

## JUDICIAL MISCONDUCT

### I. Introduction

The main sources of law that pertain to judicial misconduct are Articles VI § 18 and 18.5 of the California Constitution, the California Code of Judicial Ethics, the California Judicial Conduct Handbook (3<sup>rd</sup> edition) written by David M. Rothman, and case law.

In exercising the broad power to control the trial proceedings, a judge has, first and foremost, a duty to remain impartial. (See California Code of Judicial Ethics, Canon 3B.) Violation of this duty to remain impartial may be so serious as to constitute reversible error. The defendant's right to a fair trial presided over by a fair and impartial judge may be violated when a judge is seen to have abandoned this role as a fair and impartial judge by becoming embroiled in the proceedings, assuming the role of prosecutor, making disparaging remarks about defendant, defense counsel or defense witness, considering matters not in evidence, forming an opinion in trial court before the defense is presented, and/or exhibiting clear bias or prejudice.

### II. The leading case in California, *People v. Mahoney* (1927) 201 Cal. 618.

- A. Witkin identifies *Mahoney* as the leading case in California on judicial misconduct.
- B. Mahoney appealed his conviction for manslaughter. Mahoney was a contractor who built a viewing grandstand at Colorado and Madison Avenues in Pasadena for the Rose Parade. The grandstand collapsed injuring many and killing some.
- C. Mahoney appealed and argued judicial misconduct over "twenty-three utterances by the trial judge and numerous instances where he took to himself the task of examining witnesses, which appellant says conveyed to the mind of the jury the impression that the judge was convinced of the guilt of the defendant and that his sympathy was wholly with the prosecution. No assignments of error were made at the time of the occurrences by defendant's counsel and no opportunity given to the court to right the wrong done, if such it was." (*People v. Mahoney* (1927) 201 Cal. 618, 622. [emphasis added].)

- D. California Supreme Court overlooked the lack of objection because this case was one of those instances where objection “would be entirely fruitless; no retraction sufficient to undo the harm; and the effort made might result in further error. Further, it is evident from the attitude of the trial judge, as shown by the record, that any assignment of misconduct would have been disregarded. Counsel for the appellant, by making an assignment, would have brought upon himself further attack.” (*People v. Mahoney* (1927) 210 Cal. 618, 622.)
- E. California Supreme Court then takes 5 pages to list the questions and intemperate comments of the judge in the case. The Court then rejects the government’s *Watson* argument of harmless error and finds reversible error as follows:

“We have presented sufficient to show a state of affairs which trial judges should not permit and which may be pointed to as an example of what they should not do in the trial of lawsuits. If they will lend themselves to such methods, if they will so intemperately espouse the cause of the prosecution in criminal cases, no man charged with a penal offense is safe, whether he be guilty or innocent. Every defendant under such a charge is entitled to a fair trial on the facts and not a trial on the temper or whimsies of the judge who sits in his case. Whatever the degree of guilt of appellant here, those who know the circumstances surrounding his conviction are likely to feel that the verdict resulted from the conduct of the judge and not from the evidence. [Emphasis added.]

“Jurors rely with great confidence on the fairness of judges, and upon the correctness of their views expressed during trials. For this reason, and too strong emphasis cannot be laid on the admonition, a judge should be careful not to throw the weight of his judicial position into a case, either for or against the defendant. ...

“When, as in this case, the trial court persists in making discourteous and disparaging remarks to a defendant’s counsel and witness and utters frequent comment from which the jury may plainly perceive that the testimony of the witnesses is not believed by the judge, and in other ways discredits the cause of the defense, it has transcended so far beyond the pale of judicial fairness as to render a new trial necessary. Neither can a plea for the application of the section of the constitution save this situation. The fact that a record shows a defendant to be guilty of a crime does not

necessarily determine that there has been no miscarriage of justice. In this case, the defendant did not have the fair trial guaranteed to him by law and the constitution." [Emphasis added.]

(*People v. Mahoney* (1927) 210 Cal. 618, 622-627.)

F. *Mahoney* is noteworthy for five reasons:

1. Supreme Court reached issue despite lack of objection;
2. Supreme Court appears to review the record de novo for error;
3. Supreme Court adopts standard of appearance of bias;
4. Supreme Court rejects harmless error argument.
5. Although nearly a century old, courts continue to quote from it when deciding judicial misconduct cases.

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### III. Is The Issue Preserved?

#### A. Tension between general rule requiring objection and exception finding no objection needed due to incurable harm or futility.

1. The California Supreme Court case of *People v. Sturm* (2006) 37 Cal.4th 1218, 1237, states the general rule that an objection is required to preserve a judicial misconduct issue for appeal. But the Court immediately relies on the exceptions that no objection is necessary where objection and admonition would not cure the harm or when objecting would be futile to reach the issue. In *Sturm* the Supreme Court reached the issue of misconduct because the trial court repeatedly disparaged defense counsel and defense witnesses, conveyed to the jury that he disbelieved critical defense testimony, repeatedly intervened in the defense case, and created the impression that he was aligned with the prosecution. (*Id.* at pp. 1233-1243.)
2. In *People v. Abbaszadeh* (2003) 106 Cal.App.4th 642, 646, the court reached the misconduct claim that trial judge's instruction and comments effectively told the jurors to lie to get off of jury duty rather than to admit racist feelings because objection would have been futile and prosecutor had equal duty to object.

3. Cases invoking the objection requirement tend to find issue is waived where the alleged misconduct either is minor, although not minor is merely the trial judge exercising control of the proceedings, or is a manifestation of the inevitable conflicts inherent in a criminal trial. (*People v. Snow* (2003) 30 Cal.4th 43, 77-78; *People v. Fudge* (1994) 7 Cal.4th 1075, 1108; *People v. Anderson* (1990) 52 Cal.3d 453, 468.)

**B. The Trap of California Code of Civil Procedure section 170.1 and 170.6 Disqualification Motions.**

1. California Code of Civil Procedure section 170.1 provides a statutory mechanism for moving to disqualify a judge based on bias or other grounds.
2. Exclusive means of appellate review is petition for writ of mandate. (Code Civ. Proc., § 170.3, subd. (d).) Denial of motion to disqualify is not reviewable on appeal from final judgment. (*People v. Panah* (2005) 35 Cal.4th 395, 444-445.) Same rule holds for appeal from denial of motion under section 170.6. (*People v. Hull* (1991) 1 Cal.4th 266, 268, 276.)
3. However, appellate review is available on non-statutory grounds where appellant claims denial of due process right to an impartial judge. (*People v. Mayfield* (1997) 14 Cal.4th 668, 811; *People v. Brown* (1993) 6 Cal.4th 322, 335.) In *Mayfield*, the Supreme Court construed appellant's challenge to denial of motion to disqualify as a due process claim and reached merits of the issue.

**C. Disqualifying Judge on Remand Pursuant to California Code of Civil Procedure, section 170.1, subdivision (c).**

1. This subdivision provides the following: "At the request of a party or on its own motion an appellate court shall consider whether in the interests of justice it should direct that further proceedings be heard before a trial judge other than the judge whose judgment or order was reviewed by the appellate court."
2. Erroneous rulings without more do not justify removal of a trial judge from further proceedings in a case. (*Blakemore v. Superior*

*Court* (2005) 129 Cal.App.4th 36, 59-60.) Mere sentencing error does not justify removal of judge from case on remand. (*People v. Gulbrandsen* (1989) 209 Cal.App.3d 1547, 1563.)

3. Removal from case is warranted where sentence of the original judge indicates an animus inconsistent with judicial objectivity. (*People v. Gulbrandsen* (1989) 209 Cal.App.3d 1547, 1562.) Removal is also warranted in case where trial judge's imposition of banishment as term of plea bargain made bargain void and judge's indicated sentence displayed "an animus toward petitioner inconsistent with judicial objectivity." (*Alhusainy v. Superior Court* (2006) 143 Cal.App.4th 385, 394.)
4. Grounds for exercising removal power include "where a reasonable person might doubt whether the trial judge was impartial or where the trial court's rulings suggest the 'whimsical disregard' of a statutory scheme." (*Alhusainy v. Superior Court* (2006) 143 Cal.App.4th 385, 394.) In addition, where "a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial" removal is appropriate. The court need not determine whether there is actual bias. (*In re Wagner* (2005) 127 Cal.App.4th 138, 148; *Ng v. Superior Court* (1997) 52 Cal.App.4th 1010, 1024.)

#### IV. Standard of Review is De Novo.

1. Cases rarely explicitly state standard of review but all cases appear to undertake an independent analysis of the facts to determine whether judicial misconduct occurred. (*People v. Sturm* (2006) 37 Cal.4th 1218, 1237-1243; *People v. Snow* (2003) 30 Cal.4th 43, 77-82; *People v. Fudge* (1994) 7 Cal.4th 1075, 1108-1109; *People v. Mahoney* (1927) 210 Cal.618, 622-627.)
2. In the context of reviewing disqualification motions, on undisputed facts the question of law is subject to independent review and the test is an objective one that asks whether a reasonable person knowing the facts would fairly entertain doubts regarding the judge's impartiality. (*People v. Panah* (2005) 35 Cal.4th 395, 446; *People v. Briggs* (2001) 87 Cal.App.4th 312, 319; *Flier v. Superior Court* (1994) 23 Cal.App.4th 165, 170.)

## V. Standard of Prejudice: Argue Structural Error.

1. In *People v. Sturm* (2006) 37 Cal.4th 1218, 1243, the Supreme Court found prejudice under either the federal constitutional *Chapman* standard of the state's *Watson* standard. (*Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705]; *People v. Watson* (1956) 46 Cal.2d 818, 836.)
2. Argue structural error and reversible per se. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 309-310 [111 S.Ct. 1246, 113 L.Ed.2d 301].) The premise of structural error review is that even convictions reflecting the right result are reversed for the sake of protecting a basic right because the error affects the fundamental integrity of the proceedings. For instance, in *People v. Mahoney* (1927) 210 Cal.618, 627 Supreme Court reversed despite the fact that record shows defendant to be guilty. Likewise, in *Hernandez v. Pacius* (2003) 109 Cal.App.4th 452, 461, a civil case, the court explicitly departed from the requirement that prejudice be shown and reversed because "the appearance of judicial bias and unfairness colors the entire record ... The test is not whether plaintiff has proved harm, but whether the court's comments would cause a reasonable person to doubt the impartiality of the judge or would cause us to lack confidence in the fairness of the proceedings such as would necessitate reversal." In addition, in *People v. Hernandez* (1984) 160 Cal.App.3d 725, 747, the court reversed because of an appearance of bias.

## V. Types of Judicial Misconduct

### A. Abandoning the judicial role

#### 1. Embroilment

Embroilment is a general term and can encompass bias, abandoning the judicial role, etc. "Embroilment is the process by which the judge surrenders the role of impartial fact finder/decision maker and joins the fray." (*California Judicial Conduct Handbook* § 2.01.)

*Offutt v. United States* (1954) 348 U.S. 11, 17 [75 S.Ct. 11; 99 L.Ed 11.]

“The record is persuasive that, instead of representing the impersonal authority of law, the trial judge permitted himself to become personally embroiled with the petitioner. There was an intermittently continuous wrangle on an unedifying level between the two. For one reason or another, the judge failed to impose his moral authority upon the proceedings. His behavior precluded that atmosphere of authority which should especially dominate a criminal trial and which is indispensable for an appropriate sense of responsibility on the part of the court, counsel, and jury.”

*People v. Weaver* (2004) 118 Cal.App.4th 131, 146-150.

**Facts:** Trial judge improperly thrust himself into the middle of case settlement negotiations and therefore abandoned his role as neutral arbitrator. “No one, not even appellant, doubts that it was the trial judge's intention to encourage a plea bargain that was in everyone's best interest. The judge, however, went too far...At any given time he seemed to fill the role of judge, jury, defense counsel, prosecutor, psychiatrist, social worker and victims' advocate.” (p. 149.)

**Held:** Trial judge's undue pressure on defendant to plead guilty constituted good cause to allow withdrawal of the plea. (p. 150.)

*People v. Sandoval* (2006) 140 Cal.App.4th 111, 126-127

**Facts:** Trial judge exerted significant and inappropriate pressure on defendant to accept a plea offer.

**Held:** Trial court erred in refusing to allow defendant to withdraw his guilty plea.

## 2. Assuming the role of prosecutor

*People v. Raivairt* (2001) 93 Cal.App.4th 258, 269-272

A trial judge asking questions of a witness does not engage in misconduct unless in doing so he shows bias or “persistently makes discourteous and disparaging remarks so as to discredit the defense or create the impression it [was] allying itself with the prosecution.”

*People v. Santana* (2000) 80 Cal.App.4th 1194, 1206-1208

“A court may control the mode of questioning of a witness and comment on the evidence and credibility of witnesses as necessary for the proper determination of the case. Within reasonable limits, the court has a duty to see that justice is done and to bring out facts relevant to the jury's determination. A court commits misconduct if it persistently makes discourteous and disparaging remarks so as to discredit the defense or create the impression it is allying itself with the prosecution.” (P. 1206-1207.)

However, here, the trial court's questioning of defendant consumed more time than was necessary to elicit the point the court sought to make. “By belaboring points of evidence that were clearly adverse to [defendant], the trial court took on the role of prosecutor rather than that of impartial judge. By continuing this adversarial questioning for page after page of the reporter's transcript, the trial court created the unmistakable impression it had allied itself with the prosecution in the effort to convict [defendant]. These instances of impropriety are so egregious as to require reversal of [defendant's] conviction.”

*People v. Sturm* (2006) 37 Cal.4th 1218, 1235

Judge committed misconduct when he imposed his own objections to questions asked by defense counsel.

**3. Disparaging remarks concerning the defendant, defense counsel, or defense witness.**

*People v. McNeer* (1935) 8 Cal.App.2d 676, 680-681

**Facts:** Defendant, suffering from a bullet wound, groaned and made noises that interrupted the proceedings. The trial judge instructed the jury to ignore his remarks, calling it theatrics, and later told declared that the defendant was faking it.

**Held:** The remarks constituted reversible error.

*People v. Williams* (1942) 55 Cal.App. 2d 700, 700-703

**Facts:** After defense counsel referred to defendant as “the gentleman on the right”, the judge interrupted to say “I think the word gentleman is not only unnecessary but inappropriate to these men” and “I can think of a better one for them.”

**Held:** The remarks constituted reversible error.

*People v. Sturm* (2006) 37 Cal.4th 1237, 1238

**Held:** Trial judge committed misconduct when he engaged in a pattern of disparaging comments to defense counsel and defense witnesses in jury’s presence and conveyed impression that he favored prosecution by frequently interposing objections to defense counsel’s questions.

*People v. Santana* (2000) 80 Cal.App.4th 1194, 1208-1209

**Held:** Trial judge committed a reversible error in repeatedly, disparagingly, and prejudicially questioning defense witness. The evidence was entirely circumstantial and without the trial judge’s interference the jury might have found defendant’s explanation of the circumstances sufficient to conclude that the case against him was not proved.

#### 4. Considering matters not in evidence

*People v. Andrews* (1970) 14 Cal.App.3d 44, 45

**Held:** Reference to prosecution witness' lie detector test was a prejudicial error.

*People v. Handcock* (1983) 145 Cal.App.3d Supp. 25, 29-34

**Held:** Judge's independent investigation of accident and calling of witness to offer evidence derived from that investigation was a prejudicial error.

*People v. Ramirez* (1952) 113 Cal.App.2d 842, 852

**Held:** Without notifying defendant, the judge directed the clerk to have police chemist analyze powder found in capsule form in defendant's lamp. This was held to be a prejudicial error.

*People v. Armstead* (2002) 102 Cal.App.4th 784, 792-794

**Held:** Trial judge's response to jury query after submission was prejudicial error because it effectively directed the jury to consider evidence for the purpose other than that for which it was admitted at trial.

*People v. Archerd* (1970) 3 Cal.3d 615, 638

**Held:** Judge's consultations with medical experts outside of court was a harmless error. Alleged error in conferring with prosecutors and prosecution investigator in chambers was waived by defense counsel's failure to make objections or note matter for record.

**5. Forming an opinion in court trial before the defense is presented.**

*People v. Barquera* (1957) 154 Cal.App.2d 513

**Facts:** Defendant was charged with possession of narcotics and it was stipulated that the case be submitted on the preliminary hearing transcripts with the right reserved to produce additional evidence. The judge stated that he had read the transcripts, wouldn't take the defendant's word against the police officer and that the defendant didn't have any defense. (p. 515.)

**Held:** Reversible error. "When a judge becomes a trier of fact as well as of the law, the defendant is entitled to the same presumption of innocence and the same right to present a defense that he would have if he were being tried by a jury. In the instant controversy, the judge without specific intention to do harm, deprived the defendant of such rights." (p. 519.)

**6. Comments in court.**

*People v. Cook* (1983) 33 Cal.3d 400, 413.

**Facts:** Trial court commented to deadlocked jury on his views of the evidence and credibility of witnesses.

**Held:** Although trial court has authority to comment on the evidence it may not comment on the evidence to a deadlocked jury and "may not directly express its opinion on the ultimate factual issue of the accused's guilt or innocence."

*People v. Anderson* (1990) 52 Cal.3d 453, 469.

**Facts:** Judge told jury that issue of intent to kill was a “fairly simple question” and verdict could be reached within 2 or 3 hours.

**Held:** Court overlooked failure to object to find reversible error due to trial court’s coercive comments.

## VI. Commission Cases

The Commission on Judicial Performance, established in 1960, is the independent state agency responsible for investigating complaints of judicial misconduct and judicial incapacity and for disciplining judges, pursuant to article VI, section 18 of the California Constitution. The Commission's jurisdiction includes all judges of California's superior courts and the justices of the Court of Appeal and Supreme Court. The Commission's authority is limited to investigating allegations of judicial misconduct and, if warranted, imposing discipline. The Commission cannot change a decision made by any judicial officer; this is a function of the state's appellate courts. After investigation, and in some cases a public hearing, the Commission may impose sanctions ranging from confidential discipline to removal from office. ([www.http://cjp.ca.gov/](http://cjp.ca.gov/))

*McCullough v. Commission on Judicial Performance* (1989) 49 Cal.3d 186, 191

Judge committed obvious misconduct when he gave a directed verdict for the prosecution during closing arguments.

*Gonzales v. Commission* (1983) 33 Cal.3d 359, 371

It is judicial misconduct for a judge to conduct proceedings in the absence of counsel.

*Ryan v. Commission on Judicial Performance* (1988) 45 Cal.3d 518, 536.

Trial judge committed misconduct by conducting his own investigation in a criminal trial, with little notice to either counsel, and then interrupted defense case to bring his own witness whose testimony was severely damaging to the defense. Further misconduct committed by imposing and extracting an admission to probation violation in the absence of counsel.

Defendant's resulting conviction was later set aside in *People v. Hancock* (1983) 145 Cal.App.3d Supp. 25, 31, because the court found no authority for the judge's investigation. The court held that although a judge may call and examine witnesses, the manner in which the trial judge placed his own witness on the stand, by interrupting defendant's testimony, seriously prejudiced the defendant.