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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Inquiry Concerning Judge Tony R. Mallery, No. 206

JUDGE TONY MALLERY

Petitioner

v.

THE COMMISSION ON JUDICIAL PERFORMANCE

Respondent

PETITION FOR REVIEW OF DETERMINATION BY THE COMMISSION ON JUDICIAL PERFORMANCE (RULE 9.60)

A copy of the Commission's determination, its entry of determination, and its factual findings is attached hereto in its original format (Rule 9.60)

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ISSUE PRESENTED

Does the use of nonpublic Superior Court records during Formal Proceedings before the Commission on Judicial Performance ("Commission"), which by Staff Attorneys requested and received outside of the process stated in Government Code § 68576, violate the law, and if so, what is the remedy?

INTRODUCTION

This case affords the Court with the opportunity to decide whether Government Code § 68756 sets forth a *permissive* process by which the Staff Attorneys at the Commission may receive nonpublic court records from Superior Courts, or whether the process is *mandatory*, and the failure to comply is a violation of law.

Section 68756(a) states:

> Notwithstanding any other law, the commission shall be given access, on an ex parte basis, to all nonpublic records of court proceedings, including confidential sealed records and transcripts, relevant to the performance of any judge, former judge, or subordinate judicial officer (hereafter, collectively, judicial officer) within the commission's jurisdiction under Sections 18 and 18.1 of Article VI of the Constitution. **The commission shall make a written request to the court in which the proceedings occurred. The court shall file the request under seal.** Access to the requested records shall be provided within 15 days of the written request.

(Emphasis added.)

The text itself is clear, and its purpose is obvious. Commission—through their Staff Attorneys—has the right to investigate, view, and use nonpublic Superior Court records, but it must make a written request to the Superior Court who holds the records, and the Court must file that request under seal.

While investigating Judge Mallery, Commission Staff Attorneys inconsistently complied with the mandates set forth in Section 68756. Only sometimes did they petition the Lassen Superior Court ("LSC"), obtain a signed order to receive nonpublic, and an order to publish those records (The Parties' Stipulation # 1: Re Commission Staff Obtaining Non Public and Confidential Records Without Having Previously Applied for and Received a Judicial Order.) Other times, Staff Attorneys simply requested LSC staff to provide them with the documents, and LSC staff emailed them, often first to their personal accounts and from there, to Staff Attorneys' government email accounts. (Hearing Exhibits 601-607.)

During Formal Proceedings, Judge Mallery objected to the use of nonpublic records received without a Section 68756 order, including those documents sent to Staff Attorneys from the private email accounts of LSC Staff. Like he does here, Judge Mallery contended that the statute should be plainly construed, with a clear but defined path for the Commission to travel before receiving nonpublic records. The remainder of the statute is consistent with this interpretation, even providing the Court with the process to invite objection from the person whose nonpublic information is being sought. Throughout this process, Staff Attorneys took the other side, and they contended that the Code provides them unfettered access to the records, with no need to 'make a written request,' or for the Court to 'file the request under seal.'

In *limine*, the Special Masters ruled that Judge Mallery had not established a violation of Section 68756, and furthermore, had not established prejudice. Judge Mallery raised this issue throughout the evidentiary hearing, and asked the Special Masters to again rule on the argument

at the close of evidence. This time, the Special Masters demurred, and the Commission similarly refused to weigh in.

On these facts, an appropriate remedy is for this Court to vacate the Commission's findings and order of discipline, and dismiss the Formal Proceedings against him with prejudice. The question before this Court is not whether the Commission proved its case against Judge Mallery; rather, it is whether this Court condones the manner in which they did so.

TIMELINESS OF PETITION

Pursuant to Rule 136 of the Rules of the Commission on Judicial Performance, and California Rules of Court, Rule 9.60, the Commission's order became final on June 1, 2024, and Judge Mallery has until July 31, 2024, to file this Petition. The findings and order are attached to this petition.

AUTHORITY FOR SUPREME COURT REVIEW

California Constitution, Article 6, § 18(d) provides, "Upon petition by the judge or former judge, the Supreme Court may, in its discretion, grant review of a determination by the commission to retire, remove, censure, admonish, or disqualify pursuant to subdivision (b) a judge or former judge."

BACKGROUND

I. Staff Attorneys' Inconsistent Compliance with Government Code § 68756

During the investigation, Staff Attorneys inconsistently complied with Government Code § 68756. At Formal Proceedings, the parties stipulated:

The Commission on Judicial Performance ("CJP") staff received some confidential and/or non-public records without first having obtained a judicial order. For example, in its initial discovery on September 12, 2022, the examiners provided Form FL-300, Request for Change of Order for the Gower and Bates matter, related to Count 8. (CJP 9713-9716.) The minor's name was visible on CJP 9715.

On October 26, 2022, the examiners discovered the same Form FL-300 from the Gower and Bates matter, this time marked with "CONFIDENTIAL-GOV'T CODE § 68756," and with the minor's name still visible on CJP 27724. (CJP 27722-27725.)

On November 7, 2022, the examiners discovered a request for access to confidential court records and a request to file under seal the request for access along with a proposed order in the Gower and Bates matter, which was submitted by commission staff attorney Anne Hunter on October 18, and signed by Judge Nareau on October 19, 2022. (CJP 27989-27990.) The request for access was accompanied by a letter authored by CJP staff attorney, Anne Hunter. (CJP27991.)

On November 22, 2022, the examiners discovered an order signed by Judge Nareau on November 21, 2022, which permitted them to publicly disclose at Judge Mallery's formal proceeding eight specific nonpublic records from Gower and Bates. (CJP 28315-28318.)

On that same date of November 22, the examiners discovered the eight nonpublic records from the Gower and Bates matter that Judge Nareau ordered the prior day could be publicly disclosed. Included in those eight records from Gower and Bates was Form FL-300, also marked with "CONFIDENTIAL-GOV'T CODE § 68756," but with the minor's name redacted.

In summary, the examiners discovered the same Form FL-300 from the Gower and Bates case three times, one unredacted on September 12, 2022, with the minor's name visible on CJP 9715, one unredacted on October 26, 2022, with the minor's name visible on CJP 27724 but stamped as confidential, and the other redacted, stamped confidential, on November 22, 2022, along with an order signed by Judge Nareau on November 21, 2022, authorizing public disclosure of Form FL-300 and seven other records from Gower and Bates. With regard to the first two discovery productions of Form FL-300 by the examiners on September 12 and October 26, 2022, the examiners did not include an

> order signed by Judge Nareau or any other judicial officer before producing Form FL-300 to Judge Mallery on those two occasions.

(The Parties' Stipulation # 1.)

II. Transmission of Nonpublic Records from the Private Email Accounts of LSC Court Staff to Staff Attorneys

Separate from the LSC case of *Gower v. Bates*, referenced in the stipulation, Staff Attorneys often received nonpublic records from LSC Staff while LSC Staff were using their private email addresses to communicate, and often without a Section 68756 order. The quantity of such transmissions is unknown, but LSC Staff, Crystal Jones, sent at least seven such emails. (Admitted as Exhibits 601-607.) When so doing, Ms. Jones followed a pattern: she scanned the records on one of the LSC 'Canon' brand scanners, emailed them to her work account, and then forwarded the records to her personal account. (Exhibits 601-607.) From there, she forwarded the records to a Staff Attorney, and the Staff Attorney did not object to fact of the dissemination or its method. (Hearing Transcript, Vol. III, 538:4-25; 539-549; 550:1-6.)

LSC Staff, Brandy Cook, also sent nonpublic records from her work account to her personal account, and then on to the same Staff Attorney who Ms. Jones emailed. (Hearing Transcript, Vol. V, 1196:13-25; 1197-1199; 2000:1.)

LSC Staff, Marianne Tweddell, also sent nonpublic records from her work account to her personal account, and then on to the same Staff Attorney. (Hearing Transcript, Vol. VI, 1376:3-25; 1377; 1378:1-24.) Ms. Twedell Does not recall how many such emails she sent, but estimated it was "[p]robably less than 50." (*Id.*) She testified that she knows what a request for access to records looks like, and sometimes she saw one, other times she did not. (*Id.*) She explained:

> Q. BY MR. ULRICH: To your recollection, have you seen a document requesting access to confidential court records that's supposed to be filed under seal pursuant to Government Code 68756? Do you recall having seen such a document in the past?
>
> A. Yes.
>
> Q. Did you always have -- I'll withdraw that. Before you sent non-public and/or confidential records from your work account to your personal account, you did not always see a request for access consistent with that government code signed by a judicial officer; correct?
>
> A. Correct.
>
> Q. Ms. Hunter informed you that so long as she or someone from the Commission on Judicial Performance requested a document, you were entitled to provide it to her regardless of whether it was confidential and/or non-public; correct?
>
> MS. MURPHY: Objection. Calls for a hearsay response.
>
> SPECIAL MASTER FRANGIE: Overruled. You can answer. I assume it's for a non-hearsay purpose; correct?
>
> MR. ULRICH: Yes.
>
> SPECIAL MASTER FRANGIE: All right. You may answer.
>
> THE WITNESS: Yes.

(*Id.*)

III. Judge Mallery Moved in Limine to Exclude the Evidence Received Improperly, and to Strike the Relevant Allegations

Judge Mallery moved in limine for the Special Masters to rule on issues of the Staff Attorneys' receipt of nonpublic records without a court order, and LSC Staff's use of their private email account to provide the records. (Motion in Limine, C.) The Special Masters denied the

motion, and ruled that Judge Mallery "failed to show the Commission violated section 68756 and has failed to show he was prejudiced by any such violation." (Ruling on Motions in Limine.)

IV. Nonpublic Records Were Used in Formal Proceedings

At formal proceedings, Staff Attorneys used nonpublic records they had received in the *Gower v. Bates* matter against Judge Mallery. (Exhibit 240.) As noted in the stipulation, Staff Attorneys initially received nonpublic records without a court order, but they then returned to LSC, and complied with Government Code § 68756. In the *Gower v. Bates* matter, it was established that Exhibit 240 was a nonpublic record, Staff Attorneys discovered it to Judge Mallery before they received a court order to receive it, and then when they realized they wanted to use the record in formal proceedings, they sought permission to obtain the records in the first place. They then used this Section 68756-compliant copy against Judge Mallery as Exhibit 240.

In total, Commission Staff Attorneys discovered more than 40,000 pages of documents, and it is unknown how often this sequence of events occurred.

V. Even After Evidence Was Taken, the Special Masters Declined to Rule on Judge Mallery's Argument, and the Commission Similarly Ignored Judge Mallery's Request

At the close of evidence, Judge Mallery argued that Staff Attorneys had improperly obtained nonpublic records, and he asked the Special Masters to make that finding and to craft an appropriate remedy. (Hearing Transcript, Vol. XVI, 3433:9-25; 3434; 3435:1-5.) The Special Masters declined to rule, and Section 68756 never appears in their findings of fact and conclusions of law. At the hearing before the Commission, Judge Mallery made the same request, and his request was similarly unheeded.

LEGAL DISCUSSION

I. Commission Staff Attorneys Violated Government Code § 68756

Government Code § 68756 is entitled, "Access grant to nonpublic records of court proceedings relevant to a judicial performance; petition for public disclosure of records; persons entitled to object." When considered from Judge Mallery's perspective, it is a coherent statute which provides a clear mandate. In Section (a), the legislature established access for the Commission to nonpublic court records, but it required documentation of the request. Section (a) reads:

> Notwithstanding any other law, the commission shall be given access, on an ex parte basis, to all nonpublic records of court proceedings, including confidential sealed records and transcripts, relevant to the performance of any judge, former judge, or subordinate judicial officer (hereafter, collectively, judicial officer) within the commission's jurisdiction under Sections 18 and 18.1 of Article VI of the Constitution. The commission shall make a written request to the court in which the proceedings occurred. The court shall file the request under seal. Access to the requested records shall be provided within 15 days of the written request.

Having established the 'request' procedure in Section (a), in Sections (b)-(d), the legislature provided for a procedure whereby nonpublic records could be 'disclosed' in Commission proceedings, and objections to the same could be lodged by the subject of the records. Critically, and obviously seeking to ensure a balance between the privacy of the subject of the nonpublic record, and the Commission's mandate, the legislature provided that the Court whose records are sought, may invite objection from the subject of the records, and then determine whether good cause exists to shield the records.

This ‘consumer notice’ component is essential to the statute, as it ensures that a judge is at least asked to consider whether objections should be heard before permitting the use of the nonpublic record in formal proceedings. However, there can be no opportunity for notice if the request is not even made to a judicial officer, and instead of that correct process, here, LSC Staff acted as the sole gatekeeper, and in practice, Staff Attorneys needed only convince them to provide access to the records.

The legislative history of Section 68756 supports Judge Mallery’s interpretation that a written request and judicial approval must precede production. On August 8, 2006, the Senate Judiciary Committee published its analysis of AB 2303, which included soon-to-be-added, Section 68756, and the Committee described the section as a “substantive change.” In part, the Committee analyzed the bill as follows:

> This section of AB 2303 would give the Commission on Judicial Performance (CJP) access to confidential court files and records in order to investigate judicial misconduct.
>
> According to the CJP, 97% of complaints submitted to the CJP for investigation arise from court proceedings. While court files and proceedings are generally open to the public, they are closed in cases dealing with juvenile and delinquency proceedings, and records can only be accessed through a court order. CJP claims that the process of obtaining a court order is time consuming, and diminishes the confidentiality of the commission's investigation (since the same or another judge will have to rule on the request). CJP fears that a given judge or others will be alerted and thus jeopardize the integrity and confidentiality of the investigation.
>
> The State Bar of California currently has a procedure for access, on an ex parte basis, to all non-public court records relevant to a disciplinary action against an attorney. If the State Bar needs to make public use of the records, it is required to give notice to the parties in the case, who may then seek a hearing on whether or not the records should be made public. The CJP modeled the language currently in

> Section 27 of AB 2303 on this State Bar provision, Business and Professions Code Sec. 6090.6.
>
> Section 27 of AB 2303 would permit access to the nonpublic records of court proceedings, including those confidential sealed records and transcripts, relevant to the performance of any judge, former judge, or subordinate judicial officer, on an ex parte basis. The procedure would require the CJP to make a written request under seal to the court in which a proceeding occurred. Access to the requested records would be provided within 15 days of the request.

Like with Section 68756, there is no caselaw interpreting the State Bar's access to nonpublic records pursuant to Bus. & Prof. Code, § 6090.6, but Section 68756's direct modeling on Section 6090.6 is telling, and the Senate Judiciary Committee's notice of that is important. In no world may the State Bar informally email court clerks and receive nonpublic records about attorneys they are investigating in response; instead, the Bar must apply ex parte to the Superior Court. There is no reason why the same shouldn't be true for the Commission.

The facts agreed to in the stipulation show Staff Attorneys knew the obligations of Section 68756, and in practice, they agree with Judge Mallery's interpretation. As stated in that stipulation, Staff Attorneys originally received nonpublic records from LSC Staff without a court order, but then when they realized they wanted to use the documents at formal proceedings, they formally requested the records, and the LSC assistant presiding judge approved the release and their use. Clearly, Staff Attorneys would not have gone to the trouble of making a formal request to receive the records if they did not believe such a request was necessary.

Given the text of the statute, the legislative history, and Staff Attorneys' eventual attempt to comply, this Court should conclude that Section 68756's process is mandatory, not permissive. In

this regard, the Special Masters erred in their order denying Judge Mallery's motion in limine, and both they and the Commission erred in their refusal to rule.

II. An Appropriate Remedy Is to Vacate Commission's Findings of Misconduct and Its Imposition of Discipline, and to Dismiss the Formal Proceedings

Although the Staff Attorneys' violation of Government Code section 68756 is clear, Judge Mallery acknowledges that the remedy is less so. Nevertheless, Judge Mallery contends this Court should not abide Commission Staff's violations, and a reasonable response is to relieve Judge Mallery of the imposition of discipline. Certainly, the Supreme Court has the authority to do just that. (California Constitution, Article 6, § 18(d).)

In limine, the Special Masters ruled that Judge Mallery did not show he was prejudiced, and that is true, but the conclusion misses the point. Judge Mallery was provided more than 40,000 pages of discovery, and he did not have the resources to evaluate each document to confirm they were received consistent with Section 68756. However, and regardless of how many times it occurred, on a most basic level, records which were allegedly obtained illegally were used against Judge Mallery, and he is now the subject of discipline.

Given the dearth of caselaw on Section 68756—and its model, Business and Professions Code § 6090.6—the question remains whether the Special Masters correctly analyzed the issue in the first place. That is, it is not obvious whether the law required Judge Mallery to show he was prejudiced in the first place. Although not directly analogous, the law does not impose a duty on a criminal defendant to show that he was prejudiced by a violation of the Fourth Amendment; rather, the violation itself is sufficient to require suppression of that evidence.

The Court should also consider the downstream effects of violating Section 68756. In this sense, and like a violation of the Fourth Amendment, the consideration for what remedy is appropriate should be the effect on the system as a whole, not on Judge Mallery individually. Ms. Gower, Mr. Bates, and their minor children have a right to keep nonpublic information out of the public's view. This right to privacy is only overcome when a judicial officer makes a record-by-record decision on the release. Although not mandatory, the court may invite objection from the subject of the records. This process at least ensures that a judicial officer will consider the rights of the subject of the records before releasing them.

Instead of conforming to the orderly process provided for in Section 68756, by their informal agreement, Staff Attorneys and LSC Staff put themselves above the law, and ran roughshod on the subjects' privacy rights. Not once were Ms. Gower, Mr. Bates, or their children's rights considered; instead, Staff Attorneys had necessarily concluded that the ends justified the means.

Consider these violations in light of the Commission's mandate, and the integrity of the disciplinary system. Central to our system of law is the principle that the government may not engage in malfeasance to get an allegedly malfeasant actor. Put more simply, the government cannot break the law to catch a lawbreaker, but this is exactly what is alleged to have happened. Accepting the Special Masters' and Commission's findings of fact as accurate, it still is no okay for the Staff Attorneys to break the law to bring Judge Mallery to discipline. Perhaps Staff Attorneys could have made their case against Judge Mallery without these investigative shortcuts,

but that should not matter now—they violated Section 68756, and that violation calls into question the integrity of the entire process.

CONCLUSION

This petition for review puts at issue the integrity of the process employed against Judge Mallery. The petition does not ask this Court to overrule the Commission's findings and conclusions; rather, it asks the Court to rule that the Staff Attorneys violated the law, and to determine the appropriate remedy. The Commission itself never ruled on this question, but the plain text and the legislative history support Judge Mallery's position. If the Court agrees, fairness requires a remedy of some kind, and Judge Mallery contends vacating the discipline and dismissing formal proceedings is the correct response.

DATED: July 31, 2024

MURPHY, PEARSON, BRADLEY & FEENEY

By: */s/ Christopher R. Ulrich*
Christopher R. Ulrich
Attorneys for Judge Tony Mallery

CERTIFICATE OF WORD COUNT

The text of this brief consists of 4306 words as counted by the Microsoft Word processing program used to prepare this brief.

DATED: July 31, 2024

MURPHY, PEARSON, BRADLEY & FEENEY

By: */s/ Christopher R. Ulrich*
Christopher R. Ulrich
Attorneys for Judge Tony Mallery

RULE 9.60 ATTACHMENTS

STATE OF CALIFORNIA
BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

INQUIRY CONCERNING JUDGE TONY R. MALLERY, No. 208	DECISION AND ORDER REMOVING JUDGE TONY R. MALLERY FROM OFFICE

I. INTRODUCTION

This disciplinary matter concerns Lassen County Superior Court Judge Tony R. Mallery. The commission commenced this inquiry with the filing of its Notice of Formal Proceedings (Notice) on September 12, 2022.

Judge Mallery is charged with 21 counts of misconduct, which, with subparts, include 81 allegations of misconduct. The allegations involve discouraging court staff from cooperating with the commission and retaliating against those who did; false representations to the commission; usurping the role of prosecutors and attempting to eliminate plea bargaining in criminal cases; making judicial decisions based on improper considerations; improperly denying peremptory challenges and retaliating against attorneys who filed them; making comments to other judges that might interfere with a fair hearing; engaging in speech and conduct that could be perceived as biased; poor demeanor toward court staff; making disparaging remarks about a fellow judge and court staff; and failing to disclose or disqualify when required.

The California Supreme Court appointed Hon. Therese M. Stewart, Presiding Justice of the Court of Appeal, First Appellate District; Hon. Janet M. Frangie, Judge of the San Bernardino County Superior Court; and Hon. Barbara A. Kronlund, Judge of the San Joaquin County Superior Court, as special masters to conduct an evidentiary hearing.

The 16-day hearing took place between July 10 and 14, July 17 and 20, August 15 and 18, and August 21 and 23, 2023. The masters filed a report containing their findings of fact and conclusions of law on December 19, 2023. The commission heard oral argument on March 21, 2024.

The special masters concluded that Judge Mallery committed willful misconduct as to Counts One, Two, Three (in part), Six (in part), Seven (in part), Eight (in part), Ten, Twelve, Thirteen (in part), and Eighteen (in part). They found that Judge Mallery committed prejudicial misconduct as to Counts Three (in part), Six (in part), Eight (in part), Fifteen (in part), Sixteen (in part), Eighteen (in part), and Twenty-One. They concluded that the allegations in Counts Four, Five, Six (in part), Seven (in part), Nine, Eleven, Thirteen (in part), Fourteen, Fifteen (in part), Sixteen (in part), Seventeen, Eighteen (in part), Nineteen, and Twenty were not proven. The masters concluded that Judge Mallery engaged in 20 instances of willful misconduct and 23 instances of prejudicial misconduct.

We conclude, based on our independent review of the record, that the masters' factual findings as to all counts are supported by clear and convincing evidence, and we adopt them in their entirety. In this decision, we summarize the factual findings.

We adopt the masters' legal conclusions as to most, but not all, of the allegations. In some instances, we respectfully reach our own independent legal conclusions as to certain allegations. We find that Judge Mallery engaged in 23 instances of willful misconduct and 36 instances of prejudicial misconduct.

The masters made a number of findings regarding aggravating and mitigating factors, discussed in more detail, *infra*. Most significantly, the masters, in aggravation, found that Judge Mallery engaged in a lack of honesty and integrity in his testimony before them and in his responses to the commission's investigation. We agree with, and adopt, the masters' credibility findings.

The masters, in mitigation, found that Judge Mallery assumed the bench under a hostile presiding judge in a work environment that impeded his ability to

succeed as a judge. We adopt some, but not all, of the masters' findings on those issues. We further conclude that, even if Judge Mallery assumed the bench under a hostile presiding judge and in a negative work environment, those circumstances are not significantly exculpatory in light of the passage of time between that period and when the vast majority of Judge Mallery's misconduct occurred.

The masters also found that Judge Mallery was diagnosed with Post Traumatic Stress Disorder (PTSD), but that "Judge Mallery failed to prove that any PTSD . . . he allegedly suffered contributed to his conduct." We agree with the masters and conclude that, even if Judge Mallery suffers from PTSD, there is little evidence to prove that any PTSD he allegedly suffered contributed to his misconduct.

A judge may be removed from office for prejudicial misconduct or willful misconduct. (Cal. Const., art. VI, § 18, subd. (d).) Judge Mallery has engaged in a course of willful and prejudicial misconduct over a significant period of time. The misconduct is wide-ranging and reflects either a troubling inability to conform his behavior to appropriate judicial standards, or a lack of understanding of what being a judge is and requires, or both. The repeated nature of much of Judge Mallery's misconduct also suggests a lack of effort or ability to change or modify his conduct. Judges are expected to uphold the integrity and independence of the judiciary, perform the duties of their office impartially, competently, and diligently, and treat everyone with dignity and respect, on or off the bench. Judge Mallery's conduct demonstrates that he does not meet these fundamental expectations. His misconduct reflects an inability or unwillingness to perform judicial functions in a manner that comports with the expected rigorous standards of judicial conduct. Further, given his lack of candor during this proceeding, we do not have confidence that he has the fundamental qualities of honesty and integrity required of a judge. Consequently, in order to fulfill our mandate of

protecting the public, enforcing high judicial standards, and preserving public respect for the judiciary, we remove Judge Mallery from office.

Judge Mallery is represented by Christopher R. Ulrich, Esq. of Murphy, Pearson, Bradley & Feeney in San Francisco, California. The examiners for the commission are commission trial counsel Mark A. Lizarraga, Esq. and commission assistant trial counsel Bradford Battson, Esq. and Melissa G. Murphy, Esq.

II. LEGAL STANDARDS

A. Levels of Misconduct

There are three types of judicial misconduct: willful misconduct, prejudicial misconduct, and improper action.

1. Willful Misconduct

Willful misconduct is the most serious type of misconduct. Its elements are (1) unjudicial conduct, (2) committed in bad faith, (3) by a judge acting in a judicial capacity. (*Broadman v. Commission on Judicial Performance* (1998) 18 Cal.4th 1079, 1091.) Unjudicial conduct occurs when a judge fails to comply with the canons of judicial ethics. (*Adams v. Commission on Judicial Performance* (1994) 8 Cal.4th 630, 662.) A judge acts in bad faith "by (1) performing a judicial act for a corrupt purpose (which is any purpose other than the faithful discharge of judicial duties), or (2) performing a judicial act with knowledge that the act is beyond the judge's lawful judicial power, or (3) performing a judicial act that exceeds the judge's lawful power with a conscious disregard for the limits of the judge's authority." (*Broadman*, *supra*, 18 Cal.4th at p. 1092.)

2. Prejudicial Misconduct

Prejudicial misconduct is "conduct prejudicial to the administration of justice that brings the judicial office into disrepute." (Cal. Const., art. VI, § 18, subd. (d).) It occurs when an objective observer would conclude that the judge's

improper conduct was prejudicial to public esteem for the judicial office, regardless of the judge's motivation or intent. (*Broadman, supra,* 18 Cal.4th at pp. 1092-1093.) Prejudicial misconduct "may be committed by a judge either while acting in a judicial capacity, or in other than a judicial capacity." (*Adams v. Commission on Judicial Performance* (1995) 10 Cal.4th 866, 878 (*Adams II*).) It does not require bad faith, and the subjective intent or motivation of the judge is not a significant factor in assessing whether prejudicial conduct has occurred. (*Ibid.*)

3. Improper Action

Improper action occurs when the judge's conduct violates the canons, but does not have an adverse effect on the reputation of the judiciary. (*Inquiry Concerning Ross* (2005) 49 Cal.4th CJP Supp. 79, 89, citing *Adams II, supra,* 10 Cal.4th at pp. 897-899.)

A judge may be removed from office or censured based on willful misconduct or prejudicial misconduct, but not improper action. (Cal. Const., art. VI, § 18, subd. (d).)

B. Burden of Proof

The examiner has the burden of proving the charges by clear and convincing evidence. (*Broadman, supra,* 18 Cal.4th at p. 1090.) "Evidence of a charge is clear and convincing so long as there is a 'high probability' that the charge is true. [Citations.]" (*Ibid.*) Clear and convincing evidence is so clear as to leave no substantial doubt. It is sufficiently strong to command the unhesitating assent of every reasonable mind. (*Ibid*.)

C. Standards Regarding Masters' Findings and Conclusions

The factual findings of the masters are given special weight because the masters have "the advantage of observing the demeanor of the witnesses." (*Broadman, supra,* 18 Cal.4th at p. 1090.) The masters' legal conclusions are accorded respect, but, because of the commission's expertise in evaluating judicial misconduct, great weight is given to its conclusions of law. (*Ibid.*) The

commission may determine, however, that it is appropriate to disregard the factual findings and the legal conclusions of the special masters and make its own determinations based on its own independent review of the record. (See *Inquiry Concerning Clarke* (2016) 1 Cal.5th CJP Supp. 1, 7.)

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Count One—Retaliation and Discouraging Witnesses from Cooperating with the Commission

Count one charged Judge Mallery with engaging in a pattern of conduct involving retaliating against court employees Brandy Cook, Crystal Jones, and Marian Tweddell-Wirthlin for cooperating with the commission and discouraging them from cooperating with the commission. The conduct included (1) directing then Lassen County Superior Court (LSC) CEO Christopher Vose to undertake an internal investigation of emails court staff had sent to email addresses outside of the court, including emails sent to the commission; (2) threatening to terminate court employees who circumvented the court's grievance procedure; (3) attempting to get the Judicial Council of California (JCC) to quickly investigate court employees whom Judge Mallery knew, or suspected, had cooperated with the commission's investigation without informing the JCC that he was the subject of an investigation; (4) retaining a law firm to investigate the employees after the JCC counseled that no further investigation should be conducted; and (5) suggesting that new CEO Teresa Stalter reopen the court's investigation to find out who the "mole" was.

1. Findings of Fact

Judge Mallery was the subject of commission complaints since at least March 2014. From 2020 forward, Judge Mallery was aware of an investigation by the commission and had received preliminary investigation letters signed by Anne Hunter as Staff Counsel to the commission.

a. Email Investigation

Judge Mallery suspected that LSC staff, including Tweddell-Wirthlin, Cook, and Jones, had complained to and were cooperating with the commission by, among other things, providing records from the court. Judge Mallery was frustrated, upset, angry, and hostile toward those he believed were cooperating with the commission. He began treating Cook differently and stopped speaking to her when he walked by her; angrily accused his colleague Judge Mark Nareau of making statements to the commission to which he had to respond; told Assistant CEO Kim Gallagher he did not trust Cook, Jones, and Tweddell-Wirthlin and felt they were attacking and undermining him; told Stalter that Jones had "stabbed him in the back"; told Stalter and visiting Judge Candace Beason that he had wanted Cook to be fired; and spoke with Stalter multiple times about "court staff and loyalty," telling her "employees were being disloyal and needed to know their place." Judge Mallery also told Stalter he wanted to find out who was "ratting on" him, that court staff who had previously complained about him were "snitches," that "snitches get stitches," and suggested Stalter could "conduct your own investigation and find out who the mole is."

On the afternoon of March 3, 2021, then-CEO Vose, who, the masters concluded, was a friend and ally of Judge Mallery's, submitted his resignation letter to Gallagher, Cook, and another court employee, Adam Gaynor, and asked that Cook show Gallagher and Gaynor the "process for exiting employees" and process his final paycheck. At 5:54 a.m. the next morning, having not received a reply from Cook, Vose looked at Cook's court email box and saw she had forwarded his resignation email to her personal email address. Vose sent an email to Gallagher, copying Judge Mallery, informing them that Cook had forwarded his resignation letter to a private email address she shared with her husband. In a further email exchange, Vose requested that Gallagher obtain Cook's and Jones's personnel files. (Judge Mallery had shown or sent copies of the commission's preliminary investigation letters to Vose, and Vose had

assisted Judge Mallery in preparing responses. Gallagher was also aware of the commission's investigation.)

Judge Mallery then sent an email directing Vose to provide the dates Cook may have sent court related matters to her personal email since July 2017 and to conduct a similar search of all individuals on the court's management team. About half an hour later, Vose emailed Wyatt Horsley, LSC's IT System Analyst, asking him to run the search Judge Mallery requested. Vose blind copied Judge Mallery on the email to Horsley.

Horsley sent Vose some initial search results showing 1,000 email addresses to which the four management employees had sent emails. Vose then emailed Judge Mallery attaching the initial search results and informing Judge Mallery, "FYI . . . I'll be having Wyatt do a spot search for specific emails to certain email addresses which prompt my concern." Vose then sent Horsley an email, again with a blind copy to Judge Mallery, attaching a list of three email addresses for each of the members of the management team (Cook, Jones, Tweddell-Wirthlin, and Gallagher) and stating he wanted Horsley to "pull the emails sent to each of them, going as far back as possible, for review of the content and attachments." One of the 12 email addresses on Vose's list was staff attorney Hunter's commission email address.

On the same day, Horsley emailed Vose stating he had found certain emails in backup tapes and had placed the emails in a file Vose could access. One of the emails Horsley retrieved was between Tweddell-Wirthlin and Hunter. Horsley sent Vose more emails he had retrieved and asked whether Vose wanted him to search backup tapes located offsite. Vose responded affirmatively, and Horsley placed additional emails into Vose's file. Among the recovered emails were 11 emails between Tweddell-Wirthlin and Hunter.

Vose asked Horsley to conduct an expanded search for Hunter's email address in email boxes of other LSC employees, and Judge Mallery affirmed Vose's request for the expanded search, although he did not specifically mention

Hunter. The expanded search led to the discovery of additional email communications between Hunter and LSC employees, including several between Hunter and court clerk Lori Barron, and 23 emails from court reporter Ellyn Hamlyn to Hunter attaching transcripts. In a conversation on March 12, 2021, Judge Mallery told Horsley the investigation or some aspect of it was to be "on the DL," which Horsley understood to mean "on the down low."

Judge Mallery asked Horsley for information on emails Jones had sent to her private email address, Horsley pulled the emails and attachments Judge Mallery had requested, and Judge Mallery came to Horsley's office to review them. While he was reviewing the emails, the judge "made a comment, along the lines of, 'What the fuck is she doing?' " He also said, " 'She's going to get payback or what's coming to her' " or " '[T]hey're getting payback or what's coming to them.' " Judge Mallery asked Horsley to print out Jones's emails and attachments "for [Judge Mallery's] eyes only," and Horsley did so.

Vose's resignation took effect on March 12, 2021, and on March 15, 2021, Gallagher was promoted to Acting CEO. That morning, Judge Mallery forwarded to Gallagher three email threads Vose had sent him about the email investigation. Judge Mallery also met with Gallagher and discussed enlisting the JCC to do an investigation.

Later that day, Judge Mallery emailed JCC attorney Mark Jacobson, copying JCC attorneys Patrick Sutton and Patti Williams, with the subject line, "Need Immediate Assistance Regarding Employee Matters." In the email, Judge Mallery stated, "It has been brought to my attention that employees of the court might be downloading court information from the court server to their personal email servers. In addition to court files and minutes, confidential juvenile and financial information may have been transmitted." Judge Mallery also stated he believed this conduct violated "the court's standards, rules and policies" and that the court needed advice to "guide it through an investigation process as to what may have occurred, who may be the cause, when did it occur, for what purpose

and what action needs to be taken." Judge Mallery requested that the JCC "engage an attorney or law firm to advise the court on this matter and conduct an investigation into these concerns" and stated, "Time is of the essence." Judge Mallery put the JCC in touch with Gallagher. The JCC engaged in an intake process and ultimately advised Gallagher, who informed Judge Mallery, that because many of the emails the internal investigation had revealed involved an investigation by the commission, the JCC could not proceed with an investigation and that the court should not do so either.

During this same period in March 2021, Judge Mallery discussed with Gallagher possible disciplinary action, including termination, against Cook, Jones, and Tweddell-Wirthlin if they were violating the court's personnel policy. Judge Mallery told Gallagher several times that Cook, Jones, and Tweddell-Wirthlin were cooperating with the commission and were attacking him, undermining him, acting in concert against him, and that he did not trust them.

After the JCC advised Judge Mallery that the employees' emails of court information to their private email addresses were likely done in connection with responding to commission requests, that state law required court employees to cooperate with the commission, that the JCC would not further investigate the emails of Cook, Jones, and Tweddell-Wirthlin, and that he was strongly advised that LSC not do so either, Judge Mallery persisted. He obtained a referral for outside counsel and had Gallagher retain that attorney to begin interviewing court staff.

b. Threats to Terminate Court Employees Who Circumvented the Court's Grievance Procedure

On a couple of occasions, Judge Mallery asked Gallagher if she knew why Judge Nareau had his door closed, who was in his office, and why staff had their doors closed. Gallagher sent an email to management employees stating that if they were going to have closed-door meetings, they were required to inform her of the nature of those meetings. Judge Mallery suggested she could have staffs'

doors removed if they did not comply with her directive. Judge Nareau and court employee Ryann Brown testified that they had seen court security video coverage showing Judge Mallery outside Judge Nareau's closed chambers door, listening.

On April 3, 2021, Judge Mallery forwarded Gallagher a message Vose had sent to court staff a year and a half earlier regarding the court's grievance policy procedure, asking Gallagher whether she thought it was "time to circulate this information again and cc both judges while stressing the requirement to not address the issue with a judge." The grievance policy required employees to take any grievances to their immediate supervisors, and if that failed to satisfy them, to the CEO. The cover memo prepared by Vose, which Judge Mallery forwarded to Gallagher, advised employees that "attempts to circumvent the grievance procedure will be considered misconduct and may lead to disciplinary action, up to and including termination."

The commission sent its second preliminary investigation letter to Judge Mallery on November 9, 2021. It alleged that Judge Mallery had engaged in misconduct at a hearing in a case called *People v. Skaggs* by asking the defendant certain questions. The next day, Judge Mallery told the new CEO, Stalter, that he "wanted to find out who was ratting on him" to the commission and whether that person was a court employee. A few days later, Judge Mallery asked Stalter what the status of the email investigation was. Stalter replied that she had not been part of it and did not know what the status was. Judge Mallery replied, "you know, if you wanted to, you could conduct your own investigation and find out who the mole is."

Judge Mallery denied that the email investigation was initiated by him and testified that it was Vose who initiated it. Judge Mallery denied telling Vose he wanted to see emails sent to Hunter and testified that he "did not want anything to do with any of the items that may have been sent to the commission." He also testified that Vose never provided him access to emails sent from court staff to

Hunter and that he never asked Horsley for access to emails sent to the commission. Judge Mallery admitted he said "something similar" to the comment that clerks would be getting "payback or what's coming to them" to Horsley. Judge Mallery admitted he instructed Gallagher to send the email to employees regarding the court's grievance policy, but denied his purpose in doing so was to dissuade staff from cooperating with the commission.

Judge Mallery testified that he used the word "mole" in a conversation with Stalter to mean "there were individuals going through court records, digging around like a mole would . . . ." He denied telling Stalter that he wanted to know who the rat was but admitted that he may have used the word "ratting" to mean "information going out that was . . . being reported, in essence, ratting, reporting."

The masters found that the court employees' testimony was credible, that they had no apparent motive to be untruthful, and that the emails pertaining to the email investigation admitted into evidence were reliable evidence of what transpired, the order in which events occurred, and the impetus and instigation for the email investigation. The masters found key parts of Judge Mallery's testimony not credible, in particular, Judge Mallery's testimony that he first learned of the investigation when Vose informed him of concerns. The masters concluded that the emails clearly demonstrated that it was Judge Mallery who requested that Vose search Cook's, Jones's, and Tweddell-Wirthlin's emails back to 2017. Further, Judge Mallery's request was made before there was any basis for concluding that "a large amount of information . . . had been transferred from" any employee's computer, much less from multiple employees' computers, or that any employee had deleted information or attempted to do so. Rather, at the time he requested the broad-based search of all managers' emails going back to 2017, Judge Mallery and Vose were aware only that Cook had sent Vose's resignation email and letter to a personal email address. The masters concluded that the evidence demonstrated that Judge Mallery was aware of what the email

investigation had revealed and that he intended to obtain communications between court staff and the commission.

The masters concluded that Judge Mallery's testimony that the primary concern of the investigation was security breaches, not the commission investigation, was not credible. Further, the masters found that the fact that he was angry at the employees he believed were cooperating with the commission, complained about them on numerous occasions to multiple people, spoke about them as disloyal, " 'need[ing] to know their place,' " " 'snitches' " and " 'mole[s],' " and referring to " 'snitches get[ting] stitches' " and to them getting " 'payback' " or " 'what's coming to them' " was convincing evidence of a retaliatory motive. The masters noted that, if Judge Mallery had truly been concerned primarily about security breaches, there was no reason he would have withheld from the JCC the fact that he was under investigation by the commission. Rather, he would have explained to the JCC that he was under investigation and that the emails the internal investigation had yielded included some between employees and Hunter and asked that the JCC undertake any further investigation in a truly independent fashion without his knowledge, involvement, or input. The masters concluded that this did not happen.

The masters concluded that there was clear and convincing evidence that Judge Mallery initiated the email investigation by directing Vose to search for emails, and that Vose, working with Horsley, carried out the investigation at Judge Mallery's request and with his knowledge and input. Judge Mallery used Cook's act of forwarding Vose's resignation email to her personal email address as a pretext for launching the broad search into the emails of Cook, Jones, and Tweddell-Wirthlin. The primary purposes of the email investigation were (1) to confirm Judge Mallery's suspicions that court staff were cooperating with the commission, and (2) to develop evidence that could be used to discipline them in retaliation.

The masters further concluded that, when Judge Mallery directly and through Gallagher requested that the JCC begin an investigation, his purpose was to develop a basis for disciplining the employees he believed had cooperated with the commission. When the JCC discovered the overlap between the email investigation and the commission investigation into Judge Mallery's conduct, Judge Mallery falsely denied there was any link between the two. When the JCC declined to investigate, Judge Mallery persisted by directing Gallagher to retain outside counsel for the purpose of developing a basis for disciplining the employees in retaliation for cooperating with the commission.

The masters also concluded that Judge Mallery encouraged Gallagher to send the court's grievance policy to court staff for the purpose of discouraging them from reporting complaints to Judge Nareau to pass on to the commission. The masters concluded that there was not clear and convincing evidence that Judge Mallery's statement to Stalter -- that she could do her own investigation to identify the " 'mole' " -- was a genuine effort, on his part, to revive the email investigation.

Neither party objected to the masters' factual findings, and we adopt them.

2. Conclusions of Law

The masters concluded that Judge Mallery used an internal investigation, and attempted to have the JCC and a private law firm complete the investigation, for the purpose of retaliating against employees who cooperated with the commission. The masters further concluded that Judge Mallery's actions constituted willful misconduct in that he was familiar with the statute that required court employees to cooperate with the commission (Gov. Code, § 68725), knew or should have known his intended retaliation against them for doing so violated the canons, and because he acted for the corrupt purpose of preventing and dissuading court employees from cooperating in the commission's investigation into his conduct. The masters determined that the judge's actions violated canons 1 (a judge shall observe high standards of conduct so that the integrity of

the judiciary is preserved), 2 (a judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities), 2A (a judge shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary), 2B(2) (a judge may not lend the prestige of judicial office or use the judicial title in any manner to advance the judge's pecuniary or personal interests), 3C(1) (a judge shall discharge administrative responsibilities impartially, without bias or prejudice, free of conflict of interest, and in a manner that promotes public confidence in integrity of judiciary), 3C(2) (a judge shall maintain professional competence in judicial administration), 3D(4) (a judge shall cooperate with judicial disciplinary agencies), and 3D(5) (a judge shall not retaliate, directly or indirectly, against a person known or suspected to have assisted or cooperated with an investigation of a judge).

Judge Mallery did not object to the masters' legal conclusions. The examiners objected on the sole basis that the masters did not make a specific conclusion of law regarding their factual finding that Judge Mallery encouraged Gallagher to send the court's grievance policy to court staff for the purpose of discouraging them from reporting complaints to Judge Nareau to pass on to the commission. The examiners argued that this should be included as a separate act of willful misconduct. We agree and conclude that Judge Mallery's conduct in sending the court's grievance policy to court staff constitutes a separate act of willful misconduct in that it was committed in bad faith for the corrupt purpose of attempting to deflect complaints to the commission. We otherwise adopt the masters' legal conclusions.

B. <u>Count Two—False Representations to the Commission</u>

Count two charged Judge Mallery with responding to two of the commission's preliminary investigation letters by falsely stating that "the [JCC] was informed early in the process that the [commission] had an open investigation pertaining to Judge Mallery and that the court would not be investigating information that could be linked to the [commission]." Count two

alternatively alleged that, if Judge Mallery informed the JCC that the court would not be investigating information that could be linked to the commission, then that assertion was false and/or misleading.

1. Findings of Fact

On March 15, 2021, Judge Mallery emailed Jacobson at the JCC, copying Sutton and Williams, with the subject line, "Need Immediate Assistance Regarding Employee Matters." Sutton responded by email to Judge Mallery, telling him that Sutton would be discussing the request with his supervisor. The email further requested information from Judge Mallery that Sutton said "will help us determine if this is the type of issue for which we would provide an investigator." Specifically, it asked Judge Mallery, "Can you give more context about the situation? Are court employees accessing their own files or those of families or friends? Is it known what purpose they are using the information for? And how was it discovered?"

Judge Mallery responded that afternoon with an email stating,

> The information was brought to my attention by former CEO Chris Vose after he became aware of the possibility that someone in management was perhaps improperly using court email and access to court information. As the CEO, he requested a review of the 4 individuals who are in management and determined there appeared to be transgressions occurring by several in management. A large amount of information was being sent by certain managers to their private emails and possibly emails of other individuals. After sending an email, it appears the sender would frequently delete the file so it could not be captured.
>
> I do not know how court information is being sought and sent by certain members of management. Only speculation.
>
> I am not certain what information is being sent due to the files being deleted by the sender. However, it has been ascertained that a confidential juvenile transcript, a confidential order for ancillary services and court minutes have been sent.

> An investigation is necessary to determine what has been sent and why. It is questionable as to why a user would need to immediately delete information recently sent, as the storage capacity for outlook is significant. It appears each person on the management team has a substantial amount of storage capacity remaining in their individual inbox and would not need to delete current communications at this time due to their [*sic*] being at least one or more year(s) worth of data that could be stored in their respective inbox before being at full capacity. Furthermore, additional capacity for storage is available and can be added immediately to an inbox when an inbox is reaching capacity without the need to delete files to gain capacity.

Judge Mallery did not inform the JCC that he suspected employees were providing information to the commission, that the commission was actively investigating Judge Mallery, or that Vose's review of the emails had yielded communications between employees and Hunter. Instead, he wrote to Sutton, "I do not know how court information is being sought" and that "an investigation is necessary to determine what has been sent and why." When questioned about these communications with Sutton, Judge Mallery testified that he did not state in his emails that he was the subject of a commission investigation or that he was not seeking information on correspondence that may have been sent to the commission because "I didn't feel there was a need to because I had already discussed that with [] Sutton."

Sutton testified that he had only a single telephone conversation with Judge Mallery and that it took place on March 16, 2021, after their exchange of emails on March 15, 2021. Sutton further testified that Judge Mallery did not disclose the commission investigation in the telephone conversation, nor did he tell Sutton that he was not seeking information on correspondence that may have been sent to the commission.

Ann Schuyler, a Labor and Employee Relations Officer at the JCC, was assigned to do the intake work on the LSC request for investigation assistance on or about March 17, 2021. Schuyler testified that she never spoke with Judge

Mallery or received any emails directly from him, and neither Sutton nor anyone else at the JCC told her there was an open commission investigation of Judge Mallery. She had several email exchanges with Gallagher, who never informed her that LSC was not interested in correspondence between court staff and the commission. Neither Gallagher nor anyone else at LSC ever informed her that Judge Mallery was the subject of an open commission investigation or that the court would not be investigating any information that could be linked to the commission investigation. Schuyler first learned that there had been correspondence between LSC staff and Hunter on March 22, 2021, when she received an email attaching an "I.T. report," showing that the internal LSC investigation had revealed communications between Tweddell-Wirthlin and Hunter. On March 24, 2021, Schuyler emailed Gallagher and requested the email exchanges between Tweddell-Wirthlin and Hunter, which Gallagher provided.

Gallagher testified that she communicated with Schuyler and kept Judge Mallery apprised of her communications. Judge Mallery was eager to have the JCC interview Tweddell-Wirthlin and Cook, both of whom had announced they were leaving the court. Gallagher urged Schuyler to interview Tweddell-Wirthlin before she left the court and emailed Schuyler "I am concerned after viewing the information to date it does appear the three of them have in concert, coordinated their efforts and in totality is [*sic*] an egregious violation, subject to dismissal. Although, recently discovered it does appear they have been violating for quite some time."

On March 22, 2021, Michael Etchepare, JCC's managing attorney over litigation, began working on LSC's request for assistance. Etchepare spoke with Sutton about the investigation, and Sutton told him Schuyler had been doing the intake. He met with Schuyler, who gave him a list of emails that had been sent and recipients of emails that LSC was particularly concerned about, and he learned that LSC wanted the JCC to look into some emails that were sent to and

from Hunter. Etchepare knew from prior experience that Hunter worked for the commission, and her email address on the list Schuyler gave him had a "CJP suffix." Etchepare never had any direct communications with Judge Mallery, just emails with Gallagher. Before sending a letter on April 2, 2021 to Gallagher informing her that the JCC would not be further investigating and that LSC should not do so either, Etchepare was not told by anyone at LSC that the investigation would have any involvement with the commission. No one at LSC told him during the time he worked on LSC's request that the commission had opened an investigation pertaining to Judge Mallery.

On April 2, 2021, Etchepare emailed Gallagher, advising her that the JCC would not continue with the investigation and recommending that LSC not pursue it either because "At least some of the concerning emails the court wants to investigate are direct communications between court employees and . . . [Hunter], apparently in relation to an ongoing [commission] investigation at your court. It would be impermissible for the court to investigate or discipline an employee for participating in a [commission] investigation, or for the [JCC] to provide for or conduct that investigation." Etchepare's email further pointed out that it appeared that the commission had requested certain documents from court employees, that it was normal for court employees not to go through management to gather that information because commission investigations are confidential, and that court employees are obligated to cooperate with and give reasonable assistance in a commission investigation pursuant to Government Code section 68725.

Judge Mallery drafted a lengthy response to Etchepare's email for Gallagher to send. The letter complained that the JCC misled Gallagher into believing it would interview court staff, delayed until it was too late, costing the court the opportunity to interview Tweddell-Wirthlin, and of having "had no intentions" of assisting Gallagher in interviewing Tweddell-Wirthlin before she

retired. The JCC's investigation, the letter said, had gone "astray" and the focus had become matters only pertaining to the commission.

Meanwhile, Judge Mallery sought to retain outside counsel to interview court employees. He contacted an attorney in Watsonville seeking to retain him to conduct the investigation and asked him to review LSC's personnel plan "regarding use of email and discipline."

On April 6, 2021, Etchepare responded to Gallagher stating, "While I understand that the court would like a deeper inquiry into the deletion of emails, sending court information to non-secured servers, and similar action, it is our belief from reviewing the materials that you provided that these actions are inextricably intertwined with the [commission] investigation." Etchepare explained that it was probable that employees sent emails to personal email accounts and deleted their email trails so that the court would not be aware of the confidential communications with the commission. He advised that, "[w]ithout knowing more and given the serious offense of interfering with a [commission] investigation, we cannot conduct a further investigation (or recommend that you conduct a further investigation) based on these facts. While it is possible that some additional emails were sent beyond the scope of the [commission] investigation, there is no way to investigate that without interviewing the employees and asking them the scope of their communications with [the commission], which would be impermissible." Gallagher forwarded Etchepare's email to Judge Mallery and then signed a retainer agreement with the law firm in Watsonville after Judge Mallery authorized her to do so.

Judge Mallery testified that he reached out to the JCC for help with the email investigation believing he had a duty to look into any misuse of court emails. He testified that he told either Sutton or Jacobson that he was under investigation by the commission. The individual he spoke to asked if he knew why emails were being deleted, and he said he did not know but that one of the emails went to the commission, that he was under investigation by the

commission, and was not interested in that email. Judge Mallery testified that while Vose was still at the court, Vose was leading the investigation, and after Vose left the court, Gallagher led the investigation. Vose kept Judge Mallery apprised of the investigation while he was leading it, and Gallagher did the same. He told Gallagher he did not want to see any emails sent from court staff to the commission. Judge Mallery testified that he believed JCC had "missed the point completely."

Gallagher testified that there was a security breach, where information was going to unprotected servers, and she was concerned about that. When asked what Judge Mallery's role in the email investigation was, Gallagher testified that she believed Judge Mallery "had the same information I had." She testified that she never looked at the content of emails between LSC employees and the commission.

In his November 8, 2021 response to a commission preliminary investigation letter, Judge Mallery stated, "The [JCC] was informed early in the process that the [commission] had an open investigation pertaining to Judge Mallery and that the court would not be investigating information that could be linked to the [commission]." In his April 13, 2022 response to another commission preliminary investigation letter, he stated, "Judge Mallery is also informed and believes that [] Gallagher, acting CEO after the departure of [] Vose, informed [] Schuyler that Judge Mallery was subject to an ongoing investigation with the commission." In the same letter, he also stated that in a conversation with Sutton on March 15, 2022, "[] Sutton asked Judge Mallery if he had any speculation as to why the emails were being sent in such a fashion. Judge Mallery informed [] Sutton that he was the subject of an ongoing investigation with the [c]ommission, and it appeared that one of the actions on the spreadsheet was an email sent by [] Jones [] to []Hunter . . . . Judge Mallery informed [] Sutton that he was not seeking information on that correspondence or any correspondence that may have been sent to the [c]ommission."

In his September 29, 2022 Verified Answer to the Notice of Formal Proceedings, Judge Mallery stated he was "informed and believes, and thereupon alleges that the [JCC] was informed early in the process that the [c]ommission had an open investigation pertaining to Judge Mallery and that the court would not be investigating information that could be linked to the [c]ommission." He further stated that he informed Sutton in a telephone conversation that he was the subject of an ongoing investigation with the commission, and it appeared that one of the actions on the spreadsheet was an email sent by Jones to Hunter and "that he was not seeking information on that correspondence or any correspondence that may have been sent to the [c]ommission," and that, "[a]s to the other communications of concern that did not appear to have any relation to the [c]ommission," he wanted assistance from the JCC to investigate.

The masters concluded that the testimony of Sutton, Schuyler, and Etchepare, and the email records, convincingly demonstrated that no one at LSC, including Judge Mallery, informed the JCC about the open commission investigation into Judge Mallery and that the JCC first learned of it when Schuyler realized that a document showing results of the email investigation revealed communications between Tweddell-Wirthlin and Hunter. After Schuyler requested to see the emails between Tweddell-Wirthlin and the commission, Schuyler discovered a connection between court employees emailing documents to their private email addresses and documents Hunter had requested them to provide. The masters concluded that the evidence reflected that the JCC learned of the commission investigation from its own investigation, not from Judge Mallery, Vose, or Gallagher.

The masters further concluded that Judge Mallery's testimony that his initial contact with the JCC was a telephone call with Sutton or Jacobson and that he informed them he was under investigation by the commission in that telephone call "cannot be squared" with the emails admitted into evidence. They

found that Judge Mallery's introductory email requesting assistance from the JCC did not reference, or read like an email following up on, a telephone call. Sutton testified that the first (and only) conversation he had with Mallery was on March 16, 2021 – the day after Mallery sent the initial email. Nothing in any of the later emails between the JCC and Judge Mallery or Gallagher or among JCC personnel reflected or suggested that the JCC was aware the commission had an open investigation prior to the JCC's own discovery of that fact. The email Judge Mallery drafted for Gallagher to send described the communications between him and the JCC. The masters noted that absent from that draft letter was any assertion that Judge Mallery had a conversation with Sutton in which he informed him that he was not interested in communications between LSC staff and the commission, or that he had instructed Vose not to include such communications in the court's internal investigation. Instead, the draft letter asserted that:

> [T]he judicial council's initial investigation went astray and you got caught up on matters pertaining to the CJP. I do not disagree with you that matters pertaining to the CJP are delicate. However, there are several issues that assistance was requested [*sic*] that do not pertain to the CJP, i.e., deletion of emails, sending court information to non-secured servers, violation of court's standards, rules and policies as stated in the court's personnel plan and the Code of Ethics for the Court Employees, etc. Those issues remain unaddressed and remain so [*sic*]. Without interviewing those who are in question, the court will not be able to determine it [*sic*] there has been a security breach and if so, how did it occur and how to remedy the situation.

The masters further concluded that Judge Mallery's draft letter urging the JCC to interview employees who had cooperated with the commission to determine whether, in responding to the commission's requests for documents, they had taken steps that breached the security of confidential information or violated court policies, set the employees up for retaliatory discipline.

The masters found that neither Judge Mallery, Vose, nor Gallagher informed the JCC in their communications seeking assistance with the email investigation that Judge Mallery was the subject of an open commission investigation, and that Judge Mallery's statements in his responses to the preliminary investigation letters and his statements in his Verified Answer to count two were knowingly false.

The masters further concluded that, throughout this period and beyond, Judge Mallery remained angry with the employees he believed were cooperating with the commission and expressed interest in retaliating against them. When the JCC declined to investigate, he instead enlisted an outside law firm to review LSC's personnel plan "regarding use of email and discipline." He complained to Stalter that Jones and Horsley were cooperating with the commission, that Jones had " 'stabbed him in the back,' " and that he had wanted Cook fired. He spoke with her multiple times about " 'court staff and loyalty,' " commented to her that " 'snitches get stitches,' " told her employees were not required to cooperate with the commission unless they were subpoenaed, and accused the employees of conspiring against him. The masters concluded that Judge Mallery enlisted the JCC for the same purpose as that which motivated the initial internal email investigation: to find out who was " 'ratting' " on him and put a stop to it through employee discipline. Judge Mallery's comment to Horsley that he should keep the internal investigation " 'on the D.L.' " reflected that he knew that his real purpose for investigating the employees cooperating with the commission was improper, and he avoided reporting the commission investigation to the JCC to mask that ulterior purpose.

Neither party objected to the masters' findings of fact, and we adopt them.

2. Conclusions of Law

The masters concluded that Judge Mallery committed willful misconduct by making statements he knew to be false in his responses and Verified Answer to the commission, and violated canons 1, 2, 2A, and 3D(4).

Neither party objected to the masters' legal conclusions, and we adopt them.

C. Count Three—Statements to Discourage Teresa Stalter from Cooperating with the Commission

Count three charged Judge Mallery with making numerous statements to court employee Stalter with the intent of discouraging her and other court employees from cooperating with the commission's investigation.

1. Findings of Fact

Stalter joined the court in or about June 2021 as its Administrative Manager and about four months later was elevated to CEO. In mid-June 2021 and on other occasions, Judge Mallery told Stalter that he did not trust Jones, Tweddell-Wirthlin, or Cook, and that they had all been cooperating with the commission (count 3A). Around the same time, after court reporter Hamlyn had given notice that she was leaving the court, Judge Mallery told Stalter that Hamlyn "would not be much of a loss" because she was cooperating with the commission (count 3B). In July 2021, Judge Mallery told Stalter that he had asked then-CEO Vose to fire Cook, and that Jones had been promoted past her abilities (count 3C). In August 2021, Judge Mallery told Stalter he wanted to initiate a new clerk series because the court was too top-heavy in management, and he wanted to get rid of the supervisory position. Judge Mallery also told her they needed to do this within 90 days so that it could not be changed by Judge Nareau, who was about to become presiding judge. The only one in a supervisory position at the time was Jones, and, on several of the occasions when they discussed the need to reduce supervisory staff, Judge Mallery mentioned that Jones had cooperated with the commission (count 3D).

In August 2021, Judge Mallery told Stalter that Jones and Horsley were giving information to the commission and going against "ethical tenets" (count 3E). Judge Mallery told Stalter that court employees were not required to cooperate with the commission unless they had a subpoena, and that the code

section (referring to Government Code section 68725) said "shall" but that did not mean "must" (count 3F). In connection with those remarks, he essentially told Stalter "employees were being disloyal and needed to know their place" (count 3G). In October 2021, Judge Mallery told Stalter that if he had to go back to being a lawyer he would create a large workload and a miserable environment for the court (count 3H). In November 2021, Judge Mallery asked Stalter what the status of the email investigation was and whether she knew what had happened to it. When Stalter replied that she had not been part of it and did not know what the status was, Judge Mallery told her, "you know, if you wanted to, you could conduct your own investigation and find out who the mole is" (count 3I).

In November 2021, Judge Mallery told Stalter he wanted to know who was "ratting on him" regarding the case of *People v. Skaggs* and whether it was a court employee (count 3J). Also in November 2021, Judge Mallery told Stalter he believed the commission had abused its power and discretion in its investigation of another case, asserting he had done nothing wrong.

When Stalter asked Judge Mallery what he was going to do if the commission removed him from office, he twice told her he "would go postal." When Stalter told him he might not want to use those words because they had "heavy consequences," Judge Mallery replied, "how would you feel if someone had taken everything from you?" (count 3K).

In November 2021, Judge Mallery told Stalter that when (attorney) Leesa Webster came into the courtroom and he heard her voice, it "made him cringe," and he "couldn't stand her." On some occasions when he talked with Stalter, Judge Mallery blamed Webster for complaining to the commission about him (count 3L).

In December 2021, Judge Mallery told Stalter that he went out of his way to do nice things for employees, that they never appreciated him, and that they stabbed him in the back. He also told her Jones had stabbed him in the back. In

the same conversation, after stating that employees had complained to the commission about another employee having assisted him in putting on a holiday luncheon for them, he said “snitches get stitches,” and she understood Judge Mallery to be referring to court staff (count 3N).

Judge Mallery claimed during his testimony that, in using the phrase “snitches get stitches,” he was referring to himself because he was the person reporting incidents, and “the only person that seems to be getting stitches is myself.” Judge Mallery testified that he used the word “mole” to mean that it appeared that there were “individuals going through court records, digging around like a mole would, obtaining records and sending them off” without authority.

Judge Mallery admitted he made comments to Stalter about Cook, Tweddell-Wirthlin, and Jones cooperating with the commission, but that it was in response to questions from Stalter. He testified he felt he had a good relationship with Stalter and that she shared his philosophy of making the court a “workable environment for everybody.” Judge Mallery did not recall telling Stalter that the departure of Hamlyn would not be much of a loss because she was cooperating with the commission and did not believe he made that statement. Judge Mallery testified that he did attempt to create the new clerk position because the court was top-heavy in its management. Regarding whether he told Stalter that “shall” does not mean “must,” Judge Mallery testified that he did not believe he did. He admitted that he may have said something to the effect that “employees do not have to comply with the commission unless they get subpoenaed.”

Judge Mallery denied telling Stalter he wanted to know who the rat was or using the word “rat” in relation to a person. He admitted that he may have used the term “ratting” to mean “information going out that was, you know, being reported, in essence, ratting, reporting” to the commission, but he only meant “providing false information or unsubstantiated information, used more for harassing than it is to actually get to something that’s of relevance.” Judge

Mallery admitted using the word "postal" in a comment to Stalter. He testified that what he meant by "a feeling of going postal" was "[i]mplode, self-destruct, frustration" at being removed after everything he had "gone through and had to endure at that courthouse." In his Verified Answer, Judge Mallery admitted making negative statements about attorney Webster.

The masters found Judge Mallery's testimony to be credible in part and incredible in part. Specifically, the masters did not find credible Judge Mallery's denial that he criticized employees who cooperated with the commission, or his denial that he told Stalter that "shall" does not mean "must." They did not find credible his testimony that his statement, "snitches get stitches," referred to him being the subject of retaliation because he had sometimes reported employees for poor performance, or his denial that the proposed new clerk position was intended to strip Jones of her supervisory responsibilities. The masters found largely credible Judge Mallery's explanation that he shared his frustrations with Stalter because he viewed her as sympathetic, and that much of what he told her was in response to her asking him questions about the commission's investigation.

The masters concluded, by clear and convincing evidence, that Judge Mallery made the alleged comments to Stalter. The masters concluded, however, that the evidence was not clear and convincing that, in making the statements, Judge Mallery was attempting to discourage Stalter or other employees from cooperating with the commission. The masters found plausible Judge Mallery's explanation that he was confiding in Stalter because he viewed her as sympathetic and was venting his anger and frustration about the commission investigation and what he viewed as the employees' disloyalty and efforts to undermine him.

The masters also concluded that the evidence did not clearly and convincingly establish that Judge Mallery's statement to Stalter, that she could do

her own investigation and find out who the "mole" was, was an effort to revive the email investigation.

Judge Mallery did not object to the masters' factual findings. The examiners objected to the masters' finding that there was not clear and convincing evidence that Judge Mallery's statement to Stalter that she "could do her own investigation and find out who the 'mole' was, was a genuine effort, on his part, to revive the email investigation" (count 3I). The examiners speculated that this finding may have been based on a mistaken belief that Judge Mallery was no longer the presiding judge at the time, when in fact he was. Without further evidence, and in light of the special weight given to the masters' factual findings, we adopt the masters' factual findings, including their findings on count 3I.

2. Conclusions of Law

The masters concluded that Judge Mallery violated canons 1, 2, and 3C(1) when he: made negative statements to Stalter about court employees and attorney Webster, expressing his anger about their cooperation with the commission (counts 3A, B, C, E, G, L and M); made statements that such cooperation was not required (count 3F (in part)) and amounted to "ratting" on him (count 3J); and suggested retaliation was an appropriate response ("snitches get stitches") (count 3N). The masters concluded that Judge Mallery did not make the statements in bad faith or for a corrupt purpose, instead crediting his testimony that Stalter reached out to him and asked him personal questions about his feelings because she sympathized with him, and he made the statements to her as a trusted colleague. They therefore concluded that Judge Mallery's acts constituted prejudicial misconduct and not willful misconduct.

The masters concluded that, in proposing the new clerk position and making negative statements about Jones for the purpose of retaliating against her for cooperating with the commission (count 3D), Judge Mallery committed willful misconduct and violated canons 1, 2, 2A, 3C(1), 3D(4), and 3D(5).

Further, in telling Stalter that "shall" does not mean "must," in the context of the statute governing cooperation with the commission (count 3F (in part)), Judge Mallery violated canons 1, 2, 2A, 3C(1), 3D(4), and 3D(5) and committed willful misconduct because he knew or should have known his statement to her was false and because it was for a corrupt purpose.

Judge Mallery did not object to the masters' legal conclusions. The examiners objected to the masters' conclusion that the statements that cooperation with the commission was not required, and amounted to 'ratting' on him, and suggesting retaliation was an appropriate response by saying 'snitches get stitches' constituted prejudicial misconduct, and not willful misconduct. The examiners argued that the judge's statements constituted willful misconduct because they were made in bad faith – to vent anger and frustration with court employees – and to discourage Stalter from cooperating with the commission – a purpose other than the faithful discharge of duties.

We agree with the examiners that comments venting anger or frustration may constitute willful misconduct, (see *Inquiry Concerning Van Voorhis* (2003) 48 Cal.4th CJP Supp. 257, 275 ["Judge Van Voorhis lost his temper and made comments for the corrupt purpose of venting his anger or frustration."]) and that the comments were made to discourage Stalter from cooperating with the commission. We thus conclude that the statements constituted willful misconduct.

The examiners also argued that the commission should conclude that Judge Mallery committed prejudicial misconduct, at a minimum, when he told Stalter he would " 'go postal' " if he were removed. The masters agreed that Judge Mallery made the statement, but did not make a specific determination about which level of misconduct the judge's comments constituted. The examiners noted that the subjective intent of a judge is not a significant factor in assessing whether prejudicial conduct has occurred, and that, even where a judge's threats "appear to be more the product of respondent's emotionally

depressed state than a legitimate threat to use violence[,]" they constitute prejudicial misconduct at a minimum. (*Inquiry Concerning Bradley* (1999) 48 Cal.4th CJP Supp. 84, 93-95.) We agree with the examiners that the comments appear prejudicial to public esteem for the judicial office and conclude that the statement also constitutes prejudicial misconduct.

We otherwise adopt the masters' legal conclusions.

D. Count Four—Approving Purchase of Storage Container for the Court to Benefit Judge's Brother

Count four charged Judge Mallery with approving the purchase of a metal storage container for the purpose of storing old court documents from Lassen Rents, Inc., a company owned by the judge's brother.

The masters found that there was not clear and convincing evidence of the alleged misconduct. Neither party objected, and we adopt the masters' findings and dismiss count four.

E. Count Five—Statements Regarding Mental Health Diversion

Count five charged Judge Mallery with making statements to attorneys in a criminal matter to the effect that he would never consider mental health diversion for any defendant in Lassen County.

The masters found that there was not clear and convincing evidence of the alleged misconduct. Neither party objected, and we adopt the masters' findings and dismiss count five.

F. Count Six—Failure to Disqualify

Count six charged Judge Mallery with failing to timely disqualify himself in three matters in which disqualification was required by law. Judge Mallery had received three separate *Palma* notices in matters with almost identical procedural postures. In each of the three matters, the appellate court explained why Judge Mallery wrongly denied timely Code of Civil Procedure section 170.6 challenges and suggested that Judge Mallery reverse his rulings denying the peremptory

challenges. The masters concluded that the judge committed misconduct in two of the matters.

1. 6A – *People v. Channel Vasquez*

a. Findings of Fact

Attorney Jacob Zamora appeared before Judge Mallery at a pretrial conference in *People v. Channel Vasquez*. Previously, Zamora had requested mental health diversion for his client, Vasquez. Zamora requested funds for a doctor to evaluate Vasquez for diversion, and Judge Mallery denied the request. After a brief exchange in open court, Zamora told Judge Mallery he was filing a peremptory challenge pursuant to section 170.6. Judge Mallery denied the challenge, finding it untimely on the grounds that he had already made substantial decisions in the proceedings. Zamora advised the court he would file a writ in the appellate court, arguing that prior to arraignment the court lacks authority to make rulings on contested matters that would preclude the filing of a 170.6 affidavit. Judge Mallery responded that since LSC was a two-judge court and the other judge, Judge Nareau, had previously disqualified himself, the matter was automatically assigned to Judge Mallery for all purposes.

Zamora filed a writ challenging the denial of the peremptory challenge. The appellate court issued a *Palma* notice directed to Judge Mallery informing him the court was inclined to grant the writ. The *Palma* notice stated there was nothing in the record provided by either Vasquez or the trial court demonstrating any ruling had been made on a contested issue of fact and that Judge Mallery's characterization of being the judge assigned for all purposes was incorrect.

Zamora testified that, at a further hearing, Judge Mallery engaged in what Zamora believed was an attempt to coerce him into withdrawing the writ. During the hearing, Judge Mallery informed Zamora that he would only hear pretrial matters, and another judge would determine the issue of diversion. Zamora declined Judge Mallery's request that he withdraw the writ, and Judge Mallery continued to argue the merits of whether the 170.6 was timely. Ultimately, at the

end of that hearing, Judge Mallery accepted the 170.6 in *Vasquez* and reported that he would not contest the appellate court's tentative decision in the *Palma* notice.

At different proceedings in the same case, Judge Mallery made inconsistent statements as to whether Judge Nareau had disqualified himself. In his Verified Answer, Judge Mallery stated that he believed he was the only other judicial officer available to hear the case once he had determined that Judge Nareau had recused himself. Judge Mallery stated that he reached this conclusion in good faith and after consultation with others, and further contended, as a basis for his denial of the challenge, that he had made a substantive ruling involving a determination of contested fact pertaining to Vasquez's mental health and diversion. In his Verified Answer, Judge Mallery also denied making any attempt to persuade Zamora to withdraw the challenge.

The masters concluded that Judge Mallery went to great lengths to convince Zamora to withdraw his challenge by attempting to bargain with Zamora and suggesting that, if Zamora withdrew the peremptory challenge, another judge would be able to grant mental health diversion.

Neither party objected to the masters' factual findings, and we adopt them.

b. Conclusions of Law

The masters concluded that disqualification was required and that Judge Mallery's denial of Zamora's timely peremptory challenge violated canons 1, 2, 2A, 3 (a judge shall perform the duties of judicial office impartially, competently, and diligently), 3B(2) (a judge shall be faithful to the law regardless of partisan interests, public clamor, or fear of criticism, and shall maintain professional competence in the law), and 3E(1) (a judge shall disqualify himself or herself in any proceeding in which disqualification is required by law), and constituted prejudicial misconduct. The masters further concluded that Judge Mallery also committed prejudicial misconduct when he attempted to persuade Zamora to withdraw the peremptory challenge.

Neither party objected to the masters' legal conclusions, and we adopt them.

2. 6B – *People v. Tommy Edward Hernandez II*

a. Findings of Fact

Six days after the *Palma* notice was issued in *Vasquez*, Zamora filed a peremptory challenge against Judge Mallery in *People v. Tommy Edward Hernandez II*. Two days after Judge Mallery acquiesced to what he described as the appellate court's "tentative ruling" on the *Vasquez* writ, Judge Mallery issued a written order denying the *Hernandez* peremptory challenge as untimely. The judge based his denial on two grounds: that since Judge Nareau had recused himself from the case, the challenge was untimely under the "one judge court" rule, as it was made more than 30 days after the arraignment; and that "upon Judge Nareau becoming disqualified, Judge Mallery, as the only other judge in the Lassen County Superior Court, became the assigned judge for all purposes," which required that the peremptory challenge be filed within 10 days after notice of the all-purpose assignment. This argument was the same one that the appellate court had just rejected in *Vasquez* and to which Judge Mallery had implicitly agreed lacked merit when he accepted the peremptory challenge in *Vasquez*.

Zamora filed a writ, and the appellate court issued a *Palma* notice, rejecting both of Judge Mallery's stated grounds for denying the peremptory challenge. Judge Mallery ultimately vacated his order denying the 170.6 challenge in *Hernandez*, and the case was reassigned to a visiting judge.

Neither party objected to the masters' factual findings, and we adopt them.

b. Conclusions of Law

The masters concluded that, by not following his final decision on the peremptory challenge in *Vasquez* when he denied the peremptory challenge in *Hernandez* two days later, Judge Mallery violated canons 1, 2, 2A, 3, 3B(2), and 3E(1) and committed willful misconduct. The masters concluded that Judge

Mallery acted in bad faith because he knew his actions were beyond his lawful judicial power. Since there are two judges in Lassen County, the one-judge court rule was clearly inapplicable. The other ground (the all-purpose assignment rule) was the same ground that the Court of Appeal had tentatively rejected in the *Vasquez* case and that Judge Mallery had acceded to just two days previously when he accepted the peremptory challenge in *Vasquez*.

Neither party objected to the masters' legal conclusions, and we adopt them.

3. 6C – *People v. Ivan Sandoval*

Count six C charged Judge Mallery with initially improperly denying another peremptory challenge filed by Zamora.

The masters found that there was not clear and convincing evidence of the alleged misconduct. Neither party objected, and we adopt the masters' findings and dismiss count six C.

G. Count Seven—Retaliation Against Attorneys Who Filed Peremptory Challenges

Count seven charged Judge Mallery with retaliating against, and making improper comments to and about, attorneys for filing statements of disqualification and peremptory challenges against him pursuant to Code of Civil Procedure sections 170.1 and 170.6.

1. 7A – Jacob Zamora and Stephen King

a. Findings of Fact

The "prison court" in Lassen County consists of cases involving defendants incarcerated at High Desert State Prison or California Correctional Center. Attorney Stephen King started accepting appointments in prison cases in Lassen County in about 2008 or 2009, and cases were historically assigned on a random basis by the clerk from a list of private attorneys who agreed to accept such cases. Between 2008 and 2019, King was appointed in about five to 10 new prison cases each month. Zamora was appointed on an average of about seven

cases each month. In June 2017, when Judge Mallery became the sole judge in Lassen County, which made him the presiding judge, Judge Mallery began to appoint the attorneys to prison cases himself instead of the clerk making the appointments.

Between August and November 2019, Zamora filed peremptory challenges against Judge Mallery in at least eight cases. At some point, it became apparent that King and Zamora were receiving far fewer appointments than the other attorneys on the list. After January 2019, Zamora's appointments in prison cases had declined to about one per month. In March 2020, Zamora notified Judge Mallery he would no longer accept any prison cases in Lassen County because he lived in Reno, was not paid for travel time, and was very concerned that the judge was going to start appointing him in one case a month or every other month.

Between April and June 2019, King filed peremptory challenges against Judge Mallery in at least eight cases. King's appointments began to taper off in approximately 2019 with his filing of a 170.6 challenge against Judge Mallery. After October 2019, King stopped receiving prison appointments, and attorneys from Plumas County began receiving the appointments for Lassen County prison cases.

Judge Mallery told visiting Judge Beason that he considered the investigation costs in one of King's cases high. Judge Mallery reported to Judge Beason he had sent King a letter inviting him to come and talk to Judge Mallery, but King declined the invitation. Judge Mallery then told Judge Beason he was not going to appoint King or Zamora anymore because they were "170.6-ing" him. Judge Mallery instructed Judge Beason not to appoint either attorneys Zamora or King in the future.

In 2020, Judge Nareau had a conversation with Judge Mallery in which Judge Mallery stated that King and Zamora were not good judicial partners because they were filing 170.6 challenges against him.

Crystal Jones was employed by the court in various positions from 2003 through June 2022, including being the prison clerk for two years. At some point in time, it became apparent to Jones that Zamora and King were not receiving prison appointments. Jones testified regarding a conversation with Judge Mallery in which Judge Mallery informed her that he would not appoint King if he wanted to "play these fucking games." Judge Mallery would also make personal comments in front of Jones about other attorneys who were filing 170.6 challenges against him.

Marian Tweddell-Wirthlin was employed by LSC from 1995 through 2021. Tweddell-Wirthlin testified that she and Judge Mallery had a good working relationship when he took the bench, but their relationship changed over the years and she believed he was distancing himself from her and not addressing her when he saw her. In the latter part of 2019, and early 2020, Judge Mallery told Tweddell-Wirthlin on a few occasions that if attorneys King and Zamora were going to continue disqualifying him then he was not going to appoint them to cases.

Lori Barron has been the prison court clerk at LSC since about 2019 or 2020. When Judge Mallery was absent from court for about five weeks in approximately April and May 2020, Barron took over the responsibility of deciding which private counsel would be selected to represent defendants in prison cases. When Judge Mallery returned in about May 2020, Barron asked him if he wanted her to continue selecting counsel in prison cases. The judge replied "no" and stated that some of the attorneys had been filing challenges, and that "if they were going to continue filing those, he was not going to use those attorneys."

Judge Mallery testified that his reasons for no longer appointing Zamora and King were that defendants were repeatedly filing *Marsden* motions against them; they made requests for moneys for ancillary services without a sufficient showing of need; and they were disrespectful to and confrontational toward Judge Mallery.

Judge Nareau testified that, when he was an attorney, he represented codefendants in felony cases handled by King and Zamora and thought that they were both "highly competent." Judge Nareau did not observe any issue with their representation of clients or their interaction with him when they later appeared before him.

The masters concluded that the evidence overwhelmingly demonstrated that Judge Mallery stopped appointing attorneys Zamora and King in retaliation for their filing challenges against him. The masters further concluded that Judge Mallery tried to cover up this retaliation by asserting that billing issues were the reason he no longer wanted to appoint King. The masters also concluded that Judge Mallery failed to provide evidence of the issues he claimed he had with Zamora and King and that his testimony was not credible.

Neither party objected to the masters' factual findings, and we adopt them.

b. Conclusions of Law

The masters concluded that Judge Mallery committed willful misconduct by retaliating against Zamora and King and violated canons 1, 2, 2A, 3B(5) (a judge shall perform judicial duties without bias or prejudice or the appearance thereof), 3C(1), and 3C(5) (a judge shall avoid nepotism and favoritism). They also concluded that Judge Mallery engaged in improper action in making intemperate remarks and displaying hostility about the attorneys who were filing the challenges against him and attempting to impugn King and Zamora's credibility after they filed peremptory challenges.

Judge Mallery did not object to the masters' legal conclusions. The examiners did not object to the masters' legal conclusions but argued that the commission should make an additional finding that Judge Mallery's instructions to Judge Beason not to appoint either attorneys Zamora or King in the future, which the masters did not specifically address, constituted a separate act of prejudicial misconduct, because they created, at a minimum, the appearance that he wanted Judge Beason to support his scheme to retaliate against the two

attorneys for exercising their clients' statutory rights. We agree and conclude that Judge Mallery's instructions to Judge Beason constitutes a separate act of prejudicial misconduct. We adopt the remainder of the masters' legal conclusions.

2. 7B – P.J. Van Ert

a. Findings of Fact

In February 2021, the Lassen County Department of Children and Family Services (DCFS) began to file 170.6 challenges against Judge Mallery in every new juvenile dependency case. DCFS's attorney, P.J. Van Ert also filed 170.1 challenges against Judge Mallery in approximately 80 cases. Judge Mallery testified that Van Ert, "wanted to try and remove [him] completely from hearing any dependency cases."

During the COVID pandemic, attorney Stephanie Skeen appeared before Judge Mallery on behalf of a father, Donnelly Mora, in a juvenile dependency matter. Van Ert was counsel for DCFS. The hearing was expected to be lengthy with extensive testimony.

Three new petitions had been filed in dependency cases that day. The new cases were assigned to Judge Nareau after DCFS filed peremptory challenges against Judge Mallery. At about 10:00 a.m. or 10:15 a.m., during a break in the hearing before Judge Mallery, social workers came into Judge Mallery's courtroom and told Van Ert that four infants, including one set of twins, were waiting in the hallway for the new cases to be called. Also present in the hallway were the three mothers, three child family services workers, and the treatment professionals from a rehabilitation facility that would house the mothers with their infants. The rehabilitation facility was located five or six hours away from the Lassen courthouse.

When children were present in dependency court, it was common practice to hear their cases first. Van Ert told Judge Mallery that infants were present in the hallway and asked him if those cases could be heard while they were on the break in

the hearing. Judge Mallery responded, "All counsel in chambers." After all the attorneys who were present in court assembled, Judge Mallery said, in a raised voice, "[W]e're going to do my calendar first. This is how it's gonna go. If the department wants to file a 170.6, you're going to wait. We're doing my calendar." The judge also said words to the effect that "you're not going to change our calendar; we're finishing this hearing first[.]" Judge Mallery, who was irritated when he spoke, told Van Ert that the peremptory challenges did not matter to him and just meant more time off for him, but that they did cause calendaring issues, that the other cases were set to be heard by the other judge, and that they could not be heard until Judge Mallery heard the matters pending before him. The judge then continued with the hearing before him.

Judge Mallery testified that he denied Van Ert's request because to do so would have inconvenienced and delayed those whose cases were before him and would have required Judge Nareau to interrupt his calendar as well. In order to accommodate Van Ert, Judge Mallery would have had to recess the matter he was currently hearing with Van Ert and Skeen, contact Judge Nareau to determine if he was available to give Van Ert's case with the infants priority, and make available the only court reporter then hearing Judge Mallery's calendar. Giving Van Ert priority would have meant that Skeen and her client would be inconvenienced by the recess and made to wait until Van Ert's other case was concluded.

Neither party objected to the masters' factual findings, and we adopt them.

b. Conclusions of Law

The masters concluded that, while Judge Mallery's refusal of Van Ert's request for priority might be reasonable, his mention to her of her filing of the 170.6 challenges was misconduct. Judge Mallery knew it was inappropriate for him to bring up the peremptory challenges with Van Ert or the other attorneys, and his conduct violated canons 1, 2, 2A, 3B(4) (a judge shall be patient, dignified and courteous to persons with whom the judge deals in an official

capacity), and 3B(5). The masters further concluded that referring to the fact that peremptory challenges were being lodged in front of the other attorneys had the effect, when viewed by a reasonable person, of discouraging them from filing peremptory challenges. The masters concluded that Judge Mallery committed willful misconduct in that he acted with a corrupt purpose to discourage Van Ert and the other attorneys who were present from filing motions to disqualify him in the future.

Neither party objected to the masters' legal conclusions, and we adopt them.

3. 7C – Susan Melyssah Rios

a. Findings of Fact

Susan Melyssah Rios was and is the District Attorney for Lassen County (DA). Sometime around late 2019 or 2020, Rios began filing 170.6 challenges against Judge Mallery. Judge Nareau testified that, in early April 2021, Judge Mallery went into Judge Nareau's chambers and said, " 'I figured out why Rios is challenging me. She has daddy issues. She wants some Mark [referring to Judge Nareau] and not some Tony.' " Judge Nareau testified that he was 100 percent certain that Judge Mallery used the phrase " 'daddy issues' " and said that Rios " 'wants some Mark and not some Tony.' "

The masters found that Judge Mallery made inconsistent claims on this issue which impacted his credibility. In his response to a preliminary investigation letter, he denied making these statements, saying that he "would never make a statement like that, even in jest, especially to Judge Nareau." In his Verified Answer, Judge Mallery stated "[a]fter a reasonable inquiry concerning the alleged statements, Judge Mallery can neither admit nor deny that he made them . . . ." Judge Mallery claimed that he told Judge Nareau that "maybe it's a father/dad issue meaning she perceives Judge Nareau as the knowledgeable judge with power, strength and influence who she can identify with, due to Judge

Narreau's [*sic*] age and wisdom in the criminal law arena, while Judge Mallery is something less and 13 years younger than Judge Nareau."

At the hearing, Judge Mallery denied making the statement that Rios had "daddy issues" or that "She wants some Mark and not Tony." Judge Mallery admitted he told Judge Nareau that Rios might have a dad issue, explaining he meant she preferred the wisdom and knowledge of Judge Nareau, who was older and more experienced in criminal law. The masters concluded that Judge Mallery made the statements as alleged.

Neither party objected to the masters' factual findings, and we adopt them.

b. Conclusions of Law

The masters concluded that the statements reflected gender bias, and were undignified, demeaning, and unbecoming of a judicial officer. The masters concluded, however, that the examiners had failed to prove, by clear and convincing evidence, that this private conversation between two judges, outside of the courtroom and not in view of the public or staff, was a violation of the canons.

Judge Mallery did not object to the masters' legal conclusions. The examiners objected to the legal conclusion that the statements do not constitute misconduct and asserted that the fact that a judge's comments were made privately is not a defense to a charge of willful or prejudicial misconduct, and that the comments constitute willful misconduct because they were made in bad faith to demean Rios, sully her reputation with another judicial officer, and to absolve Judge Mallery of any responsibility for her peremptory challenges.

We agree with the examiners that the statements were improper and violated canons 1, 2, 2A, 3B(4), and 3B(5), and that the fact that they were made in private does not salvage them. (See *Gonzalez v. Commission on Judicial Performance* (1983) 33 Cal.3d 359, 377 [derogatory remarks, although made in chambers or at a staff gathering, may become public knowledge and thereby diminish the hearer's esteem for the judiciary regardless of the speaker's

subjective intent or motivation].) We do not find, however, that there is clear and convincing evidence that they were made to "sully" Rios's reputation. As such, we do not find that the comments rise to the level of willful misconduct, but do find that they constitute prejudicial misconduct in that an objective observer aware of the comments would conclude that they diminish public esteem for the judicial office in that they appear gender biased, undignified, and demeaning.

H. Count Eight—Retaliation Against Attorney Leesa Webster

Count eight charged Judge Mallery with retaliating against attorney Leesa Webster for filing statements of disqualification against him and improperly taking actions in a matter while statements of disqualification were pending and undetermined.

1. 8A – May 6, 2020 Hearing in *Amie R. Gower v. Russell Austin Bates*

a. Findings of Fact

Leesa Webster testified that she had a regular working relationship with Judge Mallery when she appeared in front of him. In approximately May 2019, she was appointed to represent Gower in a contempt proceeding brought in a pending paternity action, *Gower v. Bates*. The contempt allegations stemmed from Gower's alleged failure to attend court-ordered parenting classes. Gower was found in contempt and sentenced; the contempt was ultimately purged. At a final status hearing, Judge Mallery began asking the litigants questions, and Webster requested to trail the colloquy so she could meet and confer with opposing counsel and the parties. Judge Mallery denied Webster's request and began chastising her. He then ordered a psychological evaluation of Gower pursuant to Evidence Code section 730, to which Webster objected, asserting that since no proceedings were currently pending before him, Judge Mallery lacked jurisdiction to order such an evaluation. According to Webster, Judge Mallery instructed the opposing attorney, Peter Talia, to file a Request for Order (RFO) seeking the evaluation and to set the matter for hearing.

Gower retained Webster to represent her in the underlying paternity action, and Webster filed a 170.1 challenge to disqualify Judge Mallery from the action following Talia's filing of the RFO. Prior to striking the motion, Judge Mallery conducted a hearing on May 6, 2020. At the hearing, he acknowledged that Webster had filed the 170.1 and that he "had limited ability to act pursuant to section 170.4." He contended, however, that he had the authority to order the evaluation and made comments that Gower had a problem with communication and engaged in destructive behavior. Judge Mallery then ordered the parties to write down five concerns that they had about the other parent with factual evidence and not generalities, ordered counsel to meet and confer regarding each party's five concerns prior to the next hearing, and stayed the evaluation, pending another hearing.

The masters found that, in his Verified Answer, Judge Mallery admitted the above facts but did so in a misleading manner, including stating that he had suggested, not ordered, the parties to write down five concerns. The masters concluded that the inconsistent statements by Judge Mallery in his Verified Answer were "telling" and that he was attempting to downplay the seriousness of his conduct by portraying it as something less than an order that he could not make while the disqualification motion was pending.

Neither party objected to the masters' factual findings, and we adopt them.

b. Conclusions of Law

The masters concluded that Judge Mallery abused his authority, failed to respect and comply with the law, violated canons 1, 2, 2A, 3, 3B(2), 3B(5), and 3B(8) (a judge shall dispose of all judicial matters fairly, promptly, and efficiently, and shall manage their courtroom in a manner that provides all litigants the opportunity to have their matters fairly adjudicated in accordance with the law). The masters concluded that Judge Mallery committed willful misconduct when he took action in the matter, while he knew a statement of disqualification was

pending and undetermined, knew he had limited ability to act, and was aware of the applicable code section that limited his authority.

Neither party objected to the masters' legal conclusions, and we adopt them.

2. 8B – July 8, 2020 Hearing in *Gower v. Bates*

a. Findings of Fact

On June 10, 2020, Webster, on behalf of Gower, filed an RFO to modify the amount of monthly child support and award attorneys' fees, and a second "Motion to Recuse" which Judge Mallery struck. Webster filed an amended, verified statement of disqualification, and Judge Mallery struck the amended statement of disqualification.

On July 7, 2020, the Shasta County Superior Court notified Webster that she needed to report for a detention hearing in a juvenile dependency case scheduled to take place the following morning. Webster was obligated to appear. She testified that, in her experience, most detention hearings took 20 minutes.

On the morning of July 8, 2020, Webster appeared at the detention hearing in Shasta County. The hearing, which was contested, ended between 11:00 a.m. and 12:00 noon. Although Webster told the Shasta County judge she had to leave by a certain time in order to make it to Lassen County, the judge would not let her leave until the hearing concluded. By the time the hearing ended, there was not enough time for Webster to drive to the Lassen courthouse where she had two matters on Judge Mallery's 1:00 p.m. calendar and a 2:00 p.m. appearance on another calendar. Webster therefore arranged for an assistant to set up a CourtCall© appearance and asked attorney Jessica Keeney to inform opposing counsel Talia that Webster would not be personally present on the matter.

On the afternoon of July 8, 2020, while Webster's amended statement of disqualification in the *Gower* case was still pending, Judge Mallery presided over the hearing on Gower's RFO. Webster appeared at the hearing by CourtCall©.

Several attorneys who were present testified that, when she called in, Judge Mallery was very angry and yelled at her.

Webster tried to explain to Judge Mallery she had been held over on a juvenile dependency matter, and if she had started driving to LSC, she would have missed one of the two calendars on which she was scheduled to appear. Judge Mallery told Webster, "I don't care. You're supposed to be here. You're not here." The judge then said, "I didn't give you permission to appear by phone. You're ordered to be here. You're not here." Judge Mallery also said that Webster did whatever she wanted or had a problem following the rules of court. When Webster asked for a continuance so she could be present in person, Judge Mallery denied her request and said he would trail the matter until 4:00 p.m. Judge Mallery told Webster to start driving, and Webster responded that she could not drive there because she would then miss her child support calendar appearance.

Attorney Eugene Chittock testified that Webster tried to explain to Judge Mallery that she was handling a dependency matter in Shasta County, that she had no choice but to stay there, and that she could not be in two places at once. When Webster tried to explain, the judge repeatedly cut her off, reiterated that he had made an order for her to appear and that she had not followed it, and told Webster that if she did not appear later that afternoon, she would be sanctioned.

Attorney Van Kinney, who was Webster's opposing counsel in *Rachel David v. Robert David* (discussed *infra*), testified that he had "never seen a judge treat somebody with that kind of disrespect." He described Webster as being "very subservient [,] very polite and appropriate." Chittock, who had not known Webster prior to that day, also thought Webster acted professionally and thought Judge Mallery was "out of line."

At the July 8 hearing, Judge Mallery denied all of Gower's motions but later vacated his rulings because the amended motion to recuse was still pending and undecided when he denied the motions.

Neither party objected to the masters' factual findings, and we adopt them.

b. Conclusions of Law

The special masters concluded that, in ruling on Webster's RFOs, after the statement of disqualification had been filed but before it had been determined, Judge Mallery failed to respect and comply with the law, abused his authority, denied Webster the full right to be heard, demonstrated embroilment, violated canons 1, 2, 2A, 3, 3B(2), 3B(5), 3B(7) (a judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the full right to be heard according to law), and 3B(8), and committed willful misconduct. The masters concluded that Judge Mallery acted in bad faith when he denied the motions because he was aware that he had a limited ability to act while a statement of disqualification was pending, and, additionally, because he acted for a corrupt purpose – to vent his anger and frustration with Webster and to retaliate against her for filing statements of disqualification against him.

The masters further concluded that Judge Mallery committed prejudicial misconduct when he became angry with and raised his voice at Webster in violation of canon 3B(4), and gave the appearance that he was retaliating against Webster for filing statements of disqualification against him and for making the claims set forth in those statements in violation of canon 2.

Neither party objected to the masters' legal conclusions, and we adopt them.

3. 8C – July 8, 2020 Hearing in *Rachel David v. Robert David*

a. Findings of Fact

On July 8, Judge Mallery presided at a hearing in *David v. David,* another case in which Webster represented one of the parties. Opposing counsel, Kinney, physically appeared in court, and Webster appeared by CourtCall©. The case was on the calendar for receipt of a mediator's recommendation relating to child custody, not for an evidentiary hearing or a ruling on any request for order. Prior to the hearing, Webster attempted to contact Kinney to inform him of her

calendar challenges that day. At the hearing, Judge Mallery told Webster her absence "economically disadvantaged opposing counsel" and asked Kinney how much it cost him to be there that day. Kinney replied that his cost was $1,500, and the judge then stated his intention to impose sanctions on Webster in the amount of $1,500 and scheduled a hearing on sanctions. Kinney testified he was "shocked" by Judge Mallery's behavior, and that the hearing "could have been handled by Webster's phone appearance." On August 6, 2020, Judge Mallery issued an Order to Show Cause re: Sanctions (OSC), ordering Webster to show cause why she should not be sanctioned for up to $1,500, pursuant to Code of Civil Procedure section 177.5.

Judge Mallery testified that he issued the OSC because Webster did not appear, and "the purpose of the OSC was to determine if she had good cause for her failure to appear." When asked whether he set a potential fine or sanctions amount for Webster to pay, the judge testified that he set the amount at $1,500 because that was the amount that Kinney's client had to pay him to appear at court.

The masters found that, in fact, the OSC did not allege that Webster had failed to appear, nor did it allege that Webster had failed to inform the court or opposing counsel that she would not be present, nor that she had violated a rule of court. While Judge Mallery claimed in his Verified Answer that Webster had violated California Rules of Court, rule 5.98(a)[1], the rule was inapplicable. The masters noted that, when Webster appeared before Judge Mallery on the OSC, the judge asked Webster if she was willing to pay a lesser amount than $1,500, and she said no, again explained why she had been unable to appear in person, and started crying because it was a "big deal" for her.

Neither party objected to the masters' factual findings, and we adopt them.

[1] California Rules of Court, rule 5.98(a) requires parties to meet and confer before a hearing on an RFO.

b. Conclusions of Law

The masters concluded that, when Judge Mallery stated his intention to impose sanctions on Webster in the amount of $1,500, scheduled a sanctions hearing to take place, and issued an OSC, he failed to respect and comply with the law, demonstrated embroilment, violated canons 1, 2, 2A, 3, 3B(2), 3B(4), 3B(5), and 3B(8), and committed willful misconduct, in that he acted for the corrupt purpose of venting his anger and frustration with Webster and to retaliate against her for her statements of disqualification.

The masters (citing *Conservatorship of Becerra* (2009) 175 Cal.App.4th 1474, 1480, 1484) noted that sanctions may be imposed under section 177.5 only if there was " 'a knowing violation of a valid order of the court without good cause or substantial justification.' " The OSC, however, did not allege any violation of a court order, and there was no evidence of any order that Webster might have violated. The masters further concluded that, contrary to Judge Mallery's testimony that he determined the amount of the potential sanctions based on the amount that Kinney's client had to pay him to appear at court, sanctions under section 177.5 are payable to the court, not to the opposing party. The masters also noted that, since the threatened sanctions amount was at least $1,000, the threat was serious enough to strike fear in Webster, as sanctions in that amount would need to be reported to the State Bar.

Neither party objected to the masters' legal conclusions, and we adopt them.

4. 8D – Telling Marian Tweddell-Wirthlin Not to Appoint Webster

a. Findings of Fact

On the morning of July 9, 2020, Judge Mallery told Tweddell-Wirthlin that he no longer wanted Webster to be appointed to any cases and to notify staff of this. That same morning Tweddell-Wirthlin sent an email to court staff that stated, "Effective immediately per Judge Mallery, the court will no longer be appointing Leesa Webster to any new cases." According to Tweddell-Wirthlin,

the email accurately reflected word for word what the judge had said. That same morning, then-CEO Vose forwarded the email to Judge Mallery. Judge Mallery testified that, when he saw the email, he knew that it was "likely to get out and potentially end up with the commission," and that he would "have to address" it.

A few minutes after Tweddell-Wirthlin sent the email, Judge Mallery entered her office appearing upset and angry, and said words to the effect of, " 'You need to have this redone. If someone finds out about this, this is going to get out to the public. I did not mean it to be this way.' " When Tweddell-Wirthlin told the judge she had let staff know the judge's wording exactly, the judge replied, "Well, I didn't mean it that way. You can't let people know." Judge Mallery asked Tweddell-Wirthlin to inform staff instead that he would have to approve any appointments for Webster, and staff would have to check with him first. Tweddell-Wirthlin sent a revised email telling staff to ignore her initial email, sent Judge Mallery a draft of the revised wording of another email, which he approved, and then sent court staff a third email stating, "[a]ny new cases that may be appointed to Attorney Leesa Webster will need the prior approval of the Presiding Judge."

Judge Mallery testified that he later asked then-CEO Vose "if he would put a request out to [Webster] to see if she was interested" in representing minors in dependency proceedings, as the judge felt Webster could do "tremendous things" to help children for whom previously court-appointed attorneys had not been providing services that were good enough. Vose sent Webster an email asking her if she was interested, and Webster responded that she would take minors' cases but could not practice in front of Judge Mallery anymore because she does not "like drama and turmoil."

Neither party objected to the masters' factual findings, and we adopt them.

b. Conclusions of Law

The masters concluded that Judge Mallery's decision to suspend Webster's appointments in July 2020 gave the appearance that he was

retaliating against her for filing statements of disqualification against him and for making the claims set forth in those statements. The judge's conduct reflected embroilment, violated canons 1, 2, 2A, 3, 3B(5), 3C(1), 3C(2), and 3C(5), and constituted prejudicial misconduct.

Neither party objected to the masters' legal conclusions, and we adopt them.

I. Count Nine—Ex Parte Communications Regarding Change of Venue Motion

Count nine charged Judge Mallery with making comments to other judges about a case he was disqualified from that could substantially interfere with a fair trial or hearing.

1. Findings of Fact

Judge Mallery was disqualified from the case of *People v. Juan Ruiz Esqueda*. Esqueda filed a motion for change of venue, which Judge Nareau was scheduled to hear. Judge Nareau told Judge Mallery he was going to rule on the change of venue motion. As Judge Nareau was walking towards the courtroom, Judge Mallery told Judge Nareau he could not grant the motion because the county did not have any money. Judge Nareau did not respond but kept walking. Court employee, Crystal Jones, testified that she heard Judge Mallery's statement about the change of venue motion. Judge Nareau ultimately recused himself from *Esqueda* and did not hear the motion.

Judge Mallery testified he spoke with Judge Nareau about the issue of expenses after Judge Nareau had been recused from the case. Judge Mallery testified that they had the conversation "because one day Judge Nareau would be presiding judge as well, [and] he may have to face a similar situation." Judge Mallery also testified he would not tell Judge Nareau how to rule.

The *Esqueda* case was later reassigned to visiting Judge Beason. Judge Beason testified that Judge Mallery told her, " 'You can't grant that motion. The county can't afford it.' " Judge Beason thought that it was "quite possible" that

Judge Mallery's statement to her "was an order." Judge Beason did not think that the financial impact of a change of venue was anything that should guide her decision on whether due process required a change of venue. Judge Beason denied speaking to Judge Mallery about the merits of the case and testified Judge Mallery's remark was made in passing, and she did not recall when exactly the statement occurred. The comment by Judge Mallery did not influence Judge Beason, and she granted the change of venue motion.

Judge Mallery admitted he discussed with Judge Beason that "it seems like it may be expensive to the county if that [motion] was granted" because he understood that, when a change of venue was granted, the original court must send its own court reporter and its own judge and would have to pay a variety of costs, including hotel costs. Judge Mallery also testified he did not mean to tell Judge Beason how to rule, and it was not uncommon for him "unknowingly" to say out loud what he is thinking about, and he often "think[s] aloud as opposed to keeping it within [his] mind."

Neither party objected to the masters' factual findings, and we adopt them.

2. Conclusions of Law

The masters concluded that the examiners failed to prove by clear and convincing evidence that Judge Mallery committed any violation of the canons, because the statements by Judge Mallery did not address the merits of the venue motion, and the evidence was inconclusive as to whether he was telling either Judge Beason or Judge Nareau how to rule as opposed to simply expressing his concerns about the budget impact of a potential decision.

Judge Mallery did not object to the masters' legal conclusions. The examiners objected to the conclusion that Judge Mallery did not violate the canons. The examiners did not dispute that Judge Mallery did not address the merits of the change of venue motion but argued that Judge Mallery did discuss the change of venue motion with Judges Nareau and Beason by introducing a factor that was irrelevant to the proper resolution of the motion: the cost to the

county. The examiners argued that the masters' factual findings clearly state that Judge Mallery told Judge Nareau that " 'he could not grant the motion' " and told Judge Beason, " 'You can't grant that motion.' " The examiners also referenced a portion of Judge Beason's testimony in which she testified that Judge Mallery's remark was case-specific and not part of a general policy discussion.[2]

The examiners also referenced Judge Beason's testimony regarding another occasion when Judge Mallery allegedly sought to influence Judge Beason's ruling on another motion pending in *Esqueda*. Judge Beason testified that, before she went into court to preside over a hearing on a motion to hold a prosecutor in contempt, Judge Mallery told Judge Beason that she needed to make the prosecutor pay and that the prosecutor had been previously suspended from the State Bar for failure to pay fees. The examiners argued that this latter ex parte communication by Judge Mallery demonstrated that when Judge Mallery engaged in ex parte communications with Judges Nareau and Beason regarding the change of venue motion, his intent was to influence their rulings despite having been disqualified from *Esqueda*.

The examiners asserted that, by telling Judges Nareau and Beason how he thought they should rule on a motion in a case from which he had been disqualified, Judge Mallery committed willful misconduct because he acted with the corrupt purpose of trying to influence two judges' decisions in a case from which he was disqualified. The examiners also argued that Judge Mallery committed prejudicial misconduct because it would appear to an objective observer that the conduct in question was prejudicial to public esteem for the judicial office.

The masters' report contains no discussion of Judge Beason's testimony regarding the other alleged ex parte communication in *Esqueda*, Judge Mallery

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[2] Judge Beason was asked: "Was it a general policy discussion about change of venue, or was this a case-specific comment [?]." She responded: "It was a case-specific . . . ." (R.T. 67:16-20.)

was not charged with any misconduct relating to those alleged statements, and Judge Beason was not cross-examined on those alleged statements. We therefore decline to consider Judge Beason's testimony regarding another alleged ex parte communication as proof of intent of the ex parte communication charged in count nine.

We agree, however, that the fact that Judge Mallery's reasoning was based on a factor that was irrelevant to a decision on the motion, or that his comments did not prevent Judge Beason from ordering a change of venue, are not defenses to a charge of willful misconduct. In *Gubler v. Commission on Judicial Performance* (1984) 37 Cal.3d 27, the court found that the judge committed willful misconduct by writing a note to a court commissioner and placing it in the court file, after the judge was disqualified from the case following a peremptory challenge. (*Id*. at pp. 52, 54.) The note dealt with the question of how the commissioner should handle the issue of attorney's fees. (*Id*. at p. 52.) The commission found that the judge who ultimately decided the issue was not influenced by Judge Gubler's note, but stated:

> Since [the judge] was disqualified under section 170.6 from hearing the fee-setting issue, it was highly improper for him to give unsolicited advice to another judicial officer on how to decide it. The right to disqualify a judge, guaranteed by section 170.6 [citations], would be undermined and perhaps vitiated if the disqualified judge were permitted to circumvent the disqualification by initiating advice to another judicial officer on how to decide the matter.

(*Id*. at p. 54.)

Accordingly, we conclude that Judge Mallery's comments violated canons 1, 2, 2A, 3, 3B(7)(a) (a judge who is disqualified from hearing a case shall not discuss that matter with the judge assigned to the case), 3B(9) (a judge shall not make any nonpublic comment that might substantially interfere with a fair trial or hearing), 3C(1), and 3C(2) and constituted willful misconduct because Judge Mallery acted with the corrupt purpose of attempting to influence Judge Nareau's

and Judge Beason's decisions in a case from which Judge Mallery was disqualified.

J. Count Ten—Attempt to Persuade Attorney to Withdraw 170.6 Challenge

Count ten charged Judge Mallery with attempting to induce an attorney who filed a peremptory challenge against Judge Mallery to withdraw his petition seeking review of Judge Mallery's order striking the challenge.

1. Findings of Fact

On February 6, 2019, Judge Mallery was presiding over *Meralinda Sue Owings v. Randolph Lee Owings*. Petitioner Owings filed an RFO, and respondent's attorney, Chittock, filed a peremptory challenge against Judge Mallery. Judge Mallery struck the challenge as untimely. Chittock filed a writ petition seeking review of Judge Mallery's order.[3] While Chittock's writ petition was pending, Judge Mallery presided over the hearing on Owings's RFO. At the hearing, Judge Mallery called Chittock up to the bench. As he approached the bench, Chittock stopped behind Owings, who was unrepresented, and asked the judge if he wanted her to approach the bench with him. Judge Mallery said, "No, it will just take a moment." Judge Mallery told Chittock at the bench that he needed to listen to the judge's ruling and that he believed that Chittock would want to dismiss his writ once he heard Judge Mallery's ruling. After Chittock walked away from the bench, the hearing proceeded, and Judge Mallery heard argument. Chittock, understanding the ruling would be in favor of his client, submitted on the papers and made no further argument. After Owings spoke for a few minutes, Judge Mallery ruled entirely against her and for Chittock's client, without disclosing to Owings his private conversation with Chittock. Chittock was so disturbed by Judge Mallery's ex parte communication in court that he

[3] The masters noted that "[a] pattern was developing in cases where Judge Mallery was challenged by attorneys," referencing the misconduct found in counts six, seven, and eight.

consulted the State Bar Hotline for guidance, but was told that ethically, he could not do anything. Chittock filed a request to dismiss the writ petition, which was granted.

Judge Mallery made inconsistent statements about this communication. Before the masters, he claimed that the court minutes reflected that he disclosed the ex parte communication. The masters found they did not. The masters found Judge Mallery's testimony not credible and that he was "evasive" when asked on cross-examination whether he misrepresented the facts in his Verified Answer.

Neither party objected to the masters' factual findings, and we adopt them.

2. Conclusions of Law

The masters concluded that Judge Mallery violated canons 1, 2, 2A, 3, 3B(2), 3B(5), 3B(7), and 3B(8), and committed willful misconduct when he engaged in an improper ex parte communication with Chittock to benefit his own self-interest at the expense of a party, petitioner Owings. The masters noted that Judge Mallery's conduct impacted on the "very integrity of the [c]ourt and its administration of justice."

Neither party objected to the masters' legal conclusions, and we adopt them.

K. Count Eleven—Improper Communications Regarding Criminal Restitution Hearings

Count eleven alleged that Judge Mallery abused his authority by improperly initiating an ex parte communication with visiting retired appellate court Justice Rebecca Wiseman and telling her not to allow ability-to-pay hearings as mandated by a recent case because he thought that it was wrongly decided, and the court would be burdened if it had to hold such hearings routinely.

1. Findings of Fact

Justice Wiseman testified she was an assigned judge in Lassen County periodically over a period of four years. On one occasion when she was serving as a visiting judge, Justice Wiseman presided over the prison calendar at High Desert State Prison and handled the sentencing of four prisoners, all of which involved restitution hearings and raised the question of whether a prisoner was entitled to a hearing on the ability to pay court-ordered restitution.

Justice Wiseman testified to a conversation she had with Judges Nareau and Mallery, prior to hearing the prison calendar, concerning a new appellate decision pertaining to restitution hearings. Judge Mallery asked Justice Wiseman whether she had read the new decision and told her he thought it had been wrongly decided. The new case created a conflict with a prior case from the same appellate district which had held there was no right to a restitution hearing. Judge Mallery informed Justice Wiseman that the issue frequently occurred at the prison and while she should exercise her own judgment, he hoped she would decide that there was no right to an ability-to-pay hearing because holding such hearings would impose a burden on the court. Judge Mallery told Justice Wiseman not to let the prisoners testify or hold a hearing, and words to the effect that if she held hearings, the court would be out at the prison holding these hearings all the time. Justice Wiseman testified that she did not know whether Judge Mallery told her how she should rule. "But kind of more, what do you think the outcome should be? That type of thing."

Judge Nareau testified that he was not really involved in this conversation about restitution hearings but was "just in the area." Judge Nareau overheard something to the effect that if Justice Wiseman granted an ability-to-pay hearing on restitution at the prison, he was going to have a lot of hearings.

The masters found Justice Wiseman's testimony to be credible and not factually disputed by Judge Mallery. Judge Mallery testified he did not recall making any statements to Justice Wiseman to the effect that she should not hold

prison restitution hearings but had no reason to disbelieve her testimony. He testified that he saw this as an opportunity to have a "very seasoned jurist" whose judicial knowledge and accomplishments he greatly respected decide how to resolve the split in authority regarding the obligation to have a hearing.

Neither party objected to the masters' factual findings, and we adopt them.

2. Conclusions of Law

The masters concluded that the evidence was not clear and convincing that Judge Mallery violated any canons. They found that the discussion of the conflicting decisions was appropriate, especially in light of Justice Wiseman's testimony that she had not heard of or read one of the conflicting cases, and that Justice Wiseman was sitting on assignment and not familiar with all of LSC's policies. The masters also noted that Justice Wiseman is a former appellate justice whose experience in analyzing and deciding issues such as this could help LSC by deciding which appellate opinion to follow. Further, Justice Wiseman testified that Judge Mallery did not interfere with the exercise of her independent judgment, but expressed an opinion about a ruling that would affect the court's responsibilities.

The masters concluded that the evidence supported an inference that a precedent would be established in LSC by a visiting judge that could significantly affect court resources, while the law on the subject was unsettled. They determined that, while Judge Mallery's remark that many hearings would have to be held if one of the decisions was followed could have been misconstrued by a judge with less experience than Justice Wiseman, there was not clear and convincing evidence that Judge Mallery committed misconduct.

Judge Mallery did not object to the masters' legal conclusions. The examiners objected and argued that, since Judge Mallery told Justice Wiseman that he wanted her to refuse to hold ability-to-pay hearings partly for a reason that had nothing to do with the merits, but rather the effect that such hearings would have on his workload, Judge Mallery committed willful misconduct

because his corrupt purpose was to benefit himself, and for a reason that had nothing to do with the merits. The examiners argued that Judge Mallery's conduct also constituted prejudicial misconduct.

We agree with the masters that there is not clear and convincing evidence that Judge Mallery's remarks violated the canons, particularly in light of the split in authority in the appellate decisions that was unresolved, and Justice Wiseman's testimony that she did not know whether Judge Mallery told her how she should rule "But kind of more, what do you think the outcome should be? That type of thing." Accordingly, we adopt the masters' conclusion and dismiss count eleven.

L. Count Twelve—Loss of Impartiality and Assumption of Prosecutorial Role in Handling of Plea Agreements

Count twelve alleged that on five occasions Judge Mallery abdicated his judicial responsibility to objectively evaluate proposed plea agreements reached in criminal cases or indicated his decisions about whether or not to accept them were based on reasons other than the faithful discharge of his judicial duties.

1. Findings of Fact

a. 12A – Meeting with Counsel

Deputy District Attorney (DDA) Stephanie Skeen, DDA Shannon Carter, and Deputy Public Defender (DPD) Boris Bindman testified that, on March 27, 2017, court staff summoned them and the other criminal attorneys present for that day's calendar to a jury room to meet with Judge Mallery. When they arrived, Judge Mallery told them he would no longer accept plea deals. Judge Mallery stated there was "public outrage about the way crime was being handled in the county," and that there would be "no further plea negotiations" and that "the complaint is the offer." Judge Mallery said counsel would give him all the facts, he would make the offer, and the defendant could decide whether to take the offer or could reject it and go to trial.

In his Verified Answer, Judge Mallery admitted the allegations but stated as the "context" that "[i]n Lassen County, an increasing number of proposed plea bargains had no longer complied with the objectives of sentencing pursuant to California Rules of Court, [r]ule 4.410," attorneys were increasingly failing to provide sufficient information to the court to support their proposed dispositions, plea bargains "commonly and increasingly include[d] requests for the court to not issue certain required terms," such as participation in a domestic violence course, a child abuser's counseling program, or an alcohol or drug program, or disposal of a firearm, and prosecutors were failing to comply with Marsy's Law by not notifying victims.

At the hearing, Judge Mallery did not recall whether he said there would be no further plea negotiations or that he would not accept any plea offers but admitted he said something to the effect that "the complaint is the offer." He testified that he said that in response to defense attorneys coming to court and stating they had not received an offer and therefore had not worked the case yet or spoken to the prosecutor, and to encourage them to come into court prepared.

b. 12B – Dispositional Conference

Attorneys Zamora and Skeen testified that they and DDA Mark Beallo participated in a dispositional conference with Judge Mallery in 2017, near in time to the meeting described above. According to Zamora, Judge Mallery stated during that conference that "there would be no plea negotiations in criminal cases" and indicated counsel could not tie the hands of the court. His position was that the court would make the decision on what would happen to an individual defendant. In response, Zamora said "it would never work" and "[i]f plea bargains are taken away, it's very possible the criminal justice system can come to a grinding halt." He also said he could not "ethically plead my client to an open plea or what is referred to as plea to the sheet" and that if he could not resolve cases through negotiated dispositions, he would have to take all his cases to trial. According to Zamora, Judge Mallery's rejoinder was, "Then I will

not appoint you or you will not get any further cases." Then, recognizing he had "said something wrong," Judge Mallery said, "'What I meant to say is you just won't have enough time to handle all those cases."

Skeen testified that, during that period, it was very common for Judge Mallery to discuss the idea of open pleas and no plea negotiations. She testified that Zamora told Judge Mallery at that conference that he could not advise his clients to plead to cases when they had no idea what kind of sentence they would be facing. According to Skeen, after Zamora made that comment, Judge Mallery said "that [Zamora] didn't even live in Lassen County anymore and he may become so busy that he wouldn't be getting cases in Lassen County any longer."

Judge Mallery testified that he recalled the dispositional conference and recalled Zamora telling him he would have to take all his cases to trial if he could not resolve them by negotiated resolution. The context of his remark, he said, was, "It would be improper for us to appoint new cases and not – if he didn't have the necessary time to take care of not only his existing cases but the current cases, and if all the cases are going to trial, how would he have the necessary time to be bringing on new cases until he cycles out cases at that point." He denied making the statements with the intent to threaten Zamora or chill his advocacy for his clients, and denied instituting a policy in which negotiated dispositions would no longer be accepted.

c. 12C – In-Chambers Discussion About Possible Resolution in *People v. Samuel Craig Lima*

DDA David Evans and DPD Savina Haas testified that defendant Lima was charged with arson (among other crimes), had been on probation for burglary of a local gun store when he committed the arson, and that the gun store burglary had received local media attention. Evans and Haas had an in-chambers conference with Judge Mallery about the case, which occurred during campaign season when Judge Mallery was running unopposed for the bench and Evans

was running for district attorney. Judge Mallery rejected their proposed settlement agreement and said the only agreement he would accept was a guilty plea to all of the charges, with Lima going to prison. Evans testified that Judge Mallery was "very upset" and said, "that the case was notorious and a community concern [and] that it would have an effect, a negative effect, on my – on my bid for the District Attorney's Office." He also told Evans, "that if I wanted to succeed, I would need to punish this person as much as possible if I wanted to win the election" and that people would know that Evans "let an arsonist go." Evans testified that Judge Mallery said he, Judge Mallery, was running unopposed for a judicial term, that "it would be on [Evans]" and that they could not let someone this notorious and well known in the community be treated so lightly and that Evans should be harsh because of public opinion.

In his Verified Answer, Judge Mallery admitted the allegations but asserted that Lima was charged with multiple serious crimes while on felony probation, and was therefore statutorily ineligible for probation because he had two prior felony convictions and a serious felony and that leniency in a plea bargain would be "completely contrary to the interests of society and public safety." Judge Mallery testified that the proposed resolution made by Evans and Hass was not a legal sentence. He testified that people running for district attorney commonly try to suggest they will protect public safety and be tough on crime, and Judge Mallery told Evans that "he might want to reconsider the offer if he was going to be tough on crime, as it was not, and it did not comply with the code sections." About his own election, Judge Mallery testified that he "might have said something to the effect I'm not the one running for office."

d. <u>12D – Rejection of Proposed Plea Agreement</u>

Haas testified that she and DDA Beallo reached a negotiated resolution in a criminal case, *People v. Jack Lee Judlin*, and appeared before Judge Mallery in June 2019 and presented the proposed resolution. Judge Mallery responded that Judlin was a "menace to society" and that he would not accept the resolution

based on Judlin's prior criminal background. Haas testified that she told Judge Mallery that the plea should be based on the facts of the current case and not Judlin's prior criminal history and explained why they had agreed to the plea. She did not persuade Judge Mallery, and the case was set for trial.

Haas testified that, after the hearing, she and Judge Mallery talked briefly about the case, and Judge Mallery started the conversation with "have you heard of Judge Persky? He's standing in the unemployment line for a lenient sentence[,] and I am not going to be in that position. And, therefore, I'm not going to accept such plea deals which – which make us look bad in the community." Judge Mallery said dismissals and time-served dispositions make defense attorneys look "stellar" but "make[] the DA and the judge and the courts look bad because the community sees lighter sentences."

In his Verified Answer, Judge Mallery neither admitted nor denied the allegations of this count, but described the seriousness of Judlin's charges, his criminal history, and that he was statutorily ineligible for probation. Judge Mallery's testimony was consistent with his Verified Answer. Judge Mallery testified that he might have said Judlin was a menace but that Judlin's record supported that statement.

e. <u>12E – Meeting with Attorneys on June 25, 2019</u>

Five attorneys and Judge Mallery testified regarding a June 25, 2019 meeting during which Judge Mallery met with attorneys and Judge Nareau prior to the start of a criminal calendar. Judge Mallery stated that the plea deals coming out of the DA's office had been too lenient for a long time, that that was going to stop, and he was not going to permit any more plea bargaining. He said the "charging document is the offer in terms of what a disposition could be," he would accept open pleas only, and defendants "could expect the maximum punishments under the law." He stated repeatedly that he was "not going to go down like Judge Persky," said he needed to maintain his electability in the

community, and he was not going to "go down for anything that the attorneys did in terms of a disposition."

Chittock testified that Judge Mallery told the assembled attorneys he was going to start a new policy looking at plea deals, that the criminal defense bar in Lassen County was very experienced and was "taking advantage of the district attorney and getting some really light deals," and that he was going to change that. He said the court would be taking plea bargaining out of the attorneys' hands and putting it in the court's hands. When Judge Mallery came in, he was wearing his robe, "agitated" and, according to Chittock, "wanted to appear very strong." Chittock testified that when the attorneys pushed back it clearly surprised Judge Mallery and that "he was in tears by the end of the interaction." Attorney Jordan Funk told Judge Mallery he could not have a policy like that and would not get away with it. Four or five other attorneys commented, and the meeting went on for about 30 to 45 minutes.

Chittock testified that he felt sorry for Judge Mallery because "he was kind of losing it a little bit." Chittock told Judge Mallery, "I know you don't mean you're going to create a policy because you can't create a policy." Chittock testified that Judge Mallery's response was "yeah, I'm not going to create a policy" and then he got up and left. Judge Mallery did not indicate that he was frustrated that the prosecuting and defense attorneys were not providing sufficient information for him to evaluate a plea deal. For three or four months after that, Chittock testified, he was unable to get plea deals that he had been routinely getting because prosecutors "took a much harder position."

Judge Nareau testified that he made a practice of meeting with attorneys in a jury deliberation room before starting the calendar on certain days. He remembered an occasion when Judge Mallery asked if he could address the attorneys. He was not sure what Judge Mallery wanted to talk with them about but assented. He described the "general gist" of Judge Mallery's position was

that plea deals were too light, that it was going to be open pleas, that the complaint was the offer, and that "he wasn't going to go down like Persky."

The testimony of attorneys King, Zamora, and Funk was consistent with that of the other attorneys and Judge Nareau. Judge Beason was not present at the meeting, but testified that Judge Mallery had made similar comments to her.

Judge Mallery testified that before the meeting he discussed with Judge Nareau talking to the attorneys about their failure to provide sufficient information to the court to evaluate plea agreements, that it was an issue he and Judge Nareau had discussed before on a regular basis, and that Judge Nareau shared his frustration. Judge Mallery testified he had talked to attorneys about the problem before, but the attorneys did not seem to get it. He testified that other judges he had talked to suggested that he get the attorneys together and raise it, and that was his intention at the June 2019 meeting.

Judge Mallery testified that at the meeting he discussed sentencing factors, a judge's role in sentencing, and the problems of attorneys providing insufficient information to assess the appropriateness of plea deals. He told the attorneys that if they did not start providing adequate offers and information, "it's possible that we're not going to have plea deals until that would occur." It was not his intention to never accept plea deals, and he never had a policy to that effect.

Judge Mallery testified that he did mention Judge Persky, and that the situation Judge Persky faced:

> [S]howed me that, right or wrong, as a judge we are ultimately responsible to the public. And if we have to go in front of the public for alleged issues that they perceive as not having been done right by a judge, like Judge Persky did with his recall, is that – I didn't want to be there in such a situation without knowing that what I did, I had all the information that I needed, and based upon that information, I did what I thought was best pursuant to the rules of court and the community and the sentence that I may have issued, and it is something that I would live with even if the public didn't agree with it.

In his response to a commission preliminary investigation letter, Judge Mallery denied stating that he would no longer accept negotiated plea deals and that he was not going to be like Judge Persky. In his Verified Answer, he stated that he "could neither admit nor deny that he made" those statements.

The masters found Judge Mallery's responses not credible and unpersuasive. They concluded that the evidence clearly and convincingly established that Judge Mallery made all of the statements alleged in count twleve.

Neither party objected to the masters' factual findings, and we adopt them.

2. Conclusions of Law

The masters concluded that, in making the statements communicating to the criminal attorneys practicing in Lassen County that he would consider, in deciding whether to approve plea agreements, such improper factors as whether the agreement would be perceived negatively by the community, subject him or the court to criticism, or render him or the elected district attorney in Lassen County politically vulnerable, Judge Mallery violated canons 1, 2, 2A, 3, 3B(2), 3B(7), 3B(12) (a judge shall remain impartial at all times during resolution efforts), and 3C(1), and engaged in willful misconduct. The masters also concluded that Judge Mallery's statements referencing what a district attorney needed to do to win election, and plea agreements making district attorneys look bad, telegraphed to the criminal defense bar that they too should consider the same impermissible criteria, and violated canons 1, 2, 2A, 3, 3B(2), 3B(7), 3B(12), and 3C(1), and constituted willful misconduct.

The masters further concluded that, in making the additional statements such as that there would be no more plea negotiations, Judge Mallery failed to respect the limits on his judicial authority and the duties and prerogatives of prosecuting and defense attorneys in the plea bargaining process in violation of canons 1, 2, 2A, 3, 3B(12), and 3C(4) (a judge with supervisory authority for the judicial performance of other judges shall take reasonable measures to ensure

the prompt disposition of matters before them and the proper performance of their other judicial responsibilities). The masters concluded that Judge Mallery's statements constituted willful misconduct because he exceeded the limits of his judicial authority and did so with a conscious disregard for those limits.

The masters also concluded that, by making statements to Zamora and Skeen to the effect that Zamora might not receive any more appointments if he circumvented Judge Mallery's proposed plea bargaining policy by taking all his cases to trial and statements suggesting that defense attorneys were "taking advantage of" the district attorney and other prosecuting attorneys in her office, Judge Mallery violated canons 3B(4) and 3B(12).

The masters also concluded that Judge Mallery's statement suggesting he would retaliate against Zamora if Zamora did not comply with Judge Mallery's new practice regarding plea bargaining was willful misconduct because he made the statement with either the knowledge or conscious disregard that it was beyond his lawful judicial authority, and his statement regarding defense attorneys taking advantage of prosecuting attorneys constituted improper action.

Neither party objected to the masters' legal conclusions, and we adopt them.

M. Count Thirteen—Abuse of Authority

Count thirteen charged Judge Mallery with abandoning his role as a neutral factfinder, exceeding his authority, and usurping a prosecuting agency's discretionary authority to control the institution of proceedings on three separate occasions.

1. Findings of Fact

   a. 13A – Telling District Attorney to Charge Driving on a Suspended License as an Infraction, Not a Misdemeanor

Count thirteen A charged Judge Mallery with having a conversation with DA Rios regarding filing charges for driving on a suspended license and

requesting that she consider doing what her predecessor had done by charging those cases as infractions rather than misdemeanors.

The masters found that there was not clear and convincing evidence of the alleged misconduct. Neither party objected, and we dismiss count thirteen A.

b. 13B – Directing a Second Trespassing Count be Added in *People v. Kimberly Seamons*

On September 11, 2019, defendant Seamons, represented by DPD Haas, appeared for arraignment in Judge Mallery's courtroom. Earlier that day, DA Rios had filed a criminal complaint against Seamons for one count of trespass under Penal Code section 602, subdivision (m). At the arraignment, Judge Mallery asked DDA Jolanda Ingram-Obie why a second count of trespass had not been charged and directed Ingram-Obie to add a second count of trespass. Ingram-Obie returned to the office and told Rios what had happened at the arraignment. Ingram-Obie was confused about why Judge Mallery ordered them to add another count of trespass. Rios testified she was "irritated" because it was not the first time something like this had occurred.

Judge Mallery testified that he did not direct Ingram-Obie to add another charge but asked them if they were going to do so. He asked because the officer's citation attached to the complaint reflected there had been two incidents of trespassing. Judge Mallery could not recall whether the DA ever added a charge but testified that he arraigned Seamons on two charges.

The masters found the evidence clear and convincing that Judge Mallery directed the DA to add a second charge of trespassing to the complaint against Seamons and purported to arraign Seamons on two counts of trespassing when the complaint only alleged one.

Neither party objected to the masters' factual findings, and we adopt them.

c. 13C – Abuse of Authority and Improper Ex Parte Communications in *People v. Kenneth Massey*

In *People v. Massey*, DA Rios charged defendant Massey with a misdemeanor violation of Penal Code section 591.5 (interference with a wireless communication device) but declined to charge him with misdemeanor domestic violence because she concluded the facts in the police report were insufficient to support such a count. Massey was in custody on both misdemeanor allegations. On the day the arraignment was to be held, Judge Mallery directed Tweddell-Wirthlin to call Rios to see whether she wanted to add another count. Judge Mallery told Tweddell-Wirthlin that if the 591.5 charge was the only count, he intended to reduce the bail and cite Massey out of jail.

Tweddell-Wirthlin called Rios, asked why she had not charged domestic violence, and asked whether she would have any objection to the court asking or ordering the jail to "cite out" Massey so the court did not have to arraign him at 4:00 p.m. that day. She told Rios that the judge had said that if the complaint was not changed the bail would be reduced. Rios responded that "this was her department, she was the one that was charging the document, and that the way it was, that it would stand." Rios told Tweddell-Wirthlin that she did not agree that the jail could cite out Massey and wanted to address Massey's custodial status with the court at 4:00 p.m. When Tweddell-Wirthlin conveyed Rios's response to Judge Mallery, he appeared "agitated."

Rios testified that both parties have a right to be heard on the issue of bail at arraignment or with two days of court notice. Tweddell-Wirthlin testified that where the DA charged fewer charges than a defendant was arrested for, bail would be reduced only if the court so ordered after a hearing. However, without waiting for the 4:00 p.m. hearing, Judge Mallery reduced Massey's bail to $5,000, and as a result the jail cited him out. Judge Mallery directed a court clerk to take Massey's case off calendar and to contact the jail and tell them Massey was to be cited and released. He also told the clerk to notify the parties that bail was

now set at $5,000, and Massey would be cited and released instead of arraigned that day.

In his Verified Answer, Judge Mallery admitted that he instructed the jail to cite Massey out in lieu of requiring him to post bail. He claimed that reducing bail to $5,000 would have been proper in any event, under Penal Code section 1269b. He did not explain, however, how section 1269b supported the position that he could reduce bail without a hearing.[4] Judge Mallery's Verified Answer further stated that the purpose of contacting the DA prior to the hearing was to determine if the charge had any factors relevant to pre-arraignment review, including any domestic violence that would cause Penal Code section 1203.097 [pertaining to probation] to be taken into consideration, whether or not Massey was a flight risk, and whether or not Massey was a threat to public safety. The Verified Answer also states:

> If the District Attorney could not provide such information [*which they could not*], then there would be no apparent need to continue to detain Mr. Massey until the 4:00 p.m. arraignment as he could [*and should*] be released pursuant to section 1320.13 on his own recognizance . . . . [¶] Had Mr. Massey remained on calendar for the 4:00 p.m. arraignment, bail would have been set at $5,000.00 only if the court found Mr. Massey to be a flight risk or a threat to public safety based upon information provided by the district attorney.

At the hearing, Judge Mallery testified that on the day in question, or close to it, "COVID came out. And all the directives and precautions were being sent to us from our governor, from our chief justice, and dealing with interactions at the courthouse and not wanting to see an outbreak of COVID occur at a courthouse."

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[4] Penal Code section 1269b addresses judges setting bail "[i]f a defendant has appeared before a judge of the court on the charge contained in the complaint, indictment, or information," and provides that "[i]f that appearance has not been made, the bail shall be in the amount fixed in the warrant of arrest or, if no warrant of arrest has been issued, the amount of bail shall be pursuant to the uniform countywide schedule of bail for the county . . . ."

He testified that he did not know what Massey had been arrested for, but he had been booked on a charge of tampering with a cell phone, and he needed to know whether the charge stemmed from domestic violence. When Tweddell-Wirthlin contacted the DA's office to find out, he did not receive back any information that related to domestic violence. Judge Mallery therefore contacted the jail, pursuant to a local rule instituted by a former judge, stating that "any person that's a misdemeanor and bail is $5,000 or less, then they are to be cited and released." Under the court's local bail schedule, for most misdemeanors, with certain exceptions like domestic violence, bail was set at $5,000 or less. Judge Mallery testified he did not reduce Massey's bail since under the bail schedule if bail was set it would be set at $5,000.

The masters found that the testimony of the witnesses clearly and convincingly showed that Judge Mallery exceeded his judicial authority by directing the jail to cite Massey out without first holding a hearing allowing the DA to address the issue of bail and engaged in ex parte communications with the DA, through court staff, in an attempt to pressure the DA into changing her charging decision. The masters found Judge Mallery's testimony and Verified Answer not credible.

Neither party objected to the masters' factual findings, and we adopt them.

2. Conclusions of Law

With regard to count thirteen B, the masters found that, by directing the DA to add a second charge of trespassing to the complaint against Seamons and purporting to arraign Seamons on two counts of trespassing when the complaint only alleged one, Judge Mallery "attempted to intrude into the charging authority of the administrative branch of government" and "deprived the defendant of an impartial magistrate by advocating a harsher charge." (*Ryan v. Commission on Judicial Performance* (1988) 45 Cal.3d 518, 535.) The masters found that Judge Mallery violated canons 1, 2, 2A, 3, 3B(2), 3B(5), and 3B(8), and committed

willful misconduct because he knew or should have known that his conduct was beyond his lawful authority and was outside the scope of the judicial function.

With regard to count thirteen C, the masters concluded that Judge Mallery violated canons 1, 2, 2A, 3, 3B(2), 3B(4), 3B(5), and 3B(7), and that his conduct constituted willful misconduct in that he acted for a corrupt purpose, to interfere with the DA's charging decision, and he knew or should have known his actions were beyond his legal authority.

Neither party objected to the masters' legal conclusions, and we adopt them.

N. Count Fourteen—Abuse of Authority in *People v. Andrew Skaggs*

Count fourteen charged Judge Mallery with abusing his authority by ordering the defendant and the victim in *People v. Skaggs* to open a family law case, asking the defendant whether his family was going to church, and suggesting that the defendant take his children to church.

The masters found that there was not clear and convincing evidence of the alleged misconduct. Neither party objected, and we dismiss count fourteen.

O. Count Fifteen—Speech that Would Reasonably be Perceived as Biased or Prejudiced Based on Race, National Origin, or Ethnicity

Count fifteen charged Judge Mallery with making remarks to three court employees, Kele Kaona, Teresa Stalter, and Lori Barron, that could reasonably be perceived as biased or prejudiced based on race, national origin, or ethnicity.

1. 15A – Remarks to Kele Kaona

a. Findings of Fact

Kaona testified that she had known Judge Mallery before he was elected because they had children the same age and attended some of the same school events. In addition, when Judge Mallery was an attorney, he represented Kaona in a bankruptcy proceeding during her previous marriage. Kaona testified that she told the judge she was of Hawaiian descent when he represented her.

Kaona was an LSC clerk from 2009 until 2014. On one occasion, in the back hallway of the courthouse, the judge called her "Queen Latifah." Court clerk, Megan Reed, testified that Kaona told her she could not believe it, but Judge Mallery "had just called her the Queen Latifah of the courthouse." Kaona thought the "Queen Latifah" comment was inappropriate, unprofessional, and insulting and reflected a lack of understanding that Kaona was of a "completely difference race."

In 2013, Kaona was clerking for Judge Mallery when a defendant disrupted the proceedings. The judge referred to Kaona, who was about four feet away from him, as "Queen Latifah." Kaona explained to the judge that she was Hawaiian, not black. The judge then told the defendant that, if he did not settle down, he would send the "Hawaiian warrior" or "Hawaiian princess" down there to deal with or handle the defendant. When Kaona was clerking for Judge Mallery, the judge referred to her as "the Hawaiian princess" on more than one occasion.

When Kaona was the clerk for the restraining order calendar, it was very common that many petitioners did not properly serve the respondents. On one occasion, when the restraining order calendar was reduced from 10 cases to two due to the failure to serve, Judge Mallery commented to Kaona that she had worked her "tribal magic" or "Hawaiian mojo." Kaona believed the comment about working her "tribal magic" was inappropriate.

Judge Mallery initially denied almost all the allegations and claimed in his response to the preliminary investigation that he had "no recollection of referring to Kaona as Queen Latifah or any other similar term, and it would not be in line with his character to make such a remark." Judge Mallery also claimed that, when Kaona clerked for him in court, he would routinely thank her for her contributing efforts, and her responses were remarks akin to those alleged (e.g., that she was the Hawaiian princess, that she was the Hawaiian warrior, or that she had worked her tribal magic). In his Verified Answer, Judge Mallery admitted

making the alleged statements but repeated his claim that it was Kaona who made remarks akin to those alleged.

Judge Mallery testified that, when people failed to appear on the restraining order calendar, Kaona told the judge, "I got your back, Judge. I'm protecting you. I'm working my magic." Judge Mallery further testified that he did not recall referring to Kaona as a "Hawaiian princess" but that he did refer to her daughter that way. He admitted only that he told Kaona, "You're like Queen Latifah."

Kaona denied that she injected her Hawaiian heritage into conversations, and the masters concluded that Judge Mallery's claims that Kaona made such statements about herself were not credible.

Neither party objected to the masters' factual findings, and we adopt them.

b. Conclusions of Law

The masters concluded that Judge Mallery's comments to and about Kaona violated canons 1, 2, 2A, and 3B(4), and constituted prejudicial misconduct because they would appear to an objective observer to be prejudicial to public esteem for the judicial office. The masters found that the comments inappropriately drew attention to Kaona's ethnicity, were undignified, and would reasonably be perceived as bias or prejudice based upon race, national origin, and ethnicity.

Neither party objected to the masters' legal conclusions, and we adopt them.

2. 15B – Remarks to Stalter

Count fifteen B charged Judge Mallery with, during a conversation regarding immigration, asking Stalter whether her family had come to the United States legally.

The masters found that there was not clear and convincing evidence of misconduct. Neither party objected, and we dismiss count fifteen B.

3. 15C – Comments to Lori Barron that "I Don't Want the Chinese to Know that They Got Another American"

a. Findings of Fact

In February 2022, Barron brought files to Judge Mallery in his chambers for him to review. Judge Mallery had just missed work for two weeks due to a " 'respiratory type issue,' " and Barron had also been sick. Barron asked the judge why he had been gone, whether he was sick, whether he had had COVID, and whether he had taken a COVID test. Judge Mallery replied that he did not know if he had had COVID, that he did not take a test, and that it " 'might've been the Chinese virus.' " When Barron asked, " '[Y]ou didn't test at all [?]' " the judge replied, " 'No,' " and said he " 'didn't want the Chinese to know that they got another American.' " Judge Mallery testified that he referred to COVID as the "Chinese Virus" and that he regretted saying that.

Neither party objected to the masters' factual findings, and we adopt them.

b. Conclusions of Law

The masters concluded that the comments to Barron were made in the context of conversations between a member of court staff and the judge while both were in his chambers. The masters concluded that, while such comments were potentially offensive and unwise in a workplace setting, there was not clear and convincing evidence that they were based on racial bias as opposed to social or political views.

Judge Mallery did not object to the masters' legal conclusion. The examiners objected to the masters' conclusion that the comments do not constitute misconduct. The examiners argued that the question is not whether Judge Mallery's comments were based on, or motivated by, bias or prejudice, but whether his comments "would reasonably be perceived as" bias or prejudice based upon race, national origin, and ethnicity (canon 3C(1)(a)). The examiners pointed to the fact that Judge Mallery admitted in his Verified Answer that referring to COVID as "the Chinese virus" may show an appearance of bias, and

argued that stating that he "didn't want the Chinese to know that they got another American[]" gave the appearance that the judge believed that "the Chinese" wanted Americans to get sick, and would reasonably be perceived as bias and prejudice against people of Chinese heritage.

We agree that the question is whether Judge Mallery's comments "would reasonably be perceived as" bias or prejudice based upon race, national origin, and ethnicity, not on his subjective intent, or whether the comments were actually based on racial bias as opposed to social or political views. We conclude, however, that while this was an inappropriate remark to make in the workplace, there is not clear and convincing evidence that the comment would reasonably be perceived as bias or prejudice based upon race, national origin, and ethnicity, rather than a political viewpoint, or a negative comment about another country's policies, or the Chinese government, rather than "people of Chinese heritage" as the examiners argued. Accordingly, we dismiss count fifteen C.

P. Count Sixteen—Conduct that Would Reasonably Be Perceived as Bias, Prejudice, or Harassment Based Upon Sex or Gender

1. 16A – Ryann Brown

a. Findings of Fact

Brown graduated from Lassen High School in 2019. Her senior yearbook designated her as the "Life of the Party." According to Brown, she received that designation because, as Associated Student Body president during her senior year, she had been responsible for planning many events. The designation had nothing to do with alcohol or drinking.

In 2020, when she was 19 years old, Brown began working as a court security officer in Lassen County. About two months later, on one of the first occasions that she served as a bailiff in Judge Mallery's courtroom, while they were alone together, the judge told her, "I heard you're the life of the party." Brown asked, "Did you see an old yearbook?" and Judge Mallery replied that he had not seen a yearbook, but just knew "a lot about" her. The incident made

Brown uncomfortable, but she tried to give Judge Mallery the benefit of the doubt. On two or three subsequent occasions, as they walked past each other, Judge Mallery said to Brown, “Hi, life of the party.”

On approximately five or six evenings, when Brown was a court security officer, she worked overtime by assisting with “teen court,” where students came to learn about the “daily life” of the court. Brown wore a Lassen County Sheriff’s uniform during each teen court session. On one occasion, in approximately October 2021, when the students and court staff were playing “Jeopardy” as an icebreaker game, Judge Mallery said, “[L]ife of the party should be good at this game.” The comment made Brown very uncomfortable. In approximately November 2021, when Brown introduced herself on teen court night, Judge Mallery said, “Everyone should know Ryann. You probably all partied with her [in high school].” The comment caused her even more discomfort than the judge’s previous comments because she did not know any of the students present, and it demeaned her job as a court security officer.

In his Verified Answer, Judge Mallery admitted stating that Brown was “the life of the party” but contended that his comments were appropriate. At the hearing, Judge Mallery initially testified he did “not recall ever saying that she was the life of the party” but then admitted that he “did acknowledge her based upon her designation as life of the party” and that he referred to Brown as “the life of the party” during teen court. He testified that he was not trying to embarrass Brown but was trying to “elevate her,” “make her feel good about being an employee of the court,” and using her as an example.

In December 2021, Brown began working as a courtroom clerk. During the first two weeks of her new job, Brown took files to Judge Mallery in his chambers. When she entered his chambers, the judge rolled his chair toward the doorway, slightly blocking it, giving Brown the impression that he wanted her to sit there and have a conversation with him.

After Brown handed Judge Mallery the files, the judge asked her how she liked her job. She responded, “Good. It’s definitely different.” The judge replied, “I bet you don’t have a bunch of boys here chasing you around, and you can’t drink here like you did in high school.” The comments made Brown very uncomfortable, and it embarrassed her that he was thinking about her in that way.

In his response to the preliminary investigation, Judge Mallery replied that the allegations were “flat out false” and described the procedure for court staff bringing files to him, which required them to place the files outside his office. The judge gave the same denial in his Verified Answer.

At the hearing, former court employee Jones testified that, if the judge was in chambers, the files Brown was bringing were brought to the judge personally, rather than left outside his office.

The masters found that, at the hearing, Judge Mallery “finally admitted” that Brown had indeed come to his chambers to bring him files and professed to having very specific memories of the incident. Judge Mallery testified that, when Brown entered his chambers, it “startled” him because he “had a standing rule” or “it was well known that you don’t come into [his] chambers to deliver files.” Judge Mallery testified that Brown asked him, “ ‘Where do you want it?’ ” and he responded, “ ‘Put it on the corner of my desk.’ ” The judge testified that he did not roll his chair toward the door but wheeled it around to see what was in the files. The masters found Judge Mallery’s testimony at the hearing about this event, which was inconsistent with his prior statements, not credible.

On December 21, 2021, which was Brown’s 21st birthday, there was a Christmas luncheon for court staff. Brown got a plate of food and sat down at a table. After she sat down, Judge Mallery sat down with a plate of food two chairs away from her. The judge then pulled out the chair that was between them and moved his chair closer to Brown. This made her uncomfortable, given their prior interactions. Judge Mallery asked Brown where she was going for dinner, who

she would be going with, and what she would be drinking. She told the judge where she would be going with her family and then, because she felt uncomfortable, stood up and moved to sit with the bailiffs with whom she used to work.

At the hearing, Judge Mallery partially corroborated Brown's testimony. He testified that he sat down in a chair next to Brown, asked her what she would be doing for her 21st birthday, who she would be drinking with that night or something similar, and who was going to celebrate her birthday with her.

Neither party objected to the masters' factual findings, and we adopt them.

b. Conclusions of Law

The masters concluded that Judge Mallery engaged in a pattern of unprofessional conduct toward Brown when she was a young female court security officer and a courtroom clerk and demeaned her by suggesting that she had been an underage drinker and liked to "party." The masters concluded that calling Brown the "life of the party," while not necessarily an insult, in a work setting was discourteous and undignified, and that telling teenagers that they probably partied with Brown in high school demeaned her. In addition, the masters concluded that, by privately telling Brown that he knew "a lot about" her; stating to her in his chambers, "I bet you don't have a bunch of boys here chasing you around"; and implying that she had experienced that in high school, was undignified and would reasonably be perceived as bias, prejudice, or harassment based upon sex and gender. The masters found that the misconduct was aggravated by the fact that Brown was an entry-level employee, while Judge Mallery, the presiding judge at the time, was in a position of power. The masters concluded that Judge Mallery violated canons 1, 2, 2A, 3B(4), 3B(5), and 3C(1), and committed prejudicial misconduct.

Neither party objected to the masters' legal conclusions, and we adopt them.

2. 16B – District Attorney S. Melyssah Rios

a. Findings of Fact

On multiple occasions, Judge Mallery made disparaging remarks to court personnel about Rios. Judge Mallery regularly made negative comments to Jones about Rios, including that she "acted on emotions" and "behaved like a schoolgirl." The judge told Jones multiple times that Rios was emotional, that he thought she needed medication, that she "could do a good job if she got her emotions in check," and asked Jones whether she thought Rios had mental health issues. The judge made some of these comments in reference to Rios's filing peremptory challenges against him.

Judge Mallery told courtroom clerk Megan Reed that Rios was too "emotional" to be a district attorney and was just "170.6'ing" him because he was holding her or her department "accountable." On one occasion, Judge Mallery walked into Judge Nareau's chambers and told him, " 'I figured out why Rios is challenging me. She has daddy issues. She wants some Mark and not some Tony.' "

Judge Mallery, in his response to the preliminary investigation, stated he had no particular recollection of these specific remarks. At the hearing, Judge Mallery testified that he may have said something like Rios was too emotional to be the district attorney. He testified that, in his experience, Rios frequently showed emotion and frustration in court, and that, a few times when she was displeased, Rios wrote letters to Judges Mallery and Nareau claiming that their decisions were improper.

Neither party objected to the masters' factual findings, and we adopt them.

b. Conclusions of Law

The masters concluded that Judge Mallery's comments were undignified and discourteous and would reasonably be perceived as bias or prejudice, including bias or prejudice based on sex and gender. The masters noted that commenting that Rios acts like a " 'schoolgirl' " and has " 'daddy issues' " reflects

gender bias, as does referring to her as " 'emotional' " — a term that, applied to women, connotes weakness and immaturity. The masters concluded that Judge Mallery's conduct violated canons 1, 2, 2A, 3B(4), 3B(5), and 3C(1), and constituted prejudicial misconduct.

Neither party objected to the masters' legal conclusions, and we adopt them.

3. 16C – CEO Stalter

a. Findings of Fact

On October 4, 2021, Stalter's first day as CEO, Judge Mallery told her that she was not like a girl, and that she was "cool." The comment made Stalter uncomfortable.

In his Verified Answer, Judge Mallery admitted making these statements, but denied that any of his comments were inappropriate. When asked what he meant by those statements, the judge testified that Stalter had befriended him, was interested in what was going on, asked questions, and was truly concerned about what he was going through. The judge testified that, at the time, he "was getting pretty rattled, and there was a lot of things that [he] might've said that might have been offensive, but not intentionally though."

Judge Mallery also told Stalter that Judge Nareau "likes to hire pretty girls," judging by the age of his wife and "the clerks that he favors," and that, when he and Judge Nareau were interviewing candidates for CEO, Judge Nareau "favored the prettier gal with less experience" and Judge Mallery "favored the gal that was more like Kim [Gallagher]." Judge Mallery's comments made Stalter uncomfortable because they referenced the physical appearance of female applicants and made Stalter feel like one's looks were "what mattered in order to get the job."

In his Verified Answer, Judge Mallery admitted making the statements but denied that his comments were inappropriate.

Neither party objected to the masters' factual findings, and we adopt them.

b. Conclusions of Law

The masters concluded that Judge Mallery's comments to Stalter that she was "not like a girl" and "cool" were inappropriate but did not rise to the level of misconduct. The masters concluded that Judge Mallery's comments to Stalter about Judge Nareau were undignified, demeaning, and effectively accused Judge Nareau of gender bias in hiring court staff, and undermined his fellow judge with a court official who served the entire court. The masters concluded that these comments violated canons 1, 2, 2A, 3C(1), and 3C(2), and constituted prejudicial misconduct.

Judge Mallery did not object to the masters' legal conclusions. The examiners objected to the masters' conclusion that the statements that Stalter was "not like a girl" and "cool" do not constitute misconduct. The examiners argued that the comments imply that women generally are not "cool," and would therefore reasonably be perceived as bias based on gender or sex. They also argued that the comments were part of a pattern of prejudicial misconduct in which Judge Mallery made comments that would reasonably be perceived as bias, prejudice, or harassment based upon gender or sex.

We agree that the comments, however intended, insinuated that women are not "cool" and reflected the appearance of bias based upon gender or sex and, accordingly, conclude that the comments violated canons 1, 2, 2A, 3B(4), and 3C(2), and constituted prejudicial misconduct. We adopt the remainder of the masters' legal conclusions.

Q. Count Seventeen—Poor Demeanor Toward Court Staff

Count seventeen charged Judge Mallery with five instances of poor demeanor toward court staff between 2020 and 2021.

1. Findings of Fact

a. 17A – Using Profanity When Talking to Crystal Jones

Jones testified that Judge Mallery directed her to send attorney King an email to set up a meeting with the judge. King replied with a request that a court

reporter be available for the meeting. When Jones told Judge Mallery, Judge Mallery told her that, if King " 'wanted to play these fucking games, we wouldn't appoint him on any more cases.' "

Judge Mallery testified that he said something to the effect that if King wanted to keep playing "funky" games, he would no longer receive appointments. Judge Mallery testified that he conferred with Vose on the alleged use of the word "fucking," and based on his recollection and that conversation, Judge Mallery believes he said "funky," as opposed to "fucking."

The masters found that Judge Mallery used the word "fucking" and not "funky" and that his testimony to the contrary was not credible.

b. 17B – Scolding Jury Commissioner Lori Barron

Former jury commissioner Barron testified that Judge Mallery told her to send out 350 summonses for jury service. She testified she did not send out that many because Judge Nareau had told her to send out 200. She usually spoke to Judge Nareau about such matters because he was the one who presided over jury trials. When he found out, Judge Mallery got angry, raised his voice, and told her to do what he told her to do, not what anyone else told her to do.

Judge Mallery testified he was frustrated when Barron summoned 200 jurors instead of the 350 he had instructed her to send. The jury trial was set to take place in the middle of the COVID pandemic, and Judge Mallery had learned that in other jurisdictions only 20 percent of the summoned jurors were showing up. Recognizing that the court needed 70 jurors to appear for a proper jury selection, Judge Mallery set the number of summonses at 350.

c. 17C – Yelling at Acting CEO Kim Gallagher

In July 2021, Lassen County had been experiencing power outages related to the Dixie Fire, the courthouse sporadically lost power, and the road into Susanville, where LSC is located, had been closed. The court was contemplating shutting down the courthouse. Gallagher cancelled visiting Commissioner William Shepherd's visit to LSC from Sacramento because the

court would be closing, and she was concerned about Shepherd's safety. When she told Judge Mallery she had done so, he lost his temper with her. Stalter testified that, when she saw Gallagher later that day, she appeared to be upset, pale, and "visibly shaken." Later, Judge Mallery apologized to Gallagher but told her it wasn't her place to make that decision.

Judge Mallery testified he did not recall losing his temper but admitted he was dismayed when Gallagher cancelled the visiting commissioner without letting him know in advance. He testified it was a particularly stressful time for Judge Mallery, with wildfires being so close and his home in the path of the fire.

d. 17D – Yelling at CEO Stalter (September 9, 2021)

Judge Mallery reacted unhappily when Stalter sent a final job description for a Clerk IV position to the union without sending it to him first for his review. He was upset because the description was different from the one he had previously discussed with then-CEO Vose. Judge Mallery appeared angry, lost his temper, and raised his voice.

e. 17E – Yelling at CEO Stalter (November 30, 2021)

Judge Mallery asked Stalter whether his paycheck had been delivered to the court, and when she told him payment was not due, he responded by saying he knew the court culture, and his paycheck often arrived before the end of the month. As with the rest of the workforce, Judge Mallery was paid after having completed the work, not before. Stalter testified that the judge told her he always received his paychecks early. Stalter also testified that, later the same day that Judge Mallery had requested his paycheck, she went to his office to tell him the paychecks had been delivered. She testified that he became angry and spoke to her with a raised voice.

Neither party objected to the masters' factual findings, and we adopt them.

2. Conclusions of Law

The masters concluded that "a judge's occasional expressions of frustration with or in front of court staff do not violate the canons or constitute

misconduct." The masters also noted that the only instance of profanity alleged in count seventeen was not directed against the staff member to whom Judge Mallery used the expression.

Judge Mallery did not object to the masters' legal conclusions. The examiners argued that Judge Mallery's conduct on these five occasions was part of a pattern of disparaging court staff and Judge Nareau and losing his temper during the same time period. The examiners argued that Judge Mallery's poor demeanor constitutes prejudicial misconduct because it would appear to an objective observer that the conduct in question is prejudicial to public esteem for the judicial office.

Poor demeanor is the most frequently disciplined type of judicial misconduct. Judges are required to act in a patient, dignified, and courteous manner with all persons with whom the judge deals, including court personnel. (Rothman, et al., Cal. Judicial Handbook (4th ed. 2017) at §§ 6:27-6:29, pp. 367-376.) In *Van Voorhis*, we found that individual acts of poor demeanor toward attorneys, a bailiff, and a jury foreperson constituted separate instances of prejudicial misconduct. (*Van Voorhis*, *supra*, 48 Cal.4th CJP Supp. at pp. 268, 277, 292, 294.) More recently, in *Johnson*, we determined that poor demeanor toward four court employees, including yelling and otherwise displaying anger, constituted prejudicial misconduct. (*Inquiry Concerning Johnson* (2020) 9 Cal.5th CJP Supp. 1, pp. 44-46.)

While some of the instances here of poor demeanor, standing alone, might not rise to the level of prejudicial misconduct, they were not isolated incidents but reflected a pattern of displaying inappropriate anger towards court employees. We conclude that all five instances violated canons 1, 2, 2A, and 3B(4), and constituted prejudicial misconduct.

R. Count Eighteen—Disparaging Remarks About Judge Nareau and CEO Stalter

Count eighteen charged Judge Mallery with making disparaging remarks about his colleague, Judge Nareau, and the court's CEO, Stalter, on seven different occasions.

1. Findings of Fact

a. 18A-C – Telling Stalter that He Did Not Trust Judge Nareau

On multiple occasions, including in the summer of 2021, Judge Mallery told Stalter he did not trust Judge Nareau. Judge Mallery admitted this. Judge Mallery also told Stalter that Judge Nareau and Jones were conspiring against him and that he thought Judge Nareau might be assisting the commission with its investigation and would "screw" him. Judge Mallery also admitted making these statements.

Judge Mallery told Stalter that, if his colleague (Judge Nareau) "wasn't such an ass," Gallagher would be the court's CEO. Judge Mallery admitted that he said this. Judge Mallery testified that Gallagher had occupied the CEO position and had done a good job after Vose left in 2021, and Judge Mallery sincerely believed that Judge Nareau was "showing his bias" when he removed Gallagher from that position.

b. 18D – Telling Stalter that Judge Nareau Was Trying to Figure Out Whether the Court Could Afford to Fire Her, and that She Should "Watch [Her] Back"

Stalter testified that Judge Mallery told her it was brought to his attention that Judge Nareau was interested in the budget because he was looking for money to get rid of her. Judge Mallery said that Judge Nareau was trying to figure out whether the court could afford to fire her and pay her severance pay. Judge Mallery advised Stalter to "watch your back[.]" The judge's comments upset Stalter.

Judge Mallery testified that following a budget conversation with Judge Nareau and Stalter he informed Stalter that Judge Nareau might be asking about

the budget to determine if the court had sufficient moneys to terminate Stalter's employment as her package included a six-month severance package.

c. 18E – Telling Heather Murphy-Granfield He Had to Get Far Away from Judge Nareau and Stalter

In or about December 2021, Judge Mallery told clerk Murphy-Granfield in a hallway that he moved his chambers to the far end of the hall to get as far away as possible from "those people," indicating Stalter and Judge Nareau. At the time, Murphy-Granfield knew that there was tension between the two judges but was unaware that Stalter and Judge Mallery had a conflict. Judge Mallery admitted that he made the comment, but denied it was inappropriate.

d. 18F – False Statements to Judge Nareau Regarding Disparaging Remarks Judge Mallery Had Made About Judge Nareau

On January 13, 2022, Judge Nareau met with Judge Mallery and Stalter in Judge Nareau's chambers. During the meeting, Judge Nareau told Judge Mallery, "I understand that you have been making disparaging comments about me and my wife." Judge Mallery responded, "I want names." Judge Mallery then stated, "[N]ot in the courthouse." Judge Mallery added, "People talk. Don't say you haven't heard that before," or something along those lines.

In his Verified Answer, Judge Mallery stated he "believe[d] that Judge Nareau's motives were not proper [,]" and that "[i]t was not the first time Judge Nareau's motives based on physical preference were publicly questioned."

After the meeting in Judge Nareau's chambers ended at 5:00 p.m., Judge Nareau went home. At about 5:30 p.m., he received a telephone call from Judge Mallery in which Judge Mallery told Judge Nareau, "I'm sorry, but I have been saying those things." Judge Mallery was referring to things that he had said "in the community." Judge Mallery told Judge Nareau that he had made the comments about Judge Nareau and his wife because he was upset at the end of December after hearing about the impending hire of a new commissioner. Judge Mallery's statements to Judge Nareau on January 13, 2022, implied he did not make disparaging remarks about Judge Nareau's "motives based on physical

preference" in the courthouse or before December 2021. Later, Judge Nareau learned that Judge Mallery had made the disparaging statements about Judge Nareau and his wife on October 4, 2021, well before December 2021, when Judge Mallery learned of the new commissioner's hiring.

e. 18G – Telling Judge Nareau He Did Not Trust Stalter and Complaining About Judge Nareau's Cooperation with the Commission

On January 14, 2022, Judge Mallery entered Judge Nareau's chambers and told him that he did not trust Stalter and was not going to attend any more meetings with her. Judge Mallery also told Judge Nareau that, if their interaction the previous day (described above) made its way into a letter to the commission, he would be "pissed." Judge Mallery added that he was having to respond to the commission's allegations, and that "at least 10 of those are from you." When Judge Mallery spoke, he was "angry" and "accusatory," and Judge Nareau took Judge Mallery's statements as a "threat."

Neither party objected to the masters' factual findings, and we adopt them.

2. Conclusions of Law

With regard to count eighteen A, B, C, E, and F, the masters concluded that, except for Judge Mallery's statements to Stalter implying Judge Nareau was contemplating terminating her employment and the statements to Judge Nareau concerning the commission, Judge Mallery's statements were not grounds for discipline. They concluded that these statements constituted improper actions by Judge Mallery, at worst, and did not rise to the level of prejudicial misconduct. The masters noted that, while the statements, which were made in the context of court administration, were unprofessional and distasteful, they did not bring the judicial system into disrepute or prejudice public esteem for the judicial office

With regard to the statements alleged in count eighteen D, regarding Judge Nareau looking for money to get rid of Stalter, the masters concluded that those statements violated canons 1, 2, 2A, 3C(1), and 3C(2). By suggesting that

Judge Nareau was planning to fire Stalter, the masters concluded that Judge Mallery potentially undermined the relationship between the court's CEO and its presiding judge, who at that time was Judge Nareau, and thus violated Judge Mallery's duty to carry out his administrative duties in a manner that promotes confidence in the judiciary and free from conflict of interest. With regard to the level of misconduct, the masters noted that the evidence supported an inference that Judge Mallery acted for the corrupt purpose of undermining Stalter's relationship with Judge Nareau, but that the evidence was not clear and convincing. The masters concluded that Judge Mallery's statements to Stalter constituted prejudicial misconduct, and not willful misconduct.

With regard to count eighteen G, telling Judge Nareau that about 10 of the allegations he was facing were made by Judge Nareau and that he was going to be "pissed" if he received a letter from the commission, the masters found that Judge Mallery intended to discourage Judge Nareau from both cooperating with the commission and complying with his obligation to "take appropriate corrective action, which may include reporting the violation to the appropriate authority []" when Judge Nareau had "reliable information" that Judge Mallery had violated a canon (canon 3D(1) (whenever a judge has reliable information that another judge has violated any provision of the Code of Judicial Ethics, that judge shall take appropriate corrective action, which may include reporting the violation to the appropriate authority)). The masters concluded that these statements violated canons 1, 2, 2A, 3B(4), 3C(1), and 3C(2), and constituted willful misconduct because they were made with the corrupt purpose of discouraging Judge Nareau from cooperating with the commission's investigation.

Judge Mallery did not object to the masters' legal conclusions. The examiners objected to the legal conclusion that the statements in count eighteen A, B, C, E, and F do not constitute misconduct. They argued that the masters' conclusion that the statements did not bring the judicial system into disrepute or prejudice public esteem for the judicial office is the incorrect test because the test

for prejudicial misconduct is whether the conduct, "if known to an objective observer, would appear to be prejudicial to public esteem for the judicial office." (*Adams*, *supra*, 10 Cal.4th at p. 878, citing *Geiler v. Commission* (1973) 10 Cal.3d 270, 284.) The examiners argued that, if an objective observer knew that Judge Mallery told a court employee that his colleague was an "ass," was conspiring against him with another court employee, and would "screw" him, and that he did not trust that judge; told another court employee that he moved his chambers to the far end of the hall to get as far away as possible from the CEO and the incoming presiding judge; and told the new presiding judge that he did not trust the CEO and was not going to attend any more meetings with her, the comments would appear to be prejudicial to public esteem for the judicial office.

While some of the comments standing alone, for example, telling Murphy-Granfield that he moved his chambers to get as far away as possible from "those people," might not rise to the level of misconduct, we agree with the examiners that, taken together, if Judge Mallery's comments were known, they would be viewed as tending to undermine relationships between court staff and Judge Nareau. In particular, Judge Mallery's comments to Stalter implying that Judge Nareau engaged in gender bias in firing former CEO Gallagher could cause Stalter to doubt or mistrust Judge Nareau, and his comments to Stalter that the presiding judge was looking for ways to fire her would be viewed as tending to create a divide between senior members of the court. We therefore conclude that Judge Mallery's comments charged in count eighteen A, B, C, E, and F violated canons 1, 2, 2A, 3B(4), 3C(1), and 3C(2), and constituted prejudicial misconduct because, if known to an objective observer, they would appear to be prejudicial to public esteem for the judicial office. We adopt the remainder of the masters' legal conclusions.

S. <u>Count Nineteen—Abuse of Authority Toward DDA Ingram-Obie</u>

Count nineteen charged Judge Mallery with abusing his authority by instructing his bailiff to have DDA Ingram-Obie return to his courtroom, when no

further matters required her presence, and then directing her to dismiss a traffic infraction of a pro per defendant.

The masters found that there was not clear and convincing evidence of the alleged misconduct. Neither party objected, and we dismiss count nineteen.

T. Count Twenty—Failure to Disqualify or Timely Disclose

Count twenty charged Judge Mallery with failing to disqualify or timely disclose his friendship or familiarity with individuals involved in three cases over which he presided.

The masters found that there was not clear and convincing evidence of the alleged misconduct. Neither party objected, and we dismiss count twenty.

U. Count Twenty-One—Misconduct Related to Lassen Family Services

Count twenty-one charged Judge Mallery with ethical violations related to his involvement with Lassen Family Services (LFS), a nonprofit organization assisting victims of domestic violence, which Judge Mallery and his wife supported. The judge's involvement included personally participating in and supporting three LFS events, failing to disclose his longtime affiliation with LFS, or disqualify himself in cases involving LFS, and failing to disclose his close personal relationships with three individuals in leadership positions with LFS.

1. 21A – Participation in Public Events Benefitting LFS

a. Findings of Fact

In 2017, Judge Mallery became presiding judge and assigned himself to preside over the domestic violence restraining order (DVRO) calendar. LFS is a nonprofit organization that assists victims of domestic violence, including by assisting with the preparation and filing of DVRO petitions, and accompanying petitioners to court for hearings.

LFS held a fundraiser called "Dancing for a Brand New Me." The event was a fundraiser in which members of the community were paired with local

professional dancers in a dance competition. Judge Mallery served as a judge at the 2016 event.

LFS Deputy Director Kirby Lively was on the committee in charge of the October 2017 "Dancing for a Brand New Me" fundraiser. She testified that the first night of the two-night event was a VIP night, where a table could be purchased for $500. Judge Mallery cooked, helped in the kitchen, and delivered food from the kitchen to the "runners," who served the tables at the VIP event.

The LFS "Walk a Mile in Their Shoes" event was an awareness-raising and outreach event. Judge Mallery's cooking team, the Legal Eagles, cooked and distributed free hot dogs to participants in the April 2019 "Walk a Mile in Their Shoes" event. Judge Mallery admitted participating in the event but denied donating anything other than his time spent cooking and cleaning.

A public Facebook post advertising the April 2019 LFS "Walk a Mile in Their Shoes" event identified the Legal Eagles as one of the vendors for the event and announced: "Free Food for Officially Signed Up Participants P[r]ovided by [¶] . . . [¶] Legal Eagles: Hot Dogs (while supplies last)." The Facebook post solicited donations to LFS. Gary Bridges, who was president of the LFS Board of Directors at the time of the event, testified that announcing that the Legal Eagles would provide food for an event would "bring more people" because "they were so good at fixing food" and "they had good food and lots of it." A photograph from the event, shared on the LFS public Facebook page, pictured Judge Mallery, Bridges, and Justin Cadili (who also served on the LFS Board of Directors) in red "Legal Eagles" aprons.

Judge Mallery has participated in community events under the name Legal Eagles for more than 20 years. Judge Mallery testified that the name "Legal Eagles came about when it was the Law Offices of Tony Mallery." When his law office opened, Judge Mallery had shirts made that said "Law Office of Tony Mallery" on the front and "Legal Eagles" on the back. After Judge Mallery became a judge, he and the others in the group began wearing aprons that said

"Legal Eagles." Judge Mallery attended several community events as part of the Legal Eagles, which cooked food at community events.

Neither party objected to the masters' factual findings, and we adopt them.

b. Conclusions of Law

The masters concluded that, by acting as a judge at the "Dancing for a Brand New Me" fundraiser in 2016, and cooking and cleaning at the "Dancing for a Brand New Me" event in 2017, Judge Mallery engaged in improper fundraising activity. By cooking food for the "Walk a Mile in Their Shoes" event in 2019 and allowing his name and likeness and the name of an informal group he had long been associated with (Legal Eagles) to be used to promote these events, he used the prestige of office to further the interests of others. The masters concluded that these activities violated canons 4 (a judge shall conduct the judge's quasi-judicial and extrajudicial activities so as to minimize the risk of conflict with judicial obligations), 4A(1) (a judge shall conduct all of the judge's extrajudicial activities so that they do not cast reasonable doubt on the judge's capacity to act impartially), 4A(3) (a judge shall conduct all of the judge's extrajudicial activities so that they do not interfere with the proper performance of judicial duties), 4A(4) (a judge shall conduct all of the judge's extrajudicial activities so that they do not lead to frequent disqualification of the judge), 4C(3)(d)(i) (a judge shall not personally participate in the solicitation of funds or other fundraising activities), and 4C(3)(d)(iv) (a judge shall not permit the use of the prestige of his or her judicial office for fundraising). The masters concluded that the activities also violated canons 1, 2, 2A, 2B(1) (a judge shall hear and decide all matters except those in which the judge is disqualified), and 2B(2), because, by providing services at the October 2017 "Dancing for a Brand New Me" fundraiser, and cooking food at the 2019 "Walk a Mile in Their Shoes" event alongside then-president of the LFS Board of Directors Bridges and previous LFS board member Cadili, when LFS representatives routinely appeared in his courtroom supporting petitioners in DVRO cases, Judge Mallery created, at a

minimum, the appearance that he was aligned with or partial toward litigants who alleged they were victims of domestic violence. The masters found that Judge Mallery committed prejudicial misconduct.

Neither party objected to the masters' legal conclusions, and we adopt them.

2. Failure to Disclose or Disqualify

a. 21B – LFS

i. Findings of Fact

During the time Judge Mallery was handling DVRO petitions, a significant number of petitioners appeared at hearings with a representative from LFS who sat at counsel table as an advocate or support person. At some of those hearings, Judge Mallery referenced LFS, addressed the LFS representative, or the LFS representative spoke or took action. When an LFS advocate appeared in court with a DVRO petitioner, Judge Mallery never disclosed his support for LFS or his participation in LFS events. In addition, Judge Mallery, who, as presiding judge, was responsible for calendar assignments, continued to assign himself the DVRO calendar after his participation in and support for the 2017 and 2019 LFS events.

Lucy Niemeyer worked as a courtroom clerk for the DVRO calendar during 2019 and 2020. She testified that, when LFS advocates appeared in the courtroom, they sat at counsel table close to the pro per DVRO petitioner. An LFS advocate accompanied and sat close to the DVRO petitioner in more than half of the cases in which she was the clerk, but Niemeyer never heard Judge Mallery make any disclosures on the record about his support for or participation in LFS events. Two other clerks, Murphy-Granfield and Kristie Jimenez, who served on and off as clerks for the DVRO calendar, testified similarly.

Judge Mallery admitted that, when an LFS advocate appeared in court with a DVRO petitioner, he did not disclose his participation in LFS events or his support for LFS. In his Verified Answer, Judge Mallery contended that an LFS

advocate accompanying a DVRO petitioner to court for a hearing is "no different than that of, say, an emotional support animal appearing alongside a litigant in court," stating:

> A judge who supports anti-domestic violence organizations in his private capacity is no more precluded from hearing a matter where a litigant appears in court with a support person than would be a judge who supports the American Society for the Prevention of Cruelty to Animals (ASPCA) in his/her private capacity be precluded from hearing a matter where a litigant appears with an emotional support golden retriever.

The masters rejected this comparison, stating that an LFS advocate's presence in the courtroom at a DVRO hearing signaled LFS's significant involvement in the preparation of the petition itself, and that Judge Mallery was fully aware that, when an LFS advocate was present in court for a DVRO hearing, LFS had assisted with the DVRO petition. The masters also pointed out that LFS advocates took on roles in court beyond providing emotional support for the DVRO petitioners, including effecting service on DVRO respondents on behalf of petitioners, and requesting continuances. The masters noted that "[a]n emotional support golden retriever accompanying a litigant to court obviously does not help prepare court submissions, serve petitions, inform the court whether respondents were served, receive directives to effect service, request continuances, host visitation, or provide orders to the court."

Neither party objected to the masters' factual findings, and we adopt them.

ii. Conclusions of Law

The masters concluded that Judge Mallery's conduct violated canons 1, 2, 2A, 3, 3B(2), 3C(1), 3C(2), 3E(1), and 3E(2)(a) (a judge shall disclose information that is reasonably relevant to the question of disqualification under Code of Civil Procedure section 170.1, even if the judge believes there is no actual basis for disqualification), and constituted prejudicial misconduct.

Neither party objected to the masters' legal conclusions, and we adopt them.

b. 21C – Gary Bridges

i. Findings of Fact

Bridges knew Judge Mallery prior to his becoming a judge in 2013, he helped the judge with his judicial campaign, and they developed a close personal friendship. Bridges had been to Judge Mallery's house on numerous occasions, and they shared many meals together. Bridges joined the LFS Board of Directors in approximately 2012 and became board president not long after that. Bridges left the LFS board in approximately June or July 2020, shortly after he was elected to the Board of Supervisors. Bridges cooked with Judge Mallery and his wife at various community cooking competitions and events, including one of LFS's "Walk a Mile in Their Shoes" events.

Despite his close personal friendship with Bridges, Judge Mallery assigned himself to handle the DVRO calendar in June 2017, during the time that Bridges was a board member. While Bridges was a board member, Judge Mallery never disqualified himself or disclosed his close personal friendship with Bridges in any DVRO proceeding in which LFS provided assistance to the petitioner, including accompanying the petitioner to court.

Neither party objected to the masters' factual findings, and we adopt them.

ii. Conclusions of Law

The masters concluded that, by presiding over DVRO matters in which LFS was involved, without disqualifying himself or disclosing his close personal friendship with Bridges, Judge Mallery violated canons 3E(1) and 3E(2)(a). Further, by continuing to assign himself to the DVRO calendar when Bridges was an LFS board member, Judge Mallery violated canons 1, 2, 2A, 3, 3B(2), 3C(1),and 3C(2), and committed prejudicial misconduct.

Neither party objected to the masters' legal conclusions, and we adopt them.

c. 21D – Justin Cadili

i. Findings of Fact

Cadili is the owner of Lumberjack's Restaurant in Susanville. He joined the LFS board in March 2017, and served intermittently until October 2020. Cadili met Judge Mallery shortly after moving to Susanville in 2013, and they developed a close personal friendship. He socialized with Judge Mallery and his wife, spent holidays with them, and visited their home for dinner. Cadili also cooked with the Mallerys at various cooking competitions, community events, and fundraisers, including to support LFS.

Judge Mallery assigned himself to handle the DVRO calendar in 2017 during the time that Cadili was a board member, despite their close personal friendship. While Cadili was a board member, Judge Mallery never disqualified himself or disclosed his close personal friendship with Cadili in any DVRO proceeding in which LFS provided assistance to the petitioner, including accompanying the petitioner to court.

Neither party objected to the masters' factual findings, and we adopt them.

ii. Conclusions of Law

The masters concluded that, by presiding over DVRO matters in which LFS was involved, without disqualifying himself or disclosing his close personal friendship with Cadili, Judge Mallery violated canons 3E(1) and 3E(2)(a). By continuing to assign himself to the DVRO calendar when Cadili was an LFS board member, the masters concluded that Judge Mallery also violated canons 3C(1) and 3C(2), and that the judge's conduct also violated canons 1, 2, 2A, 3, and 3B(2), and constituted prejudicial misconduct.

Neither party objected to the masters' legal conclusions, and we adopt them.

d. 21E – Brooke Mansfield

i. Findings of Fact

Brooke Mansfield is currently employed by the Modoc County District Attorney's Office as the Victim Services Coordinator, and has worked in the legal field for 30 years doing clerical and paralegal work. Mansfield has known the Mallerys for about 25 years, and her primary friendship is with Judge Mallery's spouse, Tami Mallery. In approximately 2011 and 2012, Mansfield, who lived in Paradise and was going through a divorce, visited and stayed with the Mallerys approximately four or five times. During that same period, Mansfield provided occasional clerical support for Tami Mallery's law practice. Between approximately 2014 and 2019, Mansfield saw the Mallerys a couple of times per year, and she and Tami Mallery spoke on the telephone approximately every six weeks.

Mansfield was the executive director of LFS from approximately January to November 2019. During her time as LFS executive director, and with just a few exceptions, Mansfield resided at the Mallerys' home Mondays through Thursdays, and returned to her home in Alturas on the weekends. When Mansfield stayed with them, the Mallerys often prepared extra food for her at dinner and breakfast, and she occasionally joined them for dinner.

Judge Mallery continued to assign himself to the DVRO calendar while Mansfield was executive director of LFS. When Judge Mallery presided over DVRO calendars between January and November 2019 (when Mansfield was LFS executive director), including DVRO hearings at which an LFS advocate appeared with the petitioner, the judge did not disclose his relationship with Mansfield or the fact that she was staying at his home at the time.

While Mansfield was the executive director of LFS, and was staying with the Mallerys, she was present in court, before Judge Mallery, during at least two dependency cases. Specifically, on October 28, 2019, Mansfield appeared before Judge Mallery at two dependency proceedings in her capacity as LFS

executive director, and she was introduced by name (and title) on the record. Judge Mallery did not disqualify himself or disclose the personal relationship he and his wife had with Mansfield at either dependency proceeding.

Neither party objected to the masters' factual findings, and we adopt them.

ii. Conclusions of Law

The masters concluded that, by presiding over DVRO matters in which LFS was involved and dependency cases in which Mansfield appeared, without disqualifying himself or disclosing the personal relationship he and his wife had with Mansfield, Judge Mallery violated canons 3E(1) and 3E(2)(a). By continuing to assign himself to the DVRO calendar when Mansfield was the executive director of LFS, Judge Mallery violated canons 3C(1) and 3C(2). The judge's conduct also violated canons 1, 2, 2A, 3, and 3B(2), and constituted prejudicial misconduct.

Neither party objected to the masters' legal conclusions, and we adopt them.

IV. DISCIPLINE

The purpose of commission proceedings is not punishment, but the protection of the public, the enforcement of rigorous standards of judicial conduct, and the maintenance of public confidence in the integrity of the judicial system. (*Kloepfer v. Commission on Judicial Performance* (1989) 49 Cal.3d 826, 864-865; *Adams II, supra,* 10 Cal.4th at p. 912.)

The commission has identified several factors to consider in determining an appropriate sanction, including the judge's honesty and integrity, the number of acts and seriousness of the misconduct, whether the judge appreciates the impropriety of the conduct, the likelihood of future misconduct, the impact of the misconduct on the judicial system, and the existence of prior discipline. (*Inquiry Concerning Saucedo* (2015) 62 Cal.4th CJP Supp. 1, 50.) The commission may also consider the effect of the misconduct on other people and whether the judge has cooperated fully and honestly in the commission proceeding. (Policy

Declaration of Com. on Jud. Performance, policies 7.1(1)(f) and 7.1(2)(b).) The commission also considers any mitigating factors that a judge may advance. (*Van Voorhis*, *supra*, 48 Cal.4th CJP Supp. at p. 295.)

A. <u>Honesty and Integrity</u>

The commission has stated that foremost in its consideration of factors relevant to discipline is honesty and integrity. (*Saucedo, supra*, 62 Cal.4th CJP Supp. at p. 50.) Honesty is a minimum qualification expected of every judge, and even a good reputation for legal knowledge and administrative skills does not mitigate prejudicial misconduct. (*Kloepfer, supra,* 49 Cal.3d at p. 865.) "If the essential quality of veracity is lacking, other positive qualities of the person cannot redeem or compensate for the missing fundamental." (*Ross, supra,* 49 Cal.4th CJP Supp. at p. 90.) In *Saucedo,* the commission noted that the Supreme Court has said there are few actions that "provide greater justification for removal from office than the action of a judge in deliberately providing false information to the commission in the course of its investigation . . . ." (*Id*. at p. 50, citing *Adams II*, *supra*, 10 Cal.4th at p. 914). The commission added that it takes "particularly seriously a judge's willingness to lie under oath to the three special masters appointed by the Supreme Court to make factual findings critical to [its] decision." (*Saucedo, supra*, 62 Cal.4th CJP Supp. at p. 51.) "Lack of candor toward the commission is uniquely and exceptionally egregious." (*Ross, supra*, Cal.4th CJP Supp. at p. 90.)

The masters found that Judge Mallery was untruthful during these proceedings, including:

- In numerous respects, his testimony about count one, including his statements suggesting he had limited involvement in the email investigation, that he did not initiate it, that its purpose was to address a "security breach," that he told Vose that he did not want Vose to look into information that had gone to the commission and that he did not review any of the emails the investigation yielded, was untruthful.

- His testimony regarding count two, that in his first conversation with a person from the JCC, he told that individual that he was under investigation by the commission, that one of the emails went to the commission, and that he was not interested in that email, was not truthful. The masters noted that Judge Mallery's statements regarding count two in his Verified Answer were "knowingly false."
- Some of his testimony regarding count three, including his denials that his criticisms of court employees to Stalter were not based on their cooperation with the commission, his denial that he told Stalter in the context of Government Code section 68725 that "shall" does not mean "must," his testimony that his reference to "snitches get[ting] stitches" meant he was the subject of retaliation because he had sometimes reported employees for poor performance, and his denial that the proposed new clerk position was intended to strip Jones of her supervisory responsibilities, were false.
- Judge Mallery's response, Verified Answer, and testimony regarding count seven, specifically regarding what he said to Judge Nareau about DA Rios were inconsistent and not honest.
- Judge Mallery's Verified Answer and testimony regarding count eight was in some respects false and in other respects misleading, including his statement in his Verified Answer that he "suggested" the parties write down things that concerned them about the other spouse when in fact he ordered them to do so; his statement in his Verified Answer that Webster had violated a rule, when that rule was clearly inapplicable; and his testimony that he decided not to appoint Webster in future cases because she was unqualified to handle family law matters.

- His statement in his Verified Answer regarding count ten, that in *Owings v. Owings* he "promptly notified all parties of the substance of the ex parte communication and allowed an opportunity to respond" was false as was his testimony that he disclosed it and that the minutes reflect it. The masters also found he was "evasive" when asked on cross-examination whether he misrepresented the facts in his Verified Answer.
- His statements in his response and Verified Answer that the allegations in count sixteen regarding when Brown delivered files to his chambers were "flat out false," and that the statements alleged were "inflammatory and [the event Brown described] did not occur," only to later admit, when testifying, that Brown had been in his chambers and then offer a "contrived" account of the circumstances of that encounter.

While not included in their findings in aggravation, the masters noted other instances in which they found Judge Mallery to be not credible, including: that his responses to the allegations in count twelve E regarding no more plea bargaining in criminal cases were "incredible and unpersuasive"; that his testimony and Verified Answer to the allegations in count thirteen C regarding releasing a defendant without a bail hearing were not credible; that his assertions regarding count fifteen A that Kaona injected her Hawaiian heritage into conversations were not credible; and that his testimony regarding count seventeen that he used the word "funky" and not "fucking" was not credible.

In response to the masters' credibility findings, Judge Mallery argued that PTSD causes memory problems and that inconsistency in memory is not necessarily an indication of dishonesty. He asserted that even if the masters resolved an issue against his account of events, it does not mean that Judge Mallery was intentionally misrepresenting the truth.

We credit this argument with little weight: the masters did not just decide that certain witnesses' testimony was more credible than Judge Mallery's; they found that Judge Mallery made affirmative misrepresentations, including making a finding that certain statements were "knowingly false." Second, when the masters made their findings, they had heard the testimony about PTSD, and were well aware, as seasoned judicial officers, that inconsistency is not necessarily an indicator of dishonesty.

We find Judge Mallery's intentional misrepresentations and fabrication while testifying before the masters, and in his Verified Answer and responses to the commission, exceptionally egregious and demonstrates that he lacks the essential qualification of honesty required of a judge.

B. <u>Number of Acts and Seriousness of Misconduct</u>

The number of acts of misconduct is relevant to determining appropriate discipline to the extent that it shows whether the conduct consisted of isolated incidents or a pattern that demonstrates a lack of judicial temperament. (See (*Fletcher v. Commission on Judicial Performance* (1998) 19 Cal.4th 865, 918.)

Here, we have concluded that Judge Mallery committed 23 acts of willful misconduct and 36 acts of prejudicial misconduct. Cumulatively, Judge Mallery's conduct reflects a lack of appropriate judicial temperament and unjudicial conduct in a startlingly wide range of circumstances. Judge Mallery usurped the role of prosecutors, and attempted to eliminate plea bargaining in criminal cases; considered wholly improper factors in making judicial decisions, including how the public was going to perceive his decisions, or whether it would make an election less winnable; either did not understand his duties to disclose and/or disqualify, or simply choose to ignore them; involved himself in community events like "Dancing for a Brand New Me" without stopping to consider the ethical limitations for a judge when participating in fundraising activities; failed to maintain composure and appropriate distance when he was the subject of challenges by attorneys, and instead lashed out at attorneys and retaliated

against them; and failed to understand that, as a judge, and as a presiding judge, he was required to speak to court staff appropriately, whether that be by not criticizing and undermining his colleagues and staff at the court, or by refraining from inappropriate comments reflecting the appearance of racial or gender bias. This misconduct is compounded by what we consider to be the most serious of charges: retaliating and discouraging witnesses from cooperating with the commission and making false representations to the commission. As Rothman states:

> Judges are expected to respond forthrightly and completely to commission inquiries. Making a false or misleading statement in response to a commission inquiry would constitute a separate basis for discipline, and is conduct of such gravity that removal from office may result, even if the underlying misconduct would not have warranted such a result.

(Rothman, *supra*, § 12:28 at p. 810.)

We conclude that the number of acts and seriousness of the misconduct demonstrate that Judge Mallery lacks the temperament and judgment required for his position and supports our determination that removal is the appropriate sanction.

C. <u>Appreciation of the Misconduct</u>

" 'It is very difficult for a judge to avoid repeating an ethical violation unless he or she recognizes the act as misconduct.' " (*Johnson*, *supra*, 9 Cal.5th CJP Supp. at p. 78, quoting *Van Voorhis*, *supra*, 48 Cal.4th CJP Supp. at p. 308.) The masters concluded that Judge Mallery failed to take responsibility for his own conduct and blamed much of it on the treatment he claims to have received from former Judge Verderosa and the former CEO at the court. The masters concluded that, "in blaming all of his conduct on others and failing to recognize any of his own serious ethical lapses, Judge Mallery misses that at least some of his own conduct was beyond unacceptable," in particular his retaliation against those who challenged him and those who cooperated with the commission.

Judge Mallery stated in his Verified Answer that he did nothing that "violated the law, rules, or Judicial Canons . . . ." At the masters' hearing, Judge Mallery testified he was still "unaware" of any canons he had violated. Judge Mallery asserted in his briefs and at his appearance before the commission that he always acted in good faith, performed his duties to the best of his ability, but that he deferred to the findings of the masters. We find that Judge Mallery engaged in shifting factual claims with respect to some allegations and has demonstrated a reluctance to acknowledge that he committed many of the acts alleged. We conclude that there is little evidence that Judge Mallery appreciates his misconduct and has taken responsibility for it.

D. Likelihood of Future Misconduct

"A judge's failure to appreciate or admit to the impropriety of his or her acts indicates a lack of capacity to reform." (*Inquiry Concerning Platt* (2002) 48 Cal.4th CJP Supp. 227, 248.) "Implicit in the lack of reform is the risk of yet further violations in the future." (*Ross*, *supra*, 49 Cal.4th CJP Supp. at p. 143.)

The likelihood of future misconduct is somewhat less pertinent here, where Judge Mallery has not been actively sitting since March 2022 and has indicated to the commission that he has not applied for re-election and will "never take the bench again." He relatedly argues that "removal will make no difference to the administration of the law in Lassen Superior Court." As such, Judge Mallery argues that his removal will not serve the public interest because he will never take the bench again.

Judge Mallery's argument is essentially that there is no need to remove him in order to protect the public from further judicial misconduct, because he will soon no longer be serving in a judicial capacity. The protection of the public is one of the commission's foremost considerations. Public protection, however, is not the commission's only consideration. The commission is also tasked with enforcing rigorous standards of judicial conduct and maintaining public confidence in the integrity and independence of the judiciary. As Rothman notes,

"In determining the appropriate level of discipline, the impact of the misconduct on the integrity of and respect for the judiciary must be considered." (Rothman, *supra*, § 12:91 at p. 849, citing *Inquiry Concerning Hyde* (2003) 48 Cal.4th CJP Supp. 329, 370.) As such, even when a judge is no longer actively sitting, public trust and confidence in the judiciary and the maintenance of high standards of judicial conduct are served by the appropriate discipline of errant judicial officers. Here, we conclude that public confidence in the judiciary would be greatly diminished if the commission imposed discipline short of removal for a judge who has committed the type of serious misconduct found here.

E. <u>Impact on Judicial System and Others</u>

The impact of the misconduct on the judicial system and the nature and extent to which the misconduct has been injurious to others is also relevant in this matter. (Rothman, *supra*, § 12:91, p. 849; Policy Declarations of Com. on Jud. Performance, policy 7.1(1)(f).) The masters found that Judge Mallery's conduct harmed:

- An unrepresented litigant: ["Judge Mallery engaged in conduct to benefit his own self-interest at the expense of a party, petitioner Owings. This conduct impacts on the very integrity of the [c]ourt and its administration of justice."]
- Court staff by insulting them and making them uncomfortable: [Kaona felt insulted when Judge Mallery called her "Queen Latifah"]; [the judge's comments to Brown, some of which were public, demeaned her and made her very uncomfortable]); [CEO Stalter felt uncomfortable when the judge told her she was "not like a girl" and was "cool"]; [on her first day as CEO, Stalter felt uncomfortable when Judge Mallery referenced the physical appearance of female job applicants, and made Stalter feel like one's looks are what mattered in order to get the job].

- Court staff and attorneys by losing his temper and raising his voice at them: [Acting CEO Gallagher appeared upset, pale, and visibly shaken after the judge lost his temper with her]; [Judge Mallery became angry with and raised his voice at attorney Webster].

Beyond the masters' specific findings, the record reflects a number of other instances in which Judge Mallery's misconduct was not only unethical, but caused harm to others:

- Judge Mallery was angry and accusatory when he confronted Judge Nareau about having to respond to the commission's allegations, and said he would be " 'pissed.' " Judge Nareau perceived Judge Mallery's statements as a threat.
- Judge Mallery threatened CEO Stalter that he would " 'go postal' " if he were removed from office which made Stalter concerned about potential actions the judge might take against court staff who had cooperated with the commission. It caused her and Judge Nareau to meet with court security and the sheriff's department, who designed a security plan that included stationing an armed bailiff or security guard upstairs in the judicial suites.

Public respect for the judiciary cannot help but be damaged when a judge fails to abide by the laws and rules applicable to the judiciary. We consider the adverse effect of Judge Mallery's conduct on the public perception of the judiciary and the harm caused to others to be a substantial aggravating factor.

F. <u>Prior Discipline</u>

In January 2018, the commission privately admonished Judge Mallery for (1) letting an endorsement of his brother's campaign for nonjudicial office appear on a Facebook page associated with the judge; (2) disregarding Presiding Judge Verderosa's directives that he set status review hearings for an 8:00 a.m. calendar, as opposed to the 11:00 a.m. setting Judge Mallery preferred; (3) telling court clerk Barron, during a discussion about medical diagnoses, that

he had once been diagnosed with a "twisted testicle"; (4) initiating a private discussion with attorney Zamora (who was about to appear before him in three cases) that may have created the perception that cases were being discussed; and (5) signing a contract for accounting services, on behalf of the court, with his personal friend and former campaign treasurer.

We consider Judge Mallery's prior discipline to be an aggravating factor.

G. Mitigating Factors Advanced by Judge Mallery

Judge Mallery argued that a number of mitigating factors should weigh in favor of discipline short of removal.

1. Toxic Work Environment

In mitigation, the masters found that Judge Mallery assumed the bench in 2013 under a hostile presiding judge in a work environment that impeded his ability to succeed as a judge. This included then-Presiding Judge Verderosa handing Judge Mallery a copy of the California Judicial Conduct Handbook and telling him to read it because he was likely to be reported to the commission soon; humiliating him by first refusing to swear him in at his official swearing-in ceremony in front of his family, and, when she did finally appear, being late; allowing and fostering an environment in which some court staff treated Judge Mallery with disdain; making it difficult for Judge Mallery to attend training and educational programs; and holding an all-court staff meeting in which she publicly criticized Judge Mallery and then refused Judge Mallery's request to meet one-on-one.

The masters also found that Judge Mallery was subjected to ongoing monitoring by Judges Verderosa and Nareau, and court staff. They noted that Judge Mallery had been the subject of five preliminary investigations by the commission. The masters concluded that investigating Judge Mallery so early in his judicial career had repercussions and "invited further complaints from LSC staff and let Judge Mallery know he was a target and would be monitored during his tenure on the bench." They concluded that this and other evidence

demonstrated that, “from early on, court staff and Judge Verderosa were watching Judge Mallery and would report any perceived transgression, no matter how small, to [the] [c]ommission.”

The masters also noted, however, that almost all of Judge Mallery’s misconduct took place after former Judge Verderosa had left the court, during a time when Judge Mallery was the presiding judge and his allies (Vose and Gallagher) were in charge of the court staff. The masters further found that beginning almost immediately after he was elected and took the bench, and throughout his time on the bench, Judge Mallery refused to follow the calendar manifest, even when he was a presiding judge and created the calendar manifest himself, did not attend most meetings with court managers, and that other problems at the court, including possibly his poor treatment by court staff, were at least in part the result of Judge Mallery’s own failings.

The examiners argued that some of the masters’ findings regarding the toxic work environment at the courthouse were not supported by the evidence and/or that the only evidence in support of some of the findings was Judge Mallery’s testimony, which should not be relied upon. While we do not find it necessary to decide all of the evidentiary disputes on this issue, we conclude that there is clear and convincing evidence that former Judge Verderosa and Judge Mallery had a hostile relationship that trickled down and affected how some court staff viewed and treated Judge Mallery, particularly when Judge Mallery first took the bench, and former Judge Verderosa was the presiding judge and thus in a position to exert a certain amount of power and influence over court processes and staff.

We conclude however, as did the masters, that almost all of Judge Mallery’s misconduct took place after he had become the presiding judge, installed his allies, Gallagher and Vose, in positions of power at the court, and was not subject to a hostile presiding judge, but was in the position of ultimate power at the court. Further, we conclude, as did the masters, that much of Judge

Mallery's misconduct directed toward court staff originated with Judge Mallery's own conduct, including not following procedures, not attending court management meetings, and engaging in inappropriate and negative speech towards and about his colleagues and court staff. As such, while beginning work in a "toxic" environment involving hostile relationships with his judicial colleague and some court staff was likely difficult for Judge Mallery, we do not believe it substantially mitigates his subsequent misconduct.

2. Commission Investigations

The masters noted that "[t]he [c]ommission's repeated investigations of, and numerous accusations against, Judge Mallery significantly affected him and the work environment in the court." They noted his testimony regarding his "feeling of being monitored, spied on, being looked upon all the time. It felt like that every move that I made was one that if I stepped in the wrong direction ever so slightly, it was going -- I was going to have to be addressing that issue with somebody somewhere. Potentially being used against me in an effort to have me removed from the bench." While the masters acknowledged that the commission has a mandate to investigate judicial misconduct, they expressed concern regarding the multiple preliminary investigation letters sent by the commission, and the work conducted by commission staff to investigate the allegations of misconduct.

The commission has a constitutional mandate to investigate allegations and complaints of judicial misconduct. Many judges receive communications from the commission and must respond appropriately, without taking personal affront, or retaliating against those whom they believe reported them to the commission. As Rothman advises judges who receive a preliminary investigation letter:

> Sometimes the complaint is or may appear to be outrageously inaccurate or petty. A judge might initially feel anger and annoyance at the commission for taking such a complaint seriously and instituting an inquiry. Under such circumstances,

> the judge needs to remember that the commission has an important role in the system of judicial accountability, that this accountability is part of the job of being a judge, and that he or she is under a duty to cooperate with and respond to the commission's inquiry in a manner that confirms the judge's objectivity, competence, judiciousness, and fitness for office.

(Rothman, *supra*, § 12:23 at p. 806.)

The commission opened a number of investigations into Judge Mallery, because numerous complaints were received alleging that he was engaging in ongoing and extensive misconduct. Many of those allegations have now been proven to be true. As such, we respectfully disagree with the masters' conclusion that the commission's multiple investigations of Judge Mallery are mitigating.

3. PTSD

The masters found that Judge Mallery was diagnosed with PTSD. The masters summarized the testimony of Judge Mallery's medical providers, all of whom concluded that he suffers from PTSD as a result of work-related stress and bullying, and that his symptoms began in 2015.

The masters, however, also concluded that Judge Mallery failed to prove that any PTSD, anxiety, or depression he allegedly suffered contributed to his misconduct. The masters further found that Judge Mallery's failure to seek help for his health issues promptly was aggravating. The masters noted that Judge Mallery did not seek any treatment until after March 2022, when Judge Nareau notified him that the court had retained an outside workplace investigator to conduct an investigation into Judge Mallery's allegedly inappropriate conduct and comments. The masters noted that, when asked why he did not see a mental health provider back in 2015, Judge Mallery blamed everyone but himself. The masters also noted one medical provider's testimony that a "recurring theme throughout" visits with Judge Mallery was the judge's "insistence that he was

disabled" and that Judge Mallery needed him to write a report on whether he was disabled.

The masters also found in aggravation that Judge Mallery failed to disclose his relevant medical history to his testifying providers. The masters noted that Judge Mallery's medical records predating his time on the bench would have reflected that Judge Mallery had pre-existing conditions like hypertension, elevated stress, and sleep issues. His medical providers testified, however, without being apprised that the conditions were pre-existing, that they were consistent with symptoms of PTSD resulting from the court's work environment.

We first note that although the masters found that Judge Mallery was "diagnosed" with PTSD, they did not make a finding that he suffers from PTSD. Additionally, the masters' concern regarding Judge Mallery's failure to seek mental health treatment until after March 2022, when Judge Nareau notified him that the court had retained an outside workplace investigator, together with their note that one of the medical providers testified that Judge Mallery insisted he was disabled, is a concern we share about Judge Mallery's motives in seeking treatment and a diagnosis. Further, the masters' conclusion in aggravation that Judge Mallery failed to disclose he had pre-existing symptoms consistent with PTSD before he took the bench, also suggests they had concerns, which we share, regarding Judge Mallery's candidness and the validity of the PTSD diagnosis.

Most importantly, however, is our conclusion that Judge Mallery failed to prove any PTSD, anxiety, or depression he allegedly suffered contributed to his misconduct. As such, whether or not Judge Mallery does in fact suffer from PTSD, we conclude it does not substantially mitigate the appropriate level of discipline when there is no evidence that any of the misconduct he engaged in arose from a symptom of PTSD, or as a result of his suffering from PTSD.

Judge Mallery also makes a related argument that he should not be removed from office, but that the commission can determine to "retire" him from

office because he is disabled as a result of his PTSD. He cites the Supreme Court's decision in *Geiler* and the decision in *McComb* for the proposition that the commission is "vested with the ultimate power to recommend to this court the censure, removal or retirement of a judge." (See *Geiler v. Commission, supra,* 10 Cal.3d at p. 275; *McComb v. Commission on Judicial Performance* (1977) 19 Cal.3d Spec. Trib. Supp. 1.)

Judge Mallery's argument is incorrect. In 1994, the Constitution was amended to provide that the commission "may (1) retire a judge for disability that seriously interferes with the performance of the judge's duties and is or is likely to become permanent, or (2) censure a judge or former judge or remove a judge for action . . . that constitutes willful misconduct in office, persistent failure or inability to perform the judge's duties, habitual intemperance in the use of intoxicants or drugs, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute . . . ." (Cal. Const., art. VI, § 18, subd. (d).) Here, it was not alleged in the Notice that Judge Mallery has a "disability that seriously interferes with the performance of the judge's duties and is or is likely to become permanent . . . ." Rather, Judge Mallery was charged with willful misconduct, prejudicial misconduct, and improper action, and the commission may censure, remove him, or otherwise discipline him. Any disability retirement of Judge Mallery may only be accomplished through a disability retirement application proceeding, to which Judge Mallery is entitled, no matter what discipline we impose here.

V. CONCLUSION

In *Saucedo*, *supra,* 62 Cal.4th CJP Supp. at p. 53, the commission stated: "Certain misconduct is so completely at odds with the core qualities and role of a judge that no amount of mitigation can redeem the seriousness of the wrongdoing or obviate the need for removal in order to fulfill our mandate to protect the public, enforce high standards of judicial conduct, and maintain public confidence in the integrity of the judiciary." Judges are expected to be honest,

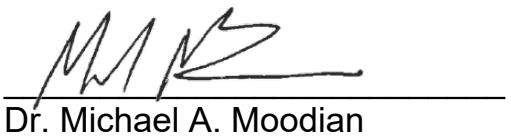
have integrity, uphold high personal standards, and treat everyone with dignity and respect, on or off the bench. We conclude that Judge Mallery's conduct before, and during, these proceedings demonstrates that he does not meet these fundamental expectations. His misconduct reflects an inability or unwillingness to perform judicial functions in a manner that comports with the expected rigorous standards of judicial conduct. Fulfilling the commission's mandate – particularly with respect to maintaining public confidence in the integrity of the judiciary – can only be achieved by removing Judge Mallery from the bench.

ORDER

Pursuant to the provisions of article VI, section 18 of the California Constitution, and rules 120(a) and 136 of the Rules of the Commission on Judicial Performance, we hereby remove Judge Tony R. Mallery from office and disqualify him from acting as a judge. Commission members Dr. Michael A. Moodian; Hon. Lisa B. Lench; Hon. William S. Dato; Mr. Eduardo De La Riva; Hon. Michael B. Harper; Rickey Ivie, Esq.; Ms. Kay Cooperman Jue; Mani Sheik, Esq.; and Ms. Beatriz E. Tapia voted in favor of all the findings and conclusions expressed herein and in this order of removal. Two public member positions were vacant.

Date: ___May 2, 2024_____

On behalf of the
Commission on Judicial Performance,



Dr. Michael A. Moodian
Chairperson

CERTIFICATE OF SERVICE

I, Jennifer Cuellar, declare:

I am a citizen of the United States, am over the age of eighteen years, and am not a party to or interested in the within entitled case. My business address is 580 California Street, Suite 1100, San Francisco, California 94104.

On July 31, 2024, I served the following document(s) on the parties in the within action:

PETITION FOR REVIEW OF DETERMINATION BY THE COMMISSION ON JUDICIAL PERFORMANCE (RULE 9.60)

X	**VIA MAIL:** I am familiar with the business practice for collection and processing of mail. The above-described document(s) will be enclosed in a sealed envelope, with first class postage thereon fully prepaid, and deposited with the United States Postal Service at on this date, addressed as listed below.
X	**VIA E-MAIL:** I attached the above-described document(s) to an e-mail message, and invoked the send command to transmit the e-mail message to the person(s) at the e-mail address(es) listed below. My email address is JCuellar@mpbf.com.

Emma Bradford, Legal Advisor
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I declare under penalty of perjury under the laws of the State of California that the foregoing is a true and correct statement and that this Certificate was executed on July 31, 2024.

By: */s/ Jennifer Cuellar*

4974924.docx

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **JUDGE TONY MALLERY v. THE COMMISSION ON JUDICIAL PERFORMANCE**
Case Number: **TEMP-V3KSL4CD**
Lower Court Case Number:

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **culrich@mpbf.com**

3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
ISI_CASE_INIT_FORM_DT	Case Initiation Form
PETITION FOR REVIEW	Mallery Petition

Service Recipients:

Person Served	Email Address	Type	Date / Time
Christopher Ulrich Murphy Pearson Bradley & Feeney 271288	culrich@mpbf.com	e-Serve	7/31/2024 7:41:11 PM
Mark Lizarraga 186240	Mark.Lizarraga@cjp.ca.gov	e-Serve	7/31/2024 7:41:11 PM
Emma Bradford	filings@cjp.ca.gov	e-Serve	7/31/2024 7:41:11 PM
Brian Heffern	Brian.Heffern@cjp.ca.gov	e-Serve	7/31/2024 7:41:11 PM
Melissa Murphy	Melissa.Murphy@cjp.ca.gov	e-Serve	7/31/2024 7:41:11 PM

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

7/31/2024
Date

/s/Christopher Ulrich
Signature

Ulrich, Christopher (271288)
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