process that ultimately takes place in the mind of the judge. Only the judge knows whether: (1) the process and decision exemplified honesty, integrity, honor, and truth; (2) the Central Principle was at the core of his or her conduct; or (3) these elements were ignored by pretense. Unless the judge revealed something during proceedings or provided a nonverbal clue, no one other than the judge will know whether the judgment was guided by fear of public opinion, desire for advancement, favoritism, political interests, personal biases, or was a result of other innumerable factors that can interfere with doing the right thing.

The following Eight Pillars focus on the thinking and organizational processes to help maintain a connection to judicial conduct and to the Central Principle.

##### § 1:31 Pillar I—Mindfulness of who you are

**Always be mindful that you are a judge—whether on the bench, at a party, or online.** As you go about your daily lives, awareness of who you are should be running in the background like an antivirus program. You are a “judge.” As you concentrate on this element of mindfulness, in time this awareness will be so much a part of you that as information, events, or perceptions enter, the idea that “*I am a judge*” is integral to your definition of self; you are a public figure who is seen as a symbol of justice. The essence of mindfulness “involves slowing down one’s mental processes enough to allow one to notice as much as possible about a given moment or situation, and then act thoughtfully based on what one has noticed. It sometimes is described as approaching each moment with a ‘beginner’s mind’ or ‘thinking about thinking while thinking.’”<sup>42</sup>

Mindfulness involves awareness of what you are thinking, saying or

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##### [Section 1:30]

<sup>41</sup>The Eight Pillars of Being a Judge were developed by David Rothman with the ideas, guidance, and assistance of Rod Cathcart and Rhoda Chang, attorneys and judicial educators at the Center for Judicial Education and Research. The Central Principle and the Eight Pillars have been the underlying structure of New Judge Orientation and, since 2012, the Qualifying Ethics programs.

##### [Section 1:31]

<sup>42</sup>Fogel, *Mindfulness and Judging* (Federal Judicial Center 2016), p. 2. The publication can be found at [http://www.fjc.gov/public/pdf.nsf/lookup/Mindfulness-and-Judging-Fogel-FJC-2016.pdf/\\$file/Mindfulness-and-Judging-Fogel-FJC-2016.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/Mindfulness-and-Judging-Fogel-FJC-2016.pdf/$file/Mindfulness-and-Judging-Fogel-FJC-2016.pdf). This resource also has a discussion of unconscious assumptions and reflective thinking useful in understanding Pillar IV (*Handbook*, § 1:31) and the Notice-Reflect-Respond system (*Handbook*, § 1:43).

doing. Mindfulness also means acquiring the wisdom to recognize and know your biases and prejudices so that they do not interfere with the duty to ensure fairness and impartiality in the proceedings, and honesty and integrity in decisionmaking (the Central Principle of Being a Judge).<sup>43</sup>

**Advancing the legitimate goals and objectives of being a judge.** Mindfulness here is the acute and constant awareness of who you are. As one who holds high office, a judge must be acutely and constantly aware that everything he or she does or says must be managed through the filter of identity with this high office. Whether you are the chief executive officer of a major company, senator, admiral, general, judge, or justice, your identity is intertwined with your title and position. What you do and say must always be in the service of (or, at the very least, be neutral to) the goals and objectives of your office. A judge needs to develop the mental process that allows for this kind of mindfulness to take place. The key question, of course, is whether the conduct undermines those legitimate goals and objectives of high office, leading to an examination of whether the conduct comports with the Central Principle of Being a Judge.

Think about this one small example of exercising mindfulness in public and private life: A lawyer (who is not a close personal friend) picks up the tab for your lunch. Does receipt of such a benefit from a lawyer, albeit small, advance the legitimate goals and objectives of your office? Does it help you, as a judge representing the judiciary, make honest decisions and advance the public perception of integrity, impartiality, and fairness?

**What is expected of a judge?** As noted in the *Handbook*, sections 1:1 and 1:2, the Central Principle is to ensure the honesty and integrity of decisions and the decision-making process. The Central Principle ensures that a judge's conduct in public and nonpublic life supports and honors these goals. Most of the conduct that reinforces the Central Principle is set out in the Code of Judicial Ethics and is based on the following foundational principles:

*Uphold the independence of the judiciary:* freedom from influence or control other than as established or permitted by law;

*Be impartial:* absence of bias or prejudice, and maintaining an open mind;

*Avoid impropriety and appearance of impropriety:* follow the law, court

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<sup>43</sup>Mindfulness comes from the word *santi* in Pali. As simply translated, *santi* means memory and mindfulness, but can also include numerous other English words and combinations of words, for example: memory, recognition, consciousness, intentness of mind, wakefulness of mind, mindfulness alertness, lucidity of mind, self-possession, conscience, self-consciousness, presence of mind, to surround oneself with watchfulness of mind, and so on. Sean Fein Oaks, Ph.D., assisted in explaining these translations. The website SuttaCentral (<https://suttacentral.net>), among other things, provides translations of Buddhist texts.

rules and the Code of Judicial Ethics, and avoid conduct that undermines independence;

*Demonstrate*: integrity, probity, fairness, honesty, uprightness, and soundness of character;

*Establish, maintain and enforce*: high standards of conduct and observe those standards;

*Promote public confidence in the integrity and impartiality of the judiciary.*

**Notice-Reflect-Respond**, described in sections 1:43 and 2:46, is a systematic means for ensuring mindfulness and managing self-control and is discussed in both Pillar I and Pillar II.

### § 1:32 Pillar II—Mindfulness in the courtroom

**Mindfulness and awareness in the courtroom involve consistency of focus on your mission as a judge in court proceedings.** This means being conscious of what you do and say, and being attentive to what others do and say. Notice your own reactions, feelings, and thoughts in regard to what is taking place. The work of judges is not confined to mastering the fine points of evidence, rules of law, intricacies of sentencing, and moving the calendar. If, at the end of each day, the judge goes into chambers satisfied at getting through the calendar while those who have appeared before the judge are smarting from a burst of judicial temper, sarcasm, or an unwillingness to listen, the judge's duty has not been fulfilled. Learning the skills to deal with the pressures of a flawed and overloaded judicial system is as important as any other judicial skill. Sections 1:43 and 2:48 of the *Handbook* provide practical guides to avoid ethical problems in court as well as in private life, and section 2:46 deals with loss of judicial demeanor.

Always remain focused on the judicial task before you. This includes both the particular elements of the task and the qualities judges must exhibit to perform that task (e.g., patience, dignity, fairness, impartiality, honesty in decisionmaking). If what you do and say does not advance the legitimate goals and objectives of being a judge, including accomplishing the particular task before you, learn to notice and be aware when this takes place, and get yourself back on track. Parties, lawyers, jurors, witnesses, and court observers expect a judge to pay close attention to the matter before the court. A court proceeding is not a place to berate the lawyers for wasting your time, entertain an "audience" with your wit and wisdom, catch up on social media, or prepare your law and motion calendar for the next day.

### § 1:33 Pillar III—The rule of law

**Actions and decisions in court must be within the law.** Judges are not in courtrooms to make up the rules as they go along. Observing the *rule of law* involves the fair application of the federal and state

constitutions, statutes, case law, rules of court, the Code of Judicial Ethics, and other laws, ensuring the constitutional rights of all before the court, including self-represented persons.

**The rule of law is the foundation of modern social order**, replacing force and despotic whim.<sup>44</sup> In administering justice, “[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,” and “be faithful to the law regardless of partisan interests, public clamor, or fear of criticism, and shall maintain professional competence in the law.”<sup>45</sup> Judicial independence does not mean freedom from constraints of the law, but is a basis for our confidence that judicial decisions are not influenced by political considerations, public opinion, the need to be popular, fear of losing an election or the desire to curry favor with the powerful. Judicial independence requires that judges have the courage to do what is right regardless of these pressures, as well as the courage to stand between abuse of power by the state and the individual before the court.

**Public confidence in the judicial institution** is necessary to preserve the rule of law. We need not be reminded of the fragility of the rule of law when public confidence is shaken, or of the degree to which public confidence in public institutions has deteriorated in recent times. Articulation of the moral principles and values to which the judicial institution binds itself should serve to encourage public confidence in that institution, and respect for its decisions.

#### § 1:34 Pillar IV—Make no assumptions

**Keep an open mind, never prejudge, learn, and remain aware of your biases and prejudices.** These are essential elements to fairness and impartiality. It is natural for humans to make assumptions and to harbor biases and prejudices, whether knowingly or unconsciously, and to take mental shortcuts in order to quickly arrive at conclusions. It is also a part of our nature that once a conclusion is reached (whether based on a bias, an assumption, or a “fact” triggered by evidence presented in a trial), it is difficult to accept as “fact” something contrary to that conclusion. The instruction to jurors to “keep an open mind” is often easier spoken than successfully accomplished. The same hold true for judges.

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#### [Section 1:33]

<sup>44</sup>See *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10* (U.S. Govt. Printing Office, 1951), vol. 3, case no. 3 (the “Justice Case”); *Handbook*, § 1:34.

<sup>45</sup>Cal. Code Jud. Ethics, canons 2A, 3B(2).

“If you don’t make assumptions, you can focus your attention on the truth, not on what you *think* is the truth. Then you see life the way it is, not the way you want to see it.”<sup>46</sup>

**Judicial empathy.** The Code of Judicial Ethics requires judges to treat those who come before the court with fairness, impartiality, and courtesy.<sup>47</sup>

The code also mandates that judges perform duties “without bias or prejudice.”<sup>48</sup>

Judicial empathy moves the judge to understand the lives and challenges of those who come before the court. This understanding is necessary to avoid assuming that everyone experiences life the same way the judge does. Appropriate judicial empathy should be undertaken when warranted by the circumstances of the case and the parties. The honesty and integrity of a judge’s decisions benefit greatly from such introspection.<sup>49</sup>

The greatest failure of a judiciary and judges in modern times took place in Nazi Germany.<sup>50</sup> As recounted in the article in California Liti-

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[Section 1:34]

<sup>46</sup>Excerpted and adapted from *The Four Agreements: A Practical Guide to Personal Freedom*, by don Miguel Ruiz (Amber-Allen Pub. 2001), on line in VividLife.me, with explanation of *The Third Agreement: Don’t Make Assumptions* by don Miguel Ruiz.

<sup>47</sup>Cal. Code Jud. Ethics, canon 3, 3B(4).

<sup>48</sup>*Id.*, canon 3B(5) & (6), 3C(1), (3) & (5), 3E(4)(b); Advisory Com. com., Cal. Code Jud. Ethics, canon 4A.

<sup>49</sup>Empathy has many definitions and usages. In the judicial context the term “judicial empathy” has been used in a number of the scholarly articles that seek to focus on an objective thoughtful usage that eliminates sympathy or emotion. The following are a few of these articles:

Mary Anne Franks describes judicial empathy as “the exercise of our moral imagination against, or at least indifferent to, our own self-interest.” This definition is similar to seeing empathy as an antidote to prejudice. (Franks, *Response & Perspective: Lies, Damned Lies, and Judicial Empathy* (2011) 51 Washburn L.J. 61, 68.)

Rebecca K. Lee explains empathy as “[o]ur capacity to better comprehend—through both knowledge and feeling—another’s perspective by trying to view the world from that person’s position, rather than simply observing another’s position from where we stand,” adding that it “entails actively imagining another person’s situation, in an attempt to fully consider that person’s experiences in light of her or his circumstances.” (Lee, *Judging Judges: Empathy as the Litmus Test for Impartiality* (2014) 82 U.Cin. L.Rev. 145, 152.)

Thomas B. Colby defines empathy as “the cognitive ability to understand a situation from the perspective of other people, combined with the emotional capacity to comprehend and feel those people’s emotions in that situation.” (Colby, *In Defense of Empathy* (2012) 96 Minn. L.Rev. 1944, 1945.)

<sup>50</sup>See Fybel, *When Mass Murder and Theft of All Human Rights Were “Legal”: The Nazi Judiciary and Judges* (2012) vol. 25, No. 2, California Litigation, pp. 15–21. This article was adapted from a chapter authored by Justice Fybel in *National Security; Civil Liberties and the War on Terror* (Prometheus Books, 2011), a book which he edited with M. Katherine B. Darmer.

gation, Nobel Peace Prize Laureate Professor Elie Wiesel said that the Nazi judges ignored the impact of their decisions on individual people and demonstrated a total absence of “humanity.”<sup>51</sup>

Judicial empathy requires a judge to be open to the idea that unconscious or implicit biases<sup>52</sup> may unwittingly influence a judge’s view of the facts, causing one to make assumptions, and impact decisions. In understanding judicial empathy the judge needs to differentiate it from sympathy<sup>53</sup> which might well interfere with the judge’s duty to ensure fairness, impartiality and appearance of impartiality, and professional distance (see Pillars I and V, *Handbook*, §§ 1:31 and 1:35.)

Keeping an open mind, controlling assumptions, and recognizing our responsibility of humanity and empathy, may be the most difficult and vital of judicial burdens. Thwarting the impact of bias, prejudice, and assumptions requires constant awareness (mindfulness) of what one is thinking, or failing to think, and focusing on reason.<sup>54</sup> Judicial empathy is an antidote to prejudice.

The *Handbook*, sections 2:3 through 2:28, has an extended discussion of fairness, impartiality, and absence of bias.

“If you would judge, understand.”<sup>55</sup>

### § 1:35 Pillar V—Professional distance

**A judge’s stake in the result? Do not take things personally, become embroiled, or be an advocate.** You are no longer a lawyer, and your *only stake* in a matter before you is that justice must be administered fairly, impartially, honestly, and without fear or favor. Do not lose awareness of who you are (see Pillars I and II, *Handbook* sections 1:31 and 1:32).

**Embroilment** is the process by which a judge surrenders impartiality.

<sup>51</sup>Fybel, *supra*, vol. 25, No. 2, California Litigation at p. 20.

<sup>52</sup>“Unlike *explicit bias* (which reflects the attitudes or beliefs that one endorses at a conscious level), *implicit bias* is the bias in judgment and/or behavior that results from subtle cognitive processes (e.g., implicit attitudes and implicit stereotypes) that often operate at a level below conscious awareness and without intentional control. The underlying implicit attitudes and stereotypes responsible for implicit bias are those beliefs or simple associations that a person makes between an object and its evaluation that ‘. . . are automatically activated by the mere presence (actual or symbolic) of the attitude object’ [Citation.] Although automatic, implicit biases are not completely inflexible: They are malleable to some degree and manifest in ways that are responsive to the perceiver’s motives and environment. [Citation.]” (What is Implicit Bias?, Helping Courts Address Implicit Bias, National Center for State Courts, www.ncsc.org.)

<sup>53</sup>Sympathy in this context involves “an affinity, association, or relationship between persons or things or between persons and things wherein whatever affects one similarly affects the other.” (Webster’s 3d New Internat. Dictionary (2002) p. 2317 col. 2.)

<sup>54</sup>“For fools rush in where Angels fear to tread.” (Alexander Pope, *An Essay on Criticism* (1711), pt. III, l. 66.)

<sup>55</sup>Lucius Annaeus Seneca (ca. 50 A.D.)

In doing so, the judge becomes a party to the quarrel, involved rather than impartial—losing the professional distance. Once a judge becomes embroiled in a matter, fairness, impartiality, and the integrity of decisions leave the courtroom. Embroilment is a frequent cause of judicial misconduct. Loss of self-control, loss of control of the courtroom, frustration that produces anger, acting in a way that favors one side in a matter, assuming the role of a prosecutor or defense attorney, and coercing pleas or settlement, are examples of losing professional distance (see Pillar VI, below).

A judge must adopt the attitude of excellence in his or her work. A judge must be patient and fair, must listen, and must avoid emotional involvement or attachment (positive or negative) regarding the parties, the issues, or the outcome of a case.<sup>56</sup> Professionalism also means that the judge must be open to feedback, including honest criticism (discussed in section 1:45 of the *Handbook*). The humility to seek out and accept advice is a hallmark of professionalism.

### § 1:36 Pillar VI—Ensure both reality and public perception of honesty and integrity

**Ensuring honesty and integrity** in the process of making decisions and in the decisions themselves encompasses both the *reality* as well as the *public perception* of integrity. The Code of Civil Procedure, the Penal Code, the Rules of Court, the Code of Judicial Ethics, the Evidence Code, and all the other rules that govern the system of justice are focused on this one ultimate objective, this one unifying idea: to ensure the honesty and integrity of decisionmaking. Not only must a judge do what is right according to law, he or she must also be *perceived* to be doing so. Ensuring honesty and integrity in private life actions is also essential to the public perception of the integrity of judicial actions and the judiciary.<sup>57</sup>

What is the role of judges to secure public confidence in the independence, integrity, and impartiality of the judiciary? Judges must speak honestly about their institution and undertake the processes necessary for its improvement. The courthouse is not an exclusive club that looks after the judge's self-interest. The Pillars provide the answer to the question: What is the role of the judge? Impartiality is not achieved by aspirations alone. It is about judicial conduct, and public confidence that is earned when judges take actions that place the good of society above self-interest.

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#### [Section 1:35]

<sup>56</sup>See *Handbook*, § 1:43 (Notice-Reflect-Respond system).

#### [Section 1:36]

<sup>57</sup>“[H]onesty is the minimum qualification for every judge. . . . If the essential quality of veracity is lacking, other positive qualities of the person cannot redeem or compensate for the missing fundamental.” (*Inquiry Concerning Ross* (2005) 49 Cal.4th CJP Supp. 79, 89.)

**§ 1:37 Pillar VII—Courage to do the right thing**

**Do what is right according to the law and have the courage to do so.** Judicial integrity is tested by the challenge of doing what is right, without fear of the consequences.

Judges are ordinary people asked to do the extraordinary. They are given enormous power and are required to eschew any temptation to abuse that power. Judges are entrusted to protect the liberty of the people, and not compromise honor and abandon trust by succumbing to biases and prejudices. Judges, as humans, have the natural desire for acceptance and advancement, but must not yield to political pressure or public opinion.<sup>58</sup>

There are many things one can do to counter these influences. As mentioned in section 1:22, keep copies of the Central Principle and the Eight Pillars on your bench. Focus on who you are and what you have been entrusted to do, and remember the qualities of the great judges you have known. These actions will help to avoid the things that distract you from your mission.

At an event honoring the memory of United States Supreme Court Justice Thurgood Marshall, United States District Judge Constance Baker Motley said that when Thurgood Marshall was the NAACP's attorney in *Brown v. Board of Education*,<sup>59</sup> in low moments he would read from Justice John Marshall Harlan's 1896 dissent in *Plessy v. Ferguson*.<sup>60</sup> Judge Motley said: "[Thurgood] Marshall admired the courage of Harlan more than any justice who has ever sat on the Supreme Court. Even Chief Justice Earl Warren's forthright and moving decision for the court in *Brown* did not affect Marshall in the same way. Earl Warren was writing for a unanimous Supreme Court. Harlan was a solitary and lonely figure writing for posterity."<sup>61</sup>

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**[Section 1:37]**

<sup>58</sup>See Cal. Code Jud. Ethics, canon 3B(2).

<sup>59</sup>*Brown v. Board of Education* (1954) 347 U.S. 483.

<sup>60</sup>*Plessy v. Ferguson* (1896) 163 U.S. 537, 552.

<sup>61</sup>Yarbrough, *Judicial Enigma: The First Justice Harlan* (Oxford University Press, 1995). Information about Judge Motley's remarks as quoted in *Judicial Enigma* can be found in *Kentucky Humanities*, published by the Kentucky Humanities Council.



John Marshall Harlan, Associate Justice of  
the United States Supreme Court<sup>62</sup>

In remarks at a New Judge Orientation of the Center for Judicial Education and Research, Judge LaDoris H. Cordell spoke about courage:

“When Judge Learned Hand was asked the meaning of judging, he answered simply, ‘Do what you think is right.’ Judging, doing the right thing, is not always easy. Indeed, when I reflect upon the work that we judges do, the word ‘heroic’ comes to mind. We have been taught that heroes are those people who submit themselves to the most treacherous of situations, entirely oblivious to fear. But, if one is oblivious to fear, then that person’s actions are really of little moment. It is precisely in

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<sup>62</sup>John Marshall Harlan, 1833-1911. Library of Congress Prints and Photographs Division, (LCCN Permalink: <https://lccn.loc.gov/2004672091>). Rights advisory: no known restrictions on publication.

acknowledging fear, in facing danger with enormous amounts of trepidation, in forging ahead even while quivering, that heroes are born. So, our stereotypical hero, by definition, cannot perform heroic acts. It is only ordinary people, like you and me, who have this heroic potential. Heroes do not need to shed blood. They do not need loud confrontations. Some of the most heroic acts are quiet demonstrations of what is right in the face of groups whose actions are definitely wrong.

“We must wear our judicial robes with courage and compassion, even in the face of challenge and controversy; for, in our noble profession, this is what being heroic is all about.”

Judicial integrity is tested by the challenge of overcoming fear to do what is right. Dean Acheson, the United States Secretary of State (1949–1953), had this to say about making courageous decisions:

“One must be true to the things by which one lives. The counsels of discretion and cowardice are appealing. The safe course is to avoid situations which are disagreeable and dangerous. Such a course might get one by the issue of the moment, but it has bitter and evil consequences. In the long days and years which stretch beyond that moment of decision, one must live with oneself; and the consequences of living with a decision which one knows has sprung from timidity and cowardice go to the roots of one’s life. It is not merely a question of peace of mind, although it is vital; it is a matter of integrity of character.”<sup>63</sup>

### § 1:38 Pillar VIII—Accountability and humility

**Acceptance of accountability.** Judicial accountability is an important element in public acceptance of court decisions. As you read the *Handbook* and look into ethics issues you need to focus on the Central Principle of Being a Judge and incorporate the Eight Pillars into your thinking. As a member of the community, imagine if there were no place to lodge a complaint about the conduct of judges, where judges could act with impunity, or where biases ran wild, and where self-interest and/or political power dominated judicial decisions.

Without honorable judges, who else would we have to protect against abuse of governmental power in order to ensure the rule of law? The Commission on Judicial Performance exists to oversee judges’ ethics when judges fail to do so themselves. We cannot look at accountability as personally offensive, or see the institutions of accountability as “the enemy.” As judges, you are not here to look out for yourselves or personal interests. You are here as guardians of a system of justice that protects our democracy. As a guardian of justice, a judge needs to recognize that accountability is an appropriate and fundamental obligation of this calling. A necessary corollary to the Central Principle of Being a Judge is acceptance of accountability and humility. Recognizing that you are accountable for your actions means having the humility to accept that you can make mistakes, and that learning never ends. It may even be a way of making fewer mistakes.

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<sup>63</sup>Acheson, *Present at the Creation: My Years in the State Department* (W.W. Norton & Co. 1987) p. 361.

**The systems of accountability governing judicial conduct in California** are more stringent than those for any other public officials. These systems include:

- Appellate review when judicial misconduct is an issue;
- Periodic elections of judges;
- Review of conduct of subordinate judicial officers by the court employer;
- Presiding judges' duty regarding misconduct of judges on their court;<sup>64</sup>
- Peer obligations to take appropriate corrective action when another judge engages in misconduct;<sup>65</sup>
- Commission on Judicial Performance, which has jurisdiction over misconduct of judges and subordinate judicial officers;<sup>66</sup>
- Fair Political Practices Commission, which oversees a judge's duties to make required disclosure;<sup>67</sup>
- The judge is the only person who knows whether his or her decision and the process of decision making carried the integrity, honesty, impartiality, and fairness required of all judges.

Public confidence in the integrity of the judiciary is enhanced by the maintenance of these institutional systems of accountability.

Over time, each judge will learn the legal rules, the relevant statutes and cases, along with the many rules of judicial ethics. But, as you learn these ethical and legal rules, the Central Principle and the Eight Pillars will be your touchstone, your North Star.

## V. SUPPORT TOOLS OF THE EIGHT PILLARS

### § 1:40 Getting ethics advice

**Solving ethics questions.** In order to solve an ethics question, one has to recognize when there might be a problem. You need constant mindfulness and awareness that you are a judge and understand the Central Principle. Noticing what you are doing and how you are reacting to what is taking place in the courtroom or in private life, will allow you to understand that there is an ethics issue and to undertake the means to solve the problem. The first step in solving ethics questions involves learning about judicial ethics *before* there is a problem.

#### **Resources for learning about judicial ethics.**

California Code of Judicial Ethics. Begin learning the rules by getting

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[Section 1:38]

<sup>64</sup>See *Handbook*, § 6:3.

<sup>65</sup>Cal. Code Jud. Ethics, canon 3D(1).

<sup>66</sup>Cal. Const., art. VI, §§ 17, 18, 18.1.

<sup>67</sup>See *Handbook*, § 6:31.

a copy of the California Code of Judicial Ethics and reading it. If you have not received a copy simply go to [www.courts.ca.gov/documents/ca\\_code\\_judicial\\_ethics.pdf](http://www.courts.ca.gov/documents/ca_code_judicial_ethics.pdf) and download the current version of the code. Even if you are an experienced judge, it is never too late to read the code and the materials described below.

Educational programs for new judges. The Center for Judicial Education and Research (CJER) provides all new judges with the fundamental principles of judicial ethics and the obligations of judges in conducting judicial proceedings in New Judge Orientation. One of the functions of this course is to provide a new judge with the resources for finding answers to ethics questions. This information is expanded upon in the B.E Witkin California Judicial College.

California Judicial Conduct Handbook. Although the authors of the *Handbook* are well aware of the fact that this is a big book, we nonetheless recommend that you read it. Section 1:2 provides an introduction to what is in the *Handbook*.

Annual Report of the Commission on Judicial Performance. The Commission on Judicial Performance publishes an Annual Report and mails it to every judge. The report provides detailed information on the law of judicial ethics, a current Code of Judicial Ethics, and explanations of all the discipline imposed on judges over the prior year. It is a valuable resource to all judges. The Annual Reports are also available on the commission's website.

Judicial Conduct Reporter. The Judicial Conduct Reporter is a quarterly publication of the National Center for State Courts (NCSC) in Williamsburg, Virginia. Cynthia Gray, the Director of the Center for Judicial Ethics of NCSC, is the editor of this publication. Although the Reporter examines issues on a national level, the information is important for California judges because judicial ethics codes around the United States are similar. Reading this publication every quarter is one of the best ways for a judge to maintain a sharp understanding of ethics issues. The Reporter is distributed to all California judges by the Judicial Council and is also available online as a free download:

<<http://www.ncsc.org/Topics/Judicial-Officers/Ethics/Center-for-Judicial-Ethics/Judicial-Conduct-Reporter.aspx>>

Fair Political Practices Commission (FPPC). The FPPC provides advice on questions regarding the annual Statement of Economic Interests required in Form 700 as well as information related to disclosure obligations for judicial candidates. A judge or judicial candidate must provide all of the financial information required to be publicly disclosed under the Political Reform Act of 1974. Failure to meet this obligation would be a violation of law and constitute willful misconduct in office, potentially ending one's judicial career. If one has the slightest question as to whether or not it is necessary to disclose something, call the FPPC at (916) 322-5600 and get its advice. The FPPC can be reached Mondays

through Thursdays, 9:00 a.m. to 11:30 a.m., or by email, [advice@FPPC.ca.gov](mailto:advice@FPPC.ca.gov).<sup>68</sup>

The disclosure requirements under the Political Reform Act of 1974 are not identical to the disqualification and disclosure requirements in the Code of Judicial Ethics and Code of Civil Procedure sections 170 et seq.<sup>69</sup>

**Resources for judicial ethics advice.** In the event the above resources do not provide an answer, there are other resources available for judges, including the following:

The Ethics Committee of the California Judges Association (CJA)

The CJA Ethics Committee provides telephonic advice on ethical issues and interpretations of the Code of Judicial Ethics in response to inquiries from judges through the Ethics Hotline, (866) 432-1252. Any judge may call and will usually receive a tentative response within two days. Following the tentative response, an informal written response is drafted. The informal written response is reviewed by the entire committee. Once the informal written response is approved by the committee, it is sent, or made available, to the inquiring judge.

The committee handles approximately 400 inquiries a year. It has certain rules regarding the sorts of questions it will answer, including not responding to questions involving a matter pending before the Commission on Judicial Performance. Inquiries are confidential. The committee prepares an annual Judicial Ethics Update that summarizes highlights of Hotline advice for the previous year. The updates are available on the CJA website.

Generally, the Judicial Ethics Updates over the years have been included in the *Handbook* if an issue has not previously been dealt with, or if the update requires comment by the authors.

The CJA Ethics Committee also occasionally issues formal opinions in response to individual inquiries or to an issue the committee determines to be significant and of common interest to the judiciary. Formal opinions are also available on the CJA website. The CJA Ethics Committee does not invite public comment prior to publication of a formal opinion. The following paragraphs explain the practice of the Supreme Court Committee on Judicial Ethics Opinions of submitting proposed formal opinions for public comment.

The Supreme Court Committee on Judicial Ethics Opinions (CJEO)

If a judge does not wish to call the CJA Hotline, the judge can contact the CJEO at (855) 854-5366 for a confidential oral opinion. CJEO has certain rules for the sorts of questions they will answer; for example, it

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[Section 1:40]

<sup>68</sup>See *Handbook*, §§ 6:31, 11:65.

<sup>69</sup>See *Handbook*, ch. 7 and appen. F.

will not respond to an ethics question involving a matter pending before the Commission on Judicial Performance. CJEO publishes summaries of some or all of the oral opinions on its website, and does so in a manner that preserves the confidentiality of the judge. CJEO provides the judge with a written copy of the advice after it has been given to the inquiring judge orally by a CJEO member.

CJEO prepares formal written ethics opinions on subjects of broad interest that it believes require a full examination. CJEO's proposed formal opinions are typically circulated for public comment before a final opinion is adopted by the committee and published. This practice gives CJEO an opportunity to consider a wider review and critique.

CJEO also provides informal written opinions on questions that raise complex issues or require greater analytical discussion.

CJEO's oral advice and written opinions are published on its website, <http://judicialethicsopinions.ca.gov/>.

In order for the CJEO to keep abreast of questions that judges are asking on the CJA Hotline, the CJA periodically communicates the questions and the answers to the CJEO, in a manner that does not reveal the identity of the inquiring judge.

The CJEO's website contains a database of the CJEO ethics opinions. The website includes both CJEO oral advice and written opinions. In addition, CJEO will be adding the following to the database: all cases, decision, opinions, private admonishments, and advisory letters published by the Commission on Judicial Performance; all of the formal opinions and ethics updates published by the CJA; and all of the national judicial ethics advisory committee opinions from those states whose opinions are not otherwise available on Westlaw.

#### **§ 1:41 Balanced approach to examining judicial ethics without fixation on discipline**

The Code of Judicial Ethics mostly consists of broad statements of the principles and rules for the ethical conduct of persons performing judicial functions. The *Handbook* contains materials that explain these principles and provides innumerable detailed examples of the applicability of these broad statements. Some of these rules are very particular (e.g., the *exact* dollar limits on political contributions, in canon 5A(3)), but most are broader and less precise (e.g., the requirement that a judge be "patient," in canon 3B(4)).

One of the objectives of the *Handbook* is to avoid throwing up your hands over what seems to be hundreds of impossible rules, and instead to provide a thorough examination of ethics issues and, whenever possible, to replace lack of clarity and uncertainty with answers or at least a clear analytical path toward answers.

**Interpretation of canons cannot ignore the fundamentals.** When examining conduct, a judge must be mindful of the Central Principle of

Being a Judge and the broad general guidelines applicable to all the rules, such as the duty to “uphold the integrity and independence of the judiciary” and to “avoid impropriety and the appearance of impropriety.”<sup>70</sup>

**Don’t push the limits.** When trying to decide whether or not to engage in some conduct or activity in court or private life, treat this decision as you would any judicial decision: do not prejudge the answer (Pillar IV) or seek to interpret the ethics rules too generously. You are not a lawyer trying to interpret a rule to win a case. Why would a judge want to be the test case on a particular interpretation of a canon? Look at the Code of Judicial Ethics as a highway. It is broad enough to get somewhere, but it is not a freeway. Don’t push the limits.

**The canons and the community.** Analysis of the canons need not be so restrictive that a judge has to be separated from the community. The Advisory Committee Commentary to canon 4A notes that “a judge should not become isolated from the community in which he or she lives.”<sup>71</sup> This idea, however, does not modify the rule of uniform application of the code throughout California.<sup>72</sup>

**The purpose of the Code of Judicial Ethics is not to avoid discipline.** One can easily slip into seeing the Code of Judicial Ethics as a bunch of negative restrictions on judges that must be avoided in order to circumvent discipline by the Commission on Judicial Performance. When, however, one is able to see the canons as the essence of what it means to be a judge, the Central Principle, i.e., ensuring the honesty and integrity of judicial decisions,<sup>73</sup> the code becomes a means of positively ensuring judicial independence, an ideal to which all judges are committed. Avoiding misconduct and judicial discipline is obviously an important goal, but only secondary to the purpose of the Code of Judicial Ethics.

**Avoid excessive fixation on judicial discipline.** Judges should not become so absorbed with the rules of judicial ethics, conduct, and discipline that they lose touch with common sense and the reality that judges are human beings. Even judges can make mistakes. Excessive worry over discipline distracts one from the meaningful and important work done by judges in their communities and impedes judicial creativity, individuality, and achievement.

Most judges are interesting people with expertise and good ideas about solving the problems facing the justice system, our society, and the people who come before the court. They are ordinarily active in their

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[Section 1:41]

<sup>70</sup>Cal. Code Jud. Ethics, canons 1, 2.

<sup>71</sup>See also Cal. Stds. Jud. Admin., § 10.5 (regarding the judicial role in community outreach).

<sup>72</sup>See *Handbook*, § 1:13.

<sup>73</sup>See *id.*, §§ 1:1, 1:37.

communities. The character and leadership of judges is important to the fabric of the judicial system, and it would be a loss to that system and to justice were the judiciary to become a group of frightened bureaucrats whose only mission is to stay out of trouble. Judges can be human and engaged in life, and still do their jobs ethically and with appropriate professional detachment. Judges are expected and entitled to be stern and demanding when it is appropriate to be so. Those appearing before the court expect strong, firm, fair, efficient, empathic, and principled people to render justice, but also expect judges to not demean and abuse those who come to the courts seeking justice. If judges fear the consequences of what they do, whether it be fear of the Commission on Judicial Performance or fear of what the public or the powerful may think, they cannot be expected to show the courage necessary to make the hard and honest decisions expected of them.

A potential downside of writing the *Handbook*, full of detailed explanations of all the things one might do wrong, with innumerable variations and nuances, is that the judicial reader may conclude that the only solutions in such an atmosphere are—stay out of trouble, avoid tough decisions, take no chances, and worry. It is hard to think of anything that would do more harm to the judicial institution and turn this rewarding career into one filled with fear and loathing.

**§ 1:42 Path to mindfulness—Familiarity with rules, spotting issues, seeing the ice on the road<sup>74</sup>**

The following four sections (1:42 through 1:45) posit approaches to awareness of potential ethics and conduct issues with the objective of avoiding misconduct. These approaches are based on the Central Principle of Being a Judge discussed in section 1:1 and the supporting Eight Pillars in sections 1:30 to 1:38.

**Familiarity with the rules.** As already noted, there are numerous procedural and ethical principles and rules that govern what judges do in their work and private lives. The *Handbook* is aimed at providing an understanding of all of them. If this were not enough, a judge is accountable for breach of behavior even if he or she was not aware of the rule.

One of the ideas for the Central Principle is to provide the judge with a singular focus on the underlying rationale of all the rules when faced with ethics and conduct issues. As noted in sections 1:31 and 1:32, mindfulness of the Central Principle should operate in the background like an antivirus program that sounds an alert if something you are about to do has ethics or conduct ramifications.

**In the world of ethics and conduct, you are the “spotter of**

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[Section 1:42]

<sup>74</sup>Richard M. Friedman, M.D., lecture to the California Judicial College (1987).

**issues.”** In much of the work of judges in an adversarial system, we expect lawyers to lay out the factual and legal issues a judge will need to consider. In the world of judicial ethics and conduct, however, you are on your own. The *Handbook* is meant to be a source of assistance in spotting the issues both in and out of the courthouse, but it will be of no help unless you spot the issue (see the ice on the road), or at least notice that there is something you are about to do, or a situation you are faced with that you need to reflect upon. If you don't notice it, who do you think will?

**Seeing the ice on the road.** Familiarity with California's ethical rules and principles is critical. A judge need not memorize the *Handbook*, but you need enough familiarity with these rules and principles to cause you to pause and realize that there may be a question that needs to be researched. This is the moment for Notice-Reflect-Respond to kick in (see section 1:43). It would be good practice for a judge to take the *Handbook* out and read it, rather than pick it up only when something happens and you need to find an answer.

#### § 1:43 Path to mindfulness: notice-reflect-respond<sup>75</sup>

**Understanding judicial misconduct.** Considering all the ethics and conduct resources and education programs, all the systems of accountability (see Pillar VIII, *Handbook*, § 1:38), the *Handbook*, and widely distributed ethics opinions, it is reasonable to wonder why there are so many examples of judicial misconduct in the annual reports of the Commission on Judicial Performance. Because of the important position of judges in our country, it should not be surprising that much is demanded of them with little tolerance for misconduct.

There are undoubtedly many evident causes for judicial misconduct, such as knowing and willful behavior, emotional problems in private life, mental health problems, and drug or alcohol problems. In addition, there are hidden causes, such as the simple, but inexcusable, lack of awareness of the rules of ethics and conduct. Studying all the possible causes does not necessarily help avoid misconduct. The *Handbook* focuses on assisting judges to avoid unproductive behavior (misconduct) in court and in private life, whatever the cause.

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#### [Section 1:43]

<sup>75</sup>The Notice-Reflect-Respond system discussed in this section was developed by Phyllis Rothman, M.S.W., Richard M. Friedman, M.D., Rhoda Chang, and David Rothman and has been used in recent years in New Judge Orientation and other judicial education programs of the Center for Judicial Education and Research of the Judicial Council of California. (See Pillar I, *Handbook*, § 1:31.)

**Two culprits of misconduct worth examining.** Before discussing the Notice-Reflect-Respond system, here are two examples of what often drives misconduct. Both are good examples of “fools” rushing in.<sup>76</sup>

**“Multitasking” vs. mindfulness.** A lot of us seem to have the belief that doing many things at the same time is a valuable skill. For example, judges have been known to conduct a jury trial while preparing for the next day’s calendar, or becoming preoccupied with professional and personal life distractions. There are many examples of multitasking and distractions. A judge must stay focused on what is taking place in the moment in the courtroom.

**Personal needs and self-interest.** Personal needs and self-interest are powerful forces that can crowd out mindfulness of who you are (Pillar I, *Handbook*, § 1:31) because these forces are generated by strong human emotions: greed, fear, pride, ego, concealing truth to avoid consequences, seeking personal advantage, and so on. These forces are so powerful that the gain achieved by actions based on personal needs and self-interest are often shockingly small when weighed against potential consequences. Abstract ideals of public service are too often trumped by self-interest and hubris.

**Judges and mindfulness.** We begin looking at the Notice-Reflect-Respond system by examining the critical element of a judge’s mindfulness discussed in Pillars I and II, sections 1:31 and 1:32, and the capacity of self-reflection.

We all know people who are not able to engage in self-reflection and self-awareness, and others who lack self-control. The ability to engage in mindfulness, self-reflection, self-awareness, and self-control are necessary elements for being a judge.

Most people who become judges, however, are able to learn from experience and develop awareness of what is going on around them if they are willing to do so. They avoid unproductive responses to charged events, stress and annoyances, whether in court or in private life. They are people who should be able to avoid stumbling into misconduct. The Notice-Reflect-Respond system discussed below provides the means to avoid such stumbling.

**Articulate the legitimate goals and objectives of being a judge.**

**(a) What are the general, fundamental and basic goals and objectives of being a judge?** For example, in regard to in your official duties and private life, you render equal justice under law, you maintain honesty and integrity of your office and in your decisions, you uphold the independence of the judiciary, you maintain respect for the judicial office, and you promote public confidence in the integrity and impartiality of the judiciary. In your courtroom and official duties you maintain dignity and decorum, you ensure fairness and impartiality, you follow the law, and you ensure full and fair hearings and due process of law.

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<sup>76</sup>See Pillar IV, *Handbook*, § 1:34 (regarding making assumptions).

**(b) What are the specific goals and objectives of the particular judicial task that you are performing at this moment in court?**

For example, if you are conducting a preliminary hearing, you rule on evidence during the hearing, you weigh testimony and credibility, you decide whether a public offense has been committed and whether the offense is a felony or a misdemeanor, you decide whether there is sufficient cause to believe the defendant is guilty of the criminal offense, and you decide bail, among other things.

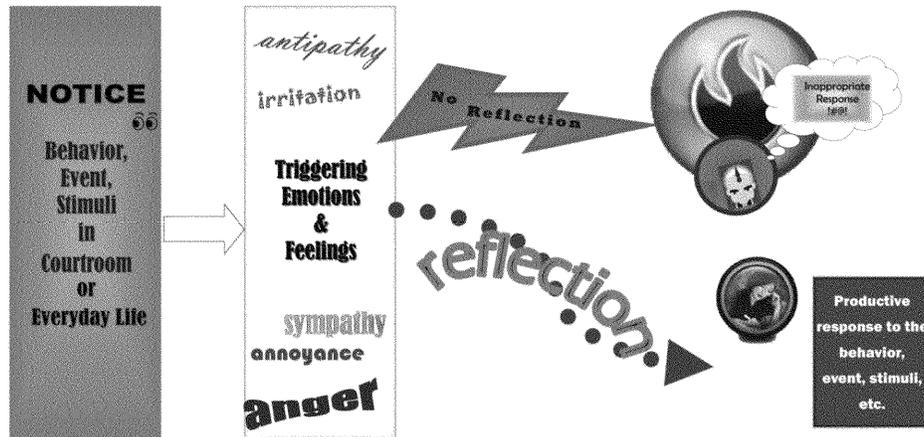
**Notice, reflect, respond.** The three steps of *noticing*, *reflecting*, and *choosing a productive response* are a systematic way to engage in mindfulness to achieve judicial self-control. Although the system focuses on courtroom conduct and judicial demeanor, the thought processes of noticing and engaging in reflection in order to find a productive response also works in other circumstances and in a judge's professional and private life.

**1. Noticing, focusing on self-awareness.** Attentiveness, awareness, or mindfulness is essential to seeing that justice is done. What takes place in court is not always pleasant. Noticing is not just witnessing an event, but it is noticing what you are experiencing: the feeling, emotion, boredom, discomfort, anger, antipathy, fear, sympathy, impatience, irritation, annoyance, concern, loss of self-control, and other feelings or thoughts. These reactions or feelings are an amber light signal to you. Noticing requires not only hearing and seeing what is happening, but also understanding what is taking place within yourself. It is not enough to know that you are, for example, very angry; it is also essential to focus on the feeling or emotion before doing something you will regret. It is the difference between noticing that you were extremely angry *after* you held the lawyer in contempt and jailed the lawyer, and noticing you are angry *before* you take action. Noticing emotion-driven behavior after the fact is not very helpful except as a cue for future behavior.

Learn to see the clues when your emotions may be getting in the way of your objectivity by observing yourself and being mindful of your actions and feelings. In addition, learn to be mindful of how others react to you in the courtroom, including staff (facial expressions, eyebrows arching, mouths dropping open, etc.).

**2. Reflection.** The antidote for jumping from emotion to mindless action is reflection. Reactions based on anger, sympathy, and other emotions have a high likelihood of being unproductive and unwise. An **unproductive response** is one that is an unprofessional, uncontrolled, or injudicious reaction, or conduct that lacks mindfulness of potential consequences. A more productive response is based on reflection and thought. Whether in or out of court, a judge must develop and use strong self-observation and self-control skills.

**3. Choosing a Response.** The following diagram is worth noting and keeping at hand.<sup>77</sup>



When you are mindful and aware that *you* are having a reaction to what is taking place, you have begun the process of reflecting to choose an appropriate response. In seeking the appropriate response, one must always remember that no response may be the appropriate response. A **productive** response includes one that is professional and judicious, free of attitude. It is one that is calm and controlled and, most important, does not allow a loss of focus on the goals and objectives of the matter before the judge. Where necessary, a productive response takes appropriate controlled and judicious corrective actions related to the cause of the event, and mindfully returns to the proceeding before the judge.

This mindful form of conduct keeps the focus on the mission of the judge in the particular proceeding, on what the judge is *supposed* to be doing in the proceeding. Making mindfulness the central principle of who you are is an integral part of your life as a judge (Pillar I), keeping attentive to one's mission in the particular proceeding (Pillar II), avoiding embroilment and maintaining professional distance (Pillar V). Keeping the Notice-Reflect-Respond system ready for use can ensure that the judge engages in constructive ethical conduct.

In activities outside the immediacy and pressure of the courtroom,<sup>78</sup> although one usually has more time to think through the ethics issues, the necessity to see the ice on the road and follow the Notice-Reflect-

<sup>77</sup>Graphic by Mandy Cover and Adam Richmond.

<sup>78</sup>Some examples of outside-the-courtroom activities include the following: judicial communications of various kinds, public and private comment, dealing with the media (*Handbook*, ch. 5); administrative and quasi-judicial activities (*id.*, ch. 6); considerations of disqualification and disclosure place both in and out of the courtroom (*id.*, ch. 7); private life issues of all kinds, including use of title or office, memberships, encounters with the law (*id.*, ch. 8); financial activities and gifts (*id.*, ch. 9); community activities and fund raising (*id.*, ch. 10); political activities, and judicial elections (*id.*, ch. 11); contacts with the Commission on Judicial Performance (*id.*, ch. 12).

Respond system is still essential. A significant element here, as in the courtroom, is to maintain objectivity and professional distance (Pillars IV and V). In order to avoid being driven by the *need* to do something to advance self-interest (see section 1:43), be mindful of who you are (Pillar I).

#### § 1:44 Path to mindfulness: objective views of conduct and the “headline test”

When you are about to do or say something, listen to the vague thought in your head that brings you to pause. This thought may be your alert that there is an ethical problem. In deciding the ethics issue, look at the comments in section 1:41. The code is a highway with enough room to navigate, but it is not a freeway. Don’t push the limits. We have also explored seeing the ice on the road (*Handbook*, § 1:42) and the Notice-Reflect-Respond system (*Handbook*, § 1:43). In this section we will look at two additional ways to secure mindfulness to ensure appropriate conclusions on ethics and conduct issues.

**The Central Principle and Pillars test.** Look at sections 1:1, 1:2, and 1:30 through 1:38 and consider whether the conduct in question is within the principles explained in these resources (see also *Handbook*, appen. B). Does the conduct meet the high standard expected of being a judge?

**The “headline test” and evaluating appearances.** Write the worst headline for tomorrow’s newspaper about the thought or action you are considering. Would you mind seeing that headline? The idea is to step back from yourself to get an objective perspective on how others might think about what you are about to do or say. Even if you have consulted someone and are told the conduct is permissible, you should still subject it to this test.

**The “headline test” does not justify *doing the wrong thing in order to avoid public disfavor*.** The headline test is by no means an excuse for a judge to write a headline to mentally gauge public opinion so he or she won’t make an unpopular decision, to avoid doing what is right in a case, or to use ethical and disqualification rules to dodge hearing cases involving grave and controversial issues of public importance. Judges must have the courage to make their decisions according to the law without regard to “partisan interests, public clamor, or fear of criticism.”<sup>79</sup> A judge’s ethics decisions must also be courageous, for example: whether to recuse or hear a difficult case; whether to enforce high standards of conduct; and whether to comply with the duty to take appropriate corrective actions related to lawyer and judicial misconduct.

#### § 1:45 Path to mindfulness—A band of colleagues

##### Openness to feedback from colleagues—the community of

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[Section 1:44]

<sup>79</sup>Cal. Code Jud. Ethics, canon 3B(2). See Pillar VII, *Handbook*, § 1:37.

**judges.** The work of a trial judge is somewhat isolated, but a judge should be humble enough to connect with colleagues. Judges are part of an institution of justice with obligations not only to oneself and those who appear before the judge, but also to others who are part of the institution.

Judicial colleagues are a resource when it comes to issues that a judge may face, including avoiding judicial misconduct. The Code of Judicial Ethics allows a judge to communicate with other judges (see canon 3B(7)(a)), and even requires a judicial colleague to take “appropriate corrective action” when there is reliable information that another judge violated the Code of Judicial Ethics (see canon 3D(1)). Judges need to break the barrier of polite silence when a colleague may be crossing the line of misconduct in court as well as private life.

It is interesting to note that some judges see canon 3D(1) as a “snitch rule,” when in most cases it can be a positive way to help judges. Canon 3D(1) encourages colleagues to do the right thing by helping one another overcome conduct that may be harmful to themselves and the system of justice. “[A]ppropriate corrective action” under this canon can include such help, as well as reporting to the “appropriate authority” when necessary.

Judges on your court should be committed to paying attention to each other’s conduct and to give and receive assistance on issues of ethics and conduct. Such a commitment goes far to ensuring the honesty and integrity of the judiciary and our system of justice. A judge whose behavior raises a question of ethics or conduct should welcome learning about it first from a colleague before someone else. Section 5:65 of the *Handbook* discusses this issue in detail.

## VI. PERSONS BOUND BY THE CODE OF JUDICIAL ETHICS

### § 1:60 Judges and others serving in judicial capacities

The following is the general rule set out in the Code of Judicial Ethics on application of the code to judges, followed by detailed explanations or limitations related to particular groups of judicial officers.

“Anyone who is an officer of the state judicial system and who performs judicial functions including, but not limited to, a subordinate judicial officer, a magistrate, a court-appointed arbitrator, a judge of the State Bar Court, a temporary judge, or a special master, is a judge within the meaning of this code.”<sup>80</sup>

**Those bound by all of the provisions of the Code of Judicial Ethics:**

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[Section 1:60]

<sup>80</sup>Cal. Code Jud. Ethics, canon 6A.

- The Supreme Court, Courts of Appeal, and Superior Courts;<sup>81</sup>
- Subordinate judicial officers;<sup>82</sup>
- Magistrates;<sup>83</sup> and
- Judges of the State Bar Court.

**Those bound by some, but not all, of the provisions of the Code of Judicial Ethics.** The location of provisions of the Code applicable to the following judicial officers are noted in the footnote following each:

- Retired judges serving in the Assigned Judges Program,<sup>84</sup>
- Temporary judges;<sup>85</sup>

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<sup>81</sup>Cal. Const., art. VI, § 1.

<sup>82</sup>The Terminology section of the Code of Judicial Ethics defines a subordinate judicial officer “for the purposes of this code” as “a person appointed pursuant to article VI, section 22 of the California Constitution, including, but not limited to, a commissioner, referee, and hearing officer.” Article VI, section 22, provides, “[t]he Legislature may provide for the appointment by trial courts of record of officers such as commissioners to perform subordinate judicial duties.” What makes the person a “subordinate judicial officer” is not the title, e.g. “referee,” but the fact that a person was appointed by “trial court[. . .] of record” to perform “subordinate judicial duties.”

<sup>83</sup>The word “magistrate” appears in the Code of Judicial Ethics (canons 4G and 6A), the California Constitution, a number of statutes, and other places in the law of California. The word is not defined in any provision of the California Constitution or statute as a particular judicial officer, but rather is used as a name that encompasses all judicial officers. Essentially, it is a title that is used in a general way when referencing a particular judicial activity rather than a defined category of judge. (See Subordinate Judicial Officers and Magistrates, Background Memorandum (1999) Deborah Kiley, J. Clark Kelso, Univ. of the Pacific School of Law, Submission to the California Law Revision Commission.) For example, Penal Code section 807 provides that a “magistrate” issues arrest warrants, and California Rule of Court 4.114 describes what a “magistrate” must do following a plea of guilty under Penal Code section 859. The word appears almost 300 times in numerous provisions in California statutes and the California Rules of Court, with a few references in the article 1, sections 14 and 28 of the California Constitution and once in the Code of Judicial Ethics.

<sup>84</sup>Cal. Code Jud. Ethics, canon 6B.

<sup>85</sup>*Id.*, Preamble and canon 6D. California Rules of Court, rule 2.814, requires that the oath of temporary judges include a certification that the temporary judge “is aware of and will comply with applicable provisions of canon 6 of the Code of Judicial Ethics.” Rule 1-710 of the Rules of Professional Conduct provides: “A member who is serving as a temporary judge, referee, or court-appointed arbitrator, and is subject under the Code of Judicial Ethics to Canon 6D, shall comply with the terms of that canon.” New rules of professional conduct, with numbering changes, have been drafted by the State Bar of California Commission for the Revision of the Rules of Professional Conduct. That commission has approved a proposed rule 2.4.1 to supersede rule 1-710. Proposed rule 2.4.1 states: “A lawyer who is serving as a temporary judge, referee, or court-appointed arbitrator, and is subject to Canon 6D of the Code of Judicial Ethics, shall comply with the terms of that canon.” Comment 1 to proposed rule 2.4.1 states: “This rule is intended to permit the State Bar to discipline lawyers who violate applicable portions of the Code of Judicial Ethics while acting in a judicial capacity pursuant to an order or appointment by a court.” The California State Bar Board of Trustees approved the proposed new rules of professional conduct in March 2017, and they are now under consideration by the California Supreme Court.

- Referees serving under Code of Civil Procedure section 638 or 639;<sup>86</sup>
- Court-appointed arbitrators;<sup>87</sup>
- Judicial candidates;<sup>88</sup>
- Administrative law judges;<sup>89</sup>
- Workers Compensation administrative law judges;<sup>90</sup>
- Special masters.<sup>91</sup>

### § 1:61 Those subject to jurisdiction of commission on judicial performance

The following judicial officers are subject to the jurisdiction of the Commission on Judicial Performance.<sup>92</sup>

**The Supreme Court, Courts of Appeal, and Superior Courts.** The California judiciary is subject to an array of means to ensure accountability. (See Pillar VIII, *Handbook*. § 1:38.)

**Subordinate judicial officers.**<sup>93</sup> As employees of the superior courts, subordinate judicial officers are primarily accountable to the court in

<sup>86</sup>Cal. Code Jud. Ethics, canon 6D; Rules Prof. Conduct, rule 1-710 (lawyer serving as referee).

<sup>87</sup>Cal. Code Jud. Ethics, canon 6D. “Court-appointed arbitrators” mentioned in this canon refers to arbitrators serving in judicial arbitration. California Rules of Court, rule 3.814(d)(2) requires members of arbitration panels to certify that the member is aware of and will comply with canon 6 of the Code of Judicial Ethics. (See also Rules Prof. Conduct, rule 1-710 (lawyer serving as court-appointed arbitrator).)

<sup>88</sup>Cal. Code Jud. Ethics, canons 5, 6E; Rules Prof. Conduct, rule 1-700. The State Bar Commission for the Revision of the Rules of Professional Conduct has approved a proposed rule 8.2 to supersede rule 1-700. (See *Handbook*, § 1:60, fn. 85.) Both rule 1-700 and proposed rule 8.2(b) require a lawyer who is a candidate for judicial office in California to comply with canon 5 of the Code of Judicial Ethics.

<sup>89</sup>Government Code sections 11475.20 et seq. and 11475.40 exclude certain provisions of the Code of Judicial Ethics from application to administrative law judges. Gov. Code section 11475.50 provides for discipline for violations of the code for failure to comply with certain gift rules.

<sup>90</sup>Workers Compensation administrative law judges are required to comply with “the Code of Judicial Ethics adopted by the Supreme Court pursuant to subdivision (m) of Section 18 of Article VI of the California Constitution for the conduct of judges and shall not otherwise, directly or indirectly, engage in conduct contrary to that code or to the commentary to the Code of Judicial Ethics.” (Lab. Code, § 123.6, subd. (a).) The administrative director of the Workers Compensation system is required to adopt regulations to enforce this section. (*Ibid.*)

<sup>91</sup>The Code of Judicial Ethics does not define “special master.” Based on canon 6, however, special masters serving in disciplinary proceedings conducted by the Commission on Judicial Performance are bound by the Code of Judicial Ethics. (See *Handbook*, § 12:15.)

#### [Section 1:61]

<sup>92</sup>The Commission on Judicial Performance is discussed at length in chapter 12.

<sup>93</sup>The term “subordinate judicial officer” apparently comes from language in the Brown-Presley Trial Court Funding Act of 1988, which defines that term as a “court commissioner or referee authorized by statute.” (Gov. Code, § 77006.)

which they serve and are subject to discipline by that court. The Commission on Judicial Performance has discretionary jurisdiction following any action by the superior court.<sup>94</sup>

The presiding judge of a superior court faces discipline by the commission for failure to fulfill the obligation to monitor and discipline subordinate judicial officers. Section 6:2 of the *Handbook* contains a discussion of the disciplinary responsibilities of the presiding judge.

**“Referee” as used in canon 6D is not a “subordinate judicial officer.”** The definition of “subordinate judicial officer” in the Terminology section of the Code of Judicial Ethics includes the terms “commissioner, referee, and hearing officer.” Persons bearing the title “referee” in California statutes are not, however, subordinate judicial officers. To be a subordinate judicial officer, one must be appointed “by a trial court of record of officers such as commissioners to perform subordinate judicial duties.”<sup>95</sup> Thus, the term “subordinate judicial officer” would include a court-appointed commissioner, hearing officer, traffic court referee, probate referee, and juvenile court referee. If the person is a “referee” within the definition of a subordinate judicial officer, the referee would be subject to the jurisdiction of the Commission on Judicial Performance. The term “referee”, as used in canon 6D of the Code of Judicial Ethics, and as described in the following paragraph, is not within this category.

**Referees pursuant to Code of Civil Procedure sections 638 and 639.** Based on the above discussion, the disciplinary responsibility of the Commission on Judicial Performance would not extend to “referees” appointed pursuant to Code of Civil Procedure sections 638 and 639, as these persons are not employees of courts or funded by them, and are usually lawyers and occasionally lay persons (accountants and other experts). They are subject to canon 6D of the Code of Judicial Ethics. If such referee is an active or inactive lawyer, the person is subject to the discipline of the State Bar.<sup>96</sup>

**Judges of the State Bar Courts** are not subject to judicial discipline by the Commission on Judicial Performance. They are “subject to admonition, censure, removal, or retirement by the Supreme Court upon the same grounds as provided for judges of courts of record of this state.”<sup>97</sup>

### § 1:62 Application of the code of judicial ethics during leaves of absence

Judges are subject to both voluntary and involuntary absence from

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<sup>94</sup>Cal. Const., art. VI, § 18.1. Section 12:61 of the Handbook has a discussion of disciplinary activities of the commission since the adoption of article VI, section 18.1.

<sup>95</sup>Cal. Const., art. VI, § 22.

<sup>96</sup>See also Rules Prof. Conduct, rule 1-710 (lawyer serving as temporary judge).

<sup>97</sup>Business and Professions Code section 6079.1, subdivision (a) and California Rules of Court, rule 9.11(d), set out the procedure for discipline for misconduct or disability of State Bar Court judges.

performance of judicial duties. These include (1) voluntary leaves of absence to run for nonjudicial office, (2) sabbaticals, and (3) involuntary leaves due to non-permanent suspension or disqualification by the Commission on Judicial Performance. During all such leaves of absence, the judge continues to be bound by ethical constraints and is subject to judicial discipline for misconduct. As already noted, canon 6A of the Code of Judicial Ethics provides that “[a]nyone who is an officer of the state judicial system and who performs judicial functions” is bound by the code.

**Leave of absence to run for another public office.** A judicial officer who is on leave to run for other public office under article VI, section 17 of the California Constitution must comply with all provisions of the Code of Judicial Ethics except the following:

- Canon 2B(2)—“[L]ending the prestige of office to advance the judge’s personal interest”;
- Canon 4C(1)—“Appearing at public hearings”; and
- Canon 5—“Engaging in political activity (including soliciting and accepting campaign contributions for the other public office)”.<sup>98</sup>

The commentary to canon 6H states that the exceptions apply “only during the time the judge is on leave while running for other public office. All of the provisions of this code will become applicable at the time a judge resumes his or her position as a judge.”

**Sabbatical leave.** Rule 10.502(g) of the California Rules of Court expressly requires a judge on sabbatical leave to comply with the Code of Judicial Ethics during such leave. The rule further provides that a judge “must not accept compensation for activities performed during that sabbatical leave but may receive reimbursement for the expenses provided in canon 4H(2) of the Code of Judicial Ethics.”<sup>99</sup>

In the above two situations (leave to run for another office and sabbaticals), even though the judge may not perform judicial functions during such leaves of absence, the provisions of the Code of Judicial Ethics, other than those expressly excluded, remain fully applicable.

**Other leaves of absence, suspension, or disqualification.** Although there is no express provision of law on the subject, there is no rationale or reason to conclude that a judge on any leave of absence is relieved of the duty to comply with the Code of Judicial Ethics, unless a specific exception applies.

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[Section 1:62]

<sup>98</sup>Cal. Code Jud. Ethics, canon 6H.

<sup>99</sup>Cal. Rules of Court, rule 10.502 (pilot program of unpaid sabbatical leaves of absence under Gov. Code, § 77213).

In the case of voluntary leave (other than running for nonjudicial office or a sabbatical),<sup>100</sup> it should be noted the Code of Judicial Ethics has wide application in a variety of circumstances that have no relationship to performance of “judicial functions.”<sup>101</sup> Misconduct by a judge, whether or not the judge was authorized at that time to perform a judicial function, brings the judiciary into disrepute and damages public confidence in the integrity of the judiciary.<sup>102</sup>

Moreover, article VI, section 18, subdivision (d) of the California Constitution authorizes the Commission on Judicial Performance to discipline a judge or former judge “for action[s] occurring not more than 6 years prior to the commencement of the judge’s current term or of the former judge’s last term.” On a number of occasions, the commission has disciplined a judge for conduct that occurred before that person became a judge.<sup>103</sup> This same principle should apply during any sort of absence from judicial duties, whether voluntary or involuntary.

In circumstances of involuntary leave (disqualification or suspension),<sup>104</sup> it might be argued that because the judge is prohibited from performing judicial duties, he or she is not required to comply with the Code of Judicial Ethics based on language in canon 6A. For reasons noted already, however, such a position would be unsound. In addition, the judge, at a minimum, would be bound by “general ethical standards.”<sup>105</sup>

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<sup>100</sup>Leaves of absence other than those expressly noted in the text (to run for other nonjudicial office or for sabbatical) can include “personal leave,” vacation, illness (see Cal. Rules of Court, rule 10.603(c)(2)(D), (E) & (H)), and education (see Cal. Stds. Jud. Admin., § 10.11(d) & (h)). Other forms of leave, not expressly directed to judges, include leave to attend to military obligations and jury duty.

<sup>101</sup>See, e.g., Cal. Code Jud. Ethics, canons 1, 2, 4, 5.

<sup>102</sup>In *Inquiry Concerning Couwenberg* (2001) 48 Cal.4th CJP Supp. 205, 220–221, the court applied “general ethical standards” to a judge for misrepresentations made in the Personal Data Questionnaire he submitted to the Governor before appointment.

<sup>103</sup>See *Handbook*, §§ 8:90, 11:66, 12:66.

<sup>104</sup>The California Constitution requires that a judge be “disqualified from acting as a judge, without loss of salary” pending certain criminal proceedings or pending a petition to the Supreme Court for review of a decision by the Commission on Judicial Performance for removal or retirement of a judge. (Cal. Const., art. VI, § 18, subd. (a).) The commission has the authority to “disqualify a judge from acting as a judge, without loss of salary, upon notice of formal proceedings by the commission charging the judge with judicial misconduct or disability.” (*Id.*, art. VI, § 18, subd. (b).) Finally, the commission is required to suspend a judge with loss of salary where the judge is found guilty or pleads guilty or no contest to certain criminal charges. (*Id.*, art. VI, § 18, subd. (c).)

<sup>105</sup>See *Inquiry Concerning Couwenberg*, *supra*, 48 Cal.4th CJP Supp. 205.

**§ 1:63 Retired judges serving in the assigned judges program**

A retired judge who applies to the Chief Justice to serve in the Assigned Judges Program,<sup>106</sup> and meets eligibility requirements for such service, is required to comply with all of the provisions of the Code of Judicial Ethics, with two exceptions noted below, whether or not the assigned judge is actually serving. The two exceptions are:

- Canon 4C(2)—Appointment to government positions;
- Canon 4E—Fiduciary activities.<sup>107</sup>

**Accountability of assigned judges.** The Chief Justice establishes the standards and guidelines for judicial assignments for the Assigned Judges Program. A retired judge who is serving in the Assigned Judges Program is deemed to “perform judicial functions” for the purposes of the Code of Judicial Ethics.<sup>108</sup> Assigned judges, however, are not subject to discipline by the Commission on Judicial Performance because they are not active judges. As a result, the Chief Justice maintains disciplinary authority over the conduct of retired judges serving in the program. An assigned judge, however, is subject to discipline by the commission for acts committed *before* the judge’s retirement from judicial office.<sup>109</sup>

**Bar on privately compensated activities by assigned judges.** Among other conduct issues in the Standards and Guidelines for Judicial Assignments is the requirement for a retired judge to certify “that he or she will not participate in privately compensated dispute resolution activities during tenure in the program.”<sup>110</sup> The standards prohibit “privately compensated dispute resolution activities during his or her tenure in the Assigned Judges Program. Engaging in dispute resolution activities for which the judge is compensated entirely by the court is not prohibited.”<sup>111</sup> An assigned judge may engage in “uncompensated dispute resolution activities for either a court or a not-for-profit organization.”<sup>112</sup>

**Diligence.** Assigned judges must make a commitment to “fully devote himself or herself to that service” as an assigned judge on assignment days,<sup>113</sup> and “must commit and certify that they have no matters pend-

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**[Section 1:63]**

<sup>106</sup>See AJP Handbook: Standards and Guidelines for Judicial Assignments (March 2016).

<sup>107</sup>Code Jud. Ethics, canon 6B.

<sup>108</sup>Advisory Com. com., Cal. Code Jud. Ethics, canon 6A.

<sup>109</sup>Cal. Const., art. VI, § 18, subd. (d).

<sup>110</sup>AJP Handbook: Standards and Guidelines for Judicial Assignments, *supra*, section III-B-1-e.

<sup>111</sup>*Id.*, § IV-B-1.

<sup>112</sup>*Id.*, § IV-B-2.

<sup>113</sup>Cal. Code Jud. Ethics, canon 3, 3B(8).

ing for more than 90 days after submission, in the same manner that incumbent judges are required to certify.”<sup>114</sup>

### § 1:64 Temporary judges, referees, and court-appointed arbitrators

Canon 6D identifies the provisions of the Code of Judicial Ethics applicable to the following categories of persons who are not judges as described in section 1:60 above, but who engage in judicial-related functions. The idea behind canon 6D is this: while the person is serving in the capacities of temporary judge, referee (under Code of Civil Procedure sections 638 and 639), or a court-appointed arbitrator, he or she is subject to the rules applicable to them by the canon.

**Temporary judges.** A temporary judge<sup>115</sup> is an “active or inactive member of the bar who . . . serves or expects to serve as a judge once, sporadically, or regularly on a part-time basis under a separate court appointment for each period of service or for each case heard.”<sup>116</sup>

**Court-appointed referees.** A court-appointed referee under Code of Civil Procedure sections 638 and 639 may be any person who the court deems necessary to perform the task required by the reference, including persons who are not either lawyers or retired judges. For example, occasionally the court needs to appoint a person with particular expertise, such as an accountant or engineer, to perform a task related to a matter before the court.<sup>117</sup>

**Court-appointed arbitrators in judicial arbitrations.** There are essentially two kinds of court-appointed arbitrators: those serving in judicial arbitrations pursuant to Code of Civil Procedure section 1141.10 et seq., and those appointed by the court in contractual arbitrations where the parties for any reason do not select an arbitrator.<sup>118</sup> Arbitrators in contractual arbitrations are bound by the Ethics Standards for Neutral Arbitrators in Contractual Arbitrations that are included in the California Rules of Court.<sup>119</sup>

#### Canon 6D provisions applicable to temporary judges, referees

<sup>114</sup>Cal. Const., art. VI, § 19, Gov. Code, § 68210. See *Handbook*, § 6:14.

#### [Section 1:64]

<sup>115</sup>Article VI, section 21 of the California Constitution provides for the appointment of temporary judges pursuant to the stipulation of the parties: “On stipulation of the parties litigant the court may order a cause to be tried by a temporary judge who is a member of the State Bar, sworn and empowered to act until final determination of the cause.” (See Cal. Rules of Court, rule 2.816.)

<sup>116</sup>Cal. Code Jud. Ethics, Terminology.

<sup>117</sup>See *Handbook*, § 1:33 (discussion related to referees).

<sup>118</sup>Code Civ. Proc., § 1281.6.

<sup>119</sup>Standard 2(a)(1)(B) of the Ethical Standards for Neutral Arbitrators in Contractual Arbitrations provides that the standards apply to neutral arbitrators in contractual arbitration, specifically including arbitrators appointed by courts where the

(Code of Civil Procedure sections 638 and 639), and arbitrators in judicial arbitrations. Canon 6D of the Code of Judicial Ethics establishes the rules of ethics for the above-described groups who function directly under the authority of the court or by appointment of the court. Again, this canon applies only to temporary judges, referees under Code of Civil Procedure sections 638 and 639, and arbitrators in judicial arbitrations, and does not apply to others performing contractual arbitrations or other private dispute resolution services.

**Concept of canon 6D and lawyer accountability.** Canon 6D imposes rules of ethics on those who serve in the capacities set out in the canon (temporary judges, referees and court-appointed judicial arbitrators). Lawyers who serve in these capacities pursuant to court appointment in a particular case or group of cases, do so for a finite period of time. Rule 1-710 of the Rules of Professional Conduct makes lawyers who serve in the above capacities accountable to the State Bar for compliance with canon 6D and the ethics rules referenced therein.<sup>120</sup>

**Organization of canon 6D.** Canon 6D is organized in a time-frame matrix defining which ethics rules apply at any given point in time. The matrix rests on the understanding that persons serving in these capacities spend most of their time engaged in various occupations, usually as lawyers representing clients, and are not full-time sitting judges.

The longest time frame set out in canon 6D is from the time of appointment and indefinitely thereafter, with the shortest time frame being while the person is actually presiding in a proceeding or communicating with the parties having, as it were, “gavel in hand.” When actually presiding or communicating with the parties, the person is bound by *all the rules* applicable to all of the time frames.

Thus, for example, when the person is actually presiding in the matter, he or she is bound by the greatest number of rules set out in canon 6D, and when the person has finished the assignment is bound “indefinitely after the termination of the appointment,” i.e., forever, by three rules set forth in canon 6D(8).

**Temporary judges, referees, and judicial arbitrators who are members of the State Bar—accountability.** As noted above, canon 6D created a system through the State Bar disciplinary structure to secure accountability for active or inactive members of the State Bar who serve in the capacity of temporary judges, referees under Code of

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parties failed to select an arbitrator.

<sup>120</sup>As explained in section 1:60, footnote 85 of the *Handbook*, new rules of professional conduct, with numbering changes, have been drafted by the State Bar of California Commission for the Revision of the Rules of Professional Conduct. That commission has approved a proposed rule 2.4.1 to supersede rule 1-710. Proposed Rule 2.4.1 states: “A lawyer who is serving as a temporary judge, referee, or court-appointed arbitrator, and is subject to Canon 6D of the Code of Judicial Ethics, shall comply with the terms of that canon.”

Civil Procedure sections 638 and 639, and arbitrators in judicial arbitrations.<sup>121</sup>

**Special rules for temporary judges.** Canon 6D(3) and (4) set out the grounds for disqualification and waiver of disqualification applicable to temporary judges. Canon 6D(9) sets out rules applicable to temporary judges appointed under rule 2.810 of the California Rules of Court, related to use of title and service as a temporary judge. Rule 2.810 et seq. establishes rules for selection, training, and other quality control matters for temporary judges appointed by the court who usually serve in small claims, traffic, family law, and other matters in courts around the state.<sup>122</sup>

**Referees and judicial arbitrators who are not members of the State Bar—disciplinary status.** Temporary judges are required to be members of the State Bar.<sup>123</sup> The fact that arbitrators and referees under Code of Civil Procedure sections 638 and 639 are not required to be members of the State Bar does not mean they are excluded from compliance with canon 6D. Canon 6D is not limited in its application and thus a nonlawyer referee or court-appointed arbitrator who violates the provisions of canon 6D is accountable in a variety of ways. A referee’s report must be approved by the court and one would assume that if the referee engaged in misconduct, that fact could be brought to the attention of the court and impact the court’s determination concerning the report. As to judicial arbitrators, although their awards are not binding, the court would certainly have the authority to remove from future appointments a person who violated canon 6D.

### § 1:65 Retired judges and state bar membership

**Assigned judges—may not be active members of the Bar.** In order to participate in the Assigned Judges Program, a retired judge must certify that he or she “does not intend to become an active member of the State Bar.”<sup>124</sup>

**State Bar members who engage in private dispute resolution may not have inactive membership status.** Rule 2.30(B) of the State Bar Membership Rules related to inactive membership in the bar provides:

“No member practicing law, or occupying a position in the employ of or

<sup>121</sup>See *Handbook*, § 1:65 (concerning requirement of active State Bar membership for members engaged in private dispute resolution).

<sup>122</sup>These changes in the Code of Judicial Ethics were the result of the extensive study and recommendations of the Temporary Judges Working Group of the California Judicial Council from 2004 to 2006.

<sup>123</sup>Cal. Const., art. VI, § 21.

#### [Section 1:65]

<sup>124</sup>AJP Handbook: Standards and Guidelines for Judicial Assignments, section III (B)(1)(c).

rendering any legal service for an active member, or occupying a position wherein he or she is called upon in any capacity to give legal advice or counsel or examine the law or pass upon the legal effect of any act, document or law, shall be enrolled as an inactive member.”<sup>125</sup>

The State Bar has taken the position that a member seeking inactive status is precluded “from engaging in certain activities in California including, but not limited to, working as a private arbitrator, mediator, referee or other dispute resolution provider, a law clerk, paralegal, real estate broker or CPA. This is based on the presumption that these activities call upon a member to give legal advice or counsel or examine the law or pass upon the legal effect of any act, document or law.”<sup>126</sup>

As noted in the *Handbook*, section 1:64, the State Bar has disciplinary authority over a member’s breaches of the provisions of the Code of Judicial Ethics related to temporary judges, referees under Code of Civil Procedure sections 638 and 639, and arbitrators in judicial arbitrations, whether the member is active or inactive.

### § 1:66 Retired judges engaged in private dispute resolution

A former judge is accountable to the Commission on Judicial Performance for acts committed while he or she served as an active judge or for acts committed before becoming a judge within the limitation period. Retired judges have been disciplined following retirement for their conduct while in office.<sup>127</sup>

As noted in section 1:64 of the *Handbook*, the rules set out in canon 6D of the Code of Judicial Ethics apply to anyone, including a retired judge, who engages in work as a temporary judge, referee, or court-appointed arbitrator. In addition, a retired judge serving as an arbitrator within the provisions of the Ethics Standards for Neutral Arbitrators in Contractual Arbitrations is bound by the ethical rules set out in the Ethics Standards.<sup>128</sup> Finally, rule 3.850 et seq., of the California Rules of Court, contains rules of conduct for mediators in “court-connected mediation programs for general civil cases.”<sup>129</sup> Although these rules concerning mediation do not apply to private mediation practice, i.e., mediation

<sup>125</sup>Rules and Regs. of State Bar, Membership Rules, tit. 2, rule 2.30(B).

<sup>126</sup>See “Application Transfer to Inactive Membership Status,” State Bar of California website [http://www.calbar.ca.gov/Portals/0/documents/members/2015\\_MSCTransferInactive\\_rV2.pdf](http://www.calbar.ca.gov/Portals/0/documents/members/2015_MSCTransferInactive_rV2.pdf) (as of Aug. 1, 2007).

#### [Section 1:66]

<sup>127</sup>Cal. Const., art. VI, § 18. See, e.g., *Kennick v. Commission on Judicial Performance* (1990) 50 Cal.3d 297; *Inquiry Concerning Ross*, Com. on Jud. Performance, Ann. Rep. (1998), Public Censure and Bar, p. 19; *Inquiry Concerning Trammell*, Com. on Jud. Performance, Ann. Rep. (1999), Public Censure and Bar, p. 17.

<sup>128</sup>Included in the California Rules of Court.

<sup>129</sup>These rules apply to a mediator included on a superior court list that is selected by the court or parties to serve, or a mediator who is selected within a court mediation program. (See Cal. Rules of Court, rule 3.851(a)(1) & (2).)

outside of court-connected programs, they may represent the standard of good practice in the field of mediation.

The Advisory Committee Commentary to canon 6A states: “Because retired judges who are privately retained may perform judicial functions, their conduct while performing those functions should be guided by this code.”

