



**Digital Commons@**  
Loyola Marymount University  
LMU Loyola Law School

Loyola of Los Angeles Law Review

---

Volume 10 | Number 1

Article 6

---

12-1-1976

## Judicial Discipline in California: A Critical Re-Evaluation

Wilbank J. Roche

Follow this and additional works at: <https://digitalcommons.lmu.edu/llr>



Part of the [Law Commons](#)

---

### Recommended Citation

Wilbank J. Roche, *Judicial Discipline in California: A Critical Re-Evaluation*, 10 Loy. L.A. L. Rev. 192 (1976).  
Available at: <https://digitalcommons.lmu.edu/llr/vol10/iss1/6>

This Notes and Comments is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact [digitalcommons@lmu.edu](mailto:digitalcommons@lmu.edu).

# JUDICIAL DISCIPLINE IN CALIFORNIA: A CRITICAL RE-EVALUATION

## I. INTRODUCTION

California was the first state to create a governmental agency (the Commission on Judicial Qualifications) with express and authority to receive and review complaints against judges, to conduct inquiries and make investigations, and to give disciplinary recommendations where necessary. More than sixteen years have elapsed since the Commission's inception. Many incipient problems not readily apparent at the outset have come to the surface, and other new ones have arisen. It is therefore very appropriate at this juncture to critically re-evaluate California's system of judicial discipline. Such a re-appraisal can be valuable not only as a means of identifying the useful aspects of the system which should be retained, as well as the useless ones that should be abandoned, but also as a vehicle for clarifying its purpose and goals. It is only by this type of introspection that a more effective system can be developed.

The ensuing analysis will explore the strengths and weaknesses of judicial discipline as it has developed in California during the last decade and one-half. The objective will be to clearly demonstrate the need, and furnish the justifications, for certain recommended changes that must be made if the system is to be utilized to its fullest potential in the years to come.

## II. BACKGROUND

Prior to 1960, the laws of California provided only three means for removing unfit judges from office: Impeachment,<sup>1</sup> recall,<sup>2</sup> and concur-

---

1. In a typical impeachment proceeding, the lower house of a bicameral legislature drafts charges against the official sought to be removed. These charges are called articles of impeachment. It is then left to the upper house, acting as judge and jury, to consider and weigh the evidence on its merits. For a structural breakdown of impeachment provisions in various state constitutions, see Braithwaite, *Judicial Discipline and Removal*, AM. JUD. SOC'Y REP. No. 5 at 22-30 (1969) [hereinafter cited as Braithwaite—*Judicial Discipline*]. As a general rule, the impeaching body will have the responsibility for presenting evidence to the trier of fact. Thus, the lower house in most cases may prosecute the matter itself, or it may appoint the state's attorney general to do the job. In some instances, special outside counsel will be brought in to prosecute the official. See, e.g., Stewart, *Impeachment of James H. Hardy, 1862*, 28 S. CAL. L. REV. 61, 66 (1956) [hereinafter cited as Stewart], where the author describes how both the At-

rent resolution.<sup>3</sup>

### A. Impeachment<sup>4</sup>

The first impeachment of a California judge occurred in 1862 when James H. Hardy, a judge of the superior court, was brought to account before the members of the state Senate.<sup>5</sup> Most of the articles of

---

torney General of California *and* special counsel were used in the first impeachment of a judge in California. Some interesting problems arose as to who actually had control of the case, with special counsel prevailing. *Id.* at 67.

2. Recall, similar to the initiative and referendum, requires the incumbent official to submit to a special type of vote-of-confidence proceeding. Standard provisions in state constitutions, or in city or county charters provide that the procedure be initiated by publishing a statement of general grounds for the recall. A petition is then circulated among the electorate and a specified number of signatures must be obtained within a certain period before the recall election can occur. *See, e.g., CAL. CONST.* art. 23, §§ 1-7 (West Supp. 1975). Recall, however, is not a widely used tool of removal and is available under the constitutions of only seven states. *See Braithwaite—Judicial Discipline, supra* note 1, at 3.

3. Concurrent resolution, very much like the more commonly known procedure of address, requires a resolution and vote by two-thirds of the legislature for the removal of an official to be effected. *See Braithwaite—Judicial Discipline, supra* note 1, at 3. *See also* Frankel, *Judicial Conduct and Removal of Judges for Cause in California*, 36 S. CAL. L. REV. 72, 76 (1962) [hereinafter cited as Frankel—*Judicial Conduct*]; McCoy, *A Note on Judicial Ethics in California*, 22 S. CAL. L. REV. 240, 246 (1949) [hereinafter cited as McCoy].

4. The constitutional provision reads as follows:

Sec. 18. (a) The assembly has the sole power of impeachment. Impeachments shall be tried by the Senate. A person may not be convicted unless, by rollcall vote entered in the journal, two thirds of the membership of the Senate concurs.

(b) State officers elected on a statewide basis, members of the State Board of Equalization, and judges of state courts are subject to impeachment for *misconduct in office*. Judgment may extend only to removal from office under the State, but the person convicted or acquitted remains subject to criminal punishment according to law.

CAL. CONST. art. 4, § 18 (1966) (emphasis added). Present section 18, a combination of former sections 17 and 18, was added to the California Constitution in November of 1966, and it included several significant changes. Former section 18 provided, in part, that "the Chief Justice and Associate Justices of the Supreme Court, the Judges of the District Court of Appeal, and Judges of the Superior Court shall be liable to impeachment *for any misdemeanor in office.*" (Emphasis added). Judges of the municipal and justice courts, not otherwise specifically mentioned, were nonetheless *thought* to be included under another provision of former section 18 which read: "All other civil officers shall be tried *for misdemeanor in office* in such manner as the Legislature may provide." (Emphasis added). *See McCoy, supra* note 3, at 250.

The language of present section 18 now specifically includes all "judges of the state courts," and makes "misconduct in office" sufficient cause for removal, as opposed to the narrow ground of misdemeanor used in former section 18. CAL. CONST. art. 4, § 18 (1966). This change represents a considerable broadening and eliminates certain problems which have arisen in the past. *See* discussion note 10 *infra* with regard to the sufficiency of charges in the impeachment trial of James Hardy.

5. Prior to this, in 1857, both the State Controller and the State Treasurer were im-

impeachment contained charges of various kinds of corrupt judicial conduct,<sup>6</sup> and Judge Hardy was also accused of having behaved publicly in a manner not consistent with the judicial office.<sup>7</sup> The most serious accusation made was that Judge Hardy had conspired with the District Attorney of San Raphael, Marin County, to fix the trial of David S. Terry, a former Chief Justice of the California Supreme Court who was then on trial for the murder of a United States Senator.<sup>8</sup> In addition, Judge Hardy, a man vehemently outspoken in favor of slavery, was charged with having violated his duty and oath to uphold the Constitution of the United States of America.<sup>9</sup> Following a trial that lasted fourteen days, an oral vote was taken among the Senators and Judge Hardy was acquitted of all charges except disloyalty to his country. As a result, he was immediately removed from office.<sup>10</sup> Within a few years, however, the political climate of the nation had changed as had the partisan make-up of the California legislature, and Hardy's friends were able to remove the stigma of his conviction by pushing through

---

peached and convicted of defrauding the State. See J. BEEK, TRIAL OF THE IMPEACHMENT OF JUDGE CARLOS S. HARDY, *Introduction X* (1930) [hereinafter cited as BEEK]. For an account of the events surrounding Judge James Hardy's impeachment trial, see Stewart, *supra* note 1; and for a complete transcript of the entire proceedings, see OFFICIAL REPORT OF THE PROCEEDINGS IN THE TRIAL OF JAMES H. HARDY, APPENDIX TO JOURNALS OF SENATE AND ASSEMBLY, 13th SESS. (1862).

6. Stewart, *supra* note 1, at 62.

7. *Id.* Apparently Judge Hardy had a habit of becoming intoxicated and boisterous in public places.

8. *Id.* Terry slew Senator David Broderick in a duel brought about by an argument over the slavery question. In Sacramento, the public reaction against Terry, who favored slavery, was running very high. Broderick was catapulted into martyrdom for the cause of black freedom, and Terry became the sacrificial lamb. Realizing the gravity of his situation, Terry moved for a change of venue. His case was transferred to San Raphael where it was assigned to Judge Hardy's court. On the day of the trial, the main witnesses for the prosecution were late in arriving. In spite of the fact that it was known they would be along soon, Judge Hardy insisted upon proceeding on schedule, without them. A jury was impaneled and the trial commenced. Two hours later, the witnesses still not having appeared, the case was submitted to the jury. With no one to testify against him, Terry was acquitted.

9. *Id.* Judge Hardy was alleged to have made expressions of sympathy toward Jefferson Davis, the Confederacy, and secession, and to have made statements disrespectful of the Constitution and the American flag. *Id.*

10. From the start, Hardy's counsel had been quick to point out that none of the nineteen specific charges against the judge was an indictable or impeachable offense according to then existing California law. Based on this he argued that the charges were insufficient to sustain a conviction. The prosecution counter-argued that the language of the constitution included within it that conduct which would have constituted a misdemeanor or otherwise impeachable offense at common law. Since this whole proceeding was primarily a political vendetta, the Senate naturally adopted the prosecution's position. *Id.* at 67.

a special measure expunging it from the Senate records.<sup>11</sup>

Sixty-seven years later, in 1929, the second and only other impeachment of a California judge took place. As a consequence of apparently well-intentioned but improper attempts to furnish legal counsel to his longtime friend, the evangelist Aimee Semple McPherson, Judge Carlos S. Hardy was impeached for having practiced law while sitting as a judge of the superior court, in violation of the California Constitution, and for having attempted to make a theater of his courtroom.<sup>12</sup> After twenty-two days of hearings, the Senate acquitted Judge Hardy of all charges brought against him by the State Assembly.<sup>13</sup>

11. *Id.* at 63, 64. A primarily Democratic legislature of 1869-70 found Judge Hardy's conviction to be illegal and void, the result of political emotionalism. In the interest of fair dealing, it was deemed a blemish on the Senate records, which should be removed. Accordingly, the Secretary of the Senate was instructed to "draw black lines around said judgment and write across the face thereof the words, 'Expunged. . . .'" *Id.*

12. For the complete transcript of the proceedings before, during, and after the trial, see BEEK, *supra* note 5.

Specifically, Judge Hardy was alleged to have given Miss McPherson legal advice concerning her business enterprise, The Echo Park Evangelistic Association, Inc. Also, in June of 1926, after Miss McPherson had returned from an unexplained absence of six weeks, claiming to have been kidnapped and causing the Grand Jury and the District Attorney's office to investigate the matter, the Judge was alleged to have willfully withheld information tending to prove Miss McPherson had never been kidnapped. Since Miss McPherson was under felony suspicion for having "cried wolf" as a publicity stunt, Judge Hardy's action amounted to obstructing justice. Further, he "delivered public addresses over the radio and on the public platform, in character directly designed to create such favorable public opinion and to create sentiment favorable to . . . Aimee Semple McPherson in the minds of the . . . [Grand] jurors, and in the minds of the citizens of . . . Los Angeles County who might be called as trial jurors in the event . . . [Miss] McPherson was . . ." prosecuted. *Id.* at 14. In this regard he was further charged with having taken \$2,500 in payment for his services. *Id.*

Perhaps the most interesting charge relates to an incident that occurred in 1928. Judge Hardy was about to try a case which had aroused great public interest. He "caused the seats provided for spectators in his court room . . . to be numbered and caused tickets to be printed and numbers endorsed thereon . . . which . . . tickets were dated for the various days during which it was contemplated that the case . . . would be on trial, and caused and permitted said tickets to be distributed to the friends of said Carlos S. Hardy, and of his wife, to the end that no persons except those provided with said tickets would be admitted to the court room during the trial . . ." *Id.* at 17. Originally these charges were drawn in five articles, but Judge Hardy demurred to all of them. His motion was unanimously denied except as to the last article relating to the "distribution of tickets" charge. *Id.* at 110-12.

13. *Id.* at 1334-49. More significant than the Judge's acquittal was the related ruling of the California Supreme Court in *State Bar of California v. Superior Court*, 207 Cal. 323, 278 P. 432 (1929). Prior to the commencement of the impeachment proceedings in the legislature, the State Bar had called Judge Hardy before the Board of Governors to account for certain behavior in regard to Miss McPherson, namely, that he was practicing law while on the bench in violation of CAL. CONST. art. 6, § 22 (presently § 17). Although he was willing to *appear* before the Board, Judge Hardy refused to testify,

Notwithstanding the prevalence of impeachment provisions in state constitutions throughout the country,<sup>14</sup> research and experience have shown that as a method of *effectively* removing unfit judges it is little used and of no real value.<sup>15</sup> Impeachment is both cumbersome and wastefully expensive in that it demands the time and energies of some or all members of both houses of a legislature for extended periods.<sup>16</sup>

---

claiming that there was no jurisdiction over him since he was a judge and not a member of the bar during his tenure on the bench. The Board sought a writ of mandamus compelling Judge Hardy's testimony, but The Honorable Marshall F. McComb, then judge of the Superior Court, denied it, agreeing with Judge Hardy's position. On appeal to the supreme court, the ruling was affirmed and the court inferred that impeachment was the only available method of disciplining a judge on these facts. *State Bar of California v. Superior Court*, 207 Cal. 323, 278 P. 432 (1929).

One effect of the decision was to foreclose a potentially useful avenue of redress against wayward judges. In spite of this, the decision was a good one because of the undesirability of placing any control of judge's behavior in the hands of the bar. See Frankel—*Judicial Conduct*, *supra* note 3, at 76, 77. Several years later, the *State Bar* decision was distinguished in *Christopher v. State Bar*, 26 Cal. 2d 663, 161 P.2d 1 (1945). *Christopher* involved a similar proceeding against a justice of the peace for having practiced law while serving on the bench. The supreme court held that *State Bar* was not applicable in *Christopher* because justices of the peace were not under the constitutional proscription not to practice law that Judge Hardy had been under. Thus, insofar as the judge of a justice court was "permitted" by the constitution to practice law, he was under the jurisdiction of the State Bar when he did so.

14. Braithwaite asserts that impeachment has been the most widely adopted of the traditional removal procedures, having been provided for in the constitutions of the United States and forty-six of the sister states. See Braithwaite—*Judicial Discipline*, *supra* note 1, at 3.

15. In 1936, it was reported in 20 J. AM. JUD. SOC'Y 133, 151 n.86 that during the period 1900-25 only two judges were removed from office by impeachment; one was in Montana and the other in Texas. A 1952 survey indicated that in the twenty year period from 1928-48, only three impeachments were conducted throughout the country; in all three the defense prevailed. Brand, *The Discipline of Judges*, 46 A.B.A.J. 1315 n. 2 (1960) [hereinafter cited as Brand]. In the same note, the results of the author's further independent survey, conducted in 1960, showed that of forty states, for as far back as could be determined, only seventeen had instituted impeachment proceedings in a total of fifty-two instances. From these statistics, Mr. Brand justifiably concluded the remedy was useless. In the federal courts, there have been only eight impeachment trials, and four of those have resulted in acquittals. See Tydings, *Congress and the Courts Helping Judiciary to Help Itself*, 52 A.B.A.J. 321, 322 (1966) [hereinafter cited as Tydings].

16. For example, in Florida two impeachment trials were undertaken during the years 1957-63. In each case it was necessary to call special sessions of the legislature due to lack of time in the regular session. The cost of the two trials was nearly \$250,000, an amount greater than 50% of the annual budget of the Florida Supreme Court. See Winters and Allard, *Judicial Selection and Tenure in the U.S.*, in *THE COURTS, THE PUBLIC, AND THE LAW EXPLOSION* 167, 168 (H. Jones ed. 1965) [hereinafter cited as Winters and Allard].

As far back as 1800, a proposal was made to amend the Constitution of the United States to provide for removal by address. See Tydings, *supra* note 15, at 322. See also

A legislature's time is ill-spent in having to charge, try, and ultimately judge members of the bench who are believed unqualified for further service to the judiciary. Moreover, the very nature of the impeachment proceeding gives it strong political overtones.<sup>17</sup> From the standpoint of administering justice, this is dangerous and undesirable. Justice Fred B. Wood's remark concerning the sentiments of the California Legislature following the impeachment of Judge Carlos S. Hardy was particularly incisive: ". . . I don't think there was a single member of the Senate who sat at that trial who wanted to see another one. . . ." <sup>18</sup>

### B. Recall<sup>19</sup>

The single use of the recall to remove members of the California judiciary was made in 1932, only three years after the impeachment of Judge Carlos S. Hardy, when the Board of Trustees of the Los Angeles County Bar Association voted to initiate proceedings against three local judges of the superior court: John L. Fleming, Dailey S. Stafford, and Walter Guerin.<sup>20</sup> A prior investigation by the Associa-

---

note 3 *supra*. Thomas Jefferson is also known to have written to his good friend Judge Roane in 1819 that the impeachment method of removing judges did not even serve as a deterrent to judicial misconduct. See 1 WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 295 (1922); Tydings, *supra* note 15, at 322. One writer has noted that in the federal system attendance has been a crucial problem during impeachment trials, and he states that an average of only 16 senators out of a possible 96 have been present during the trials of federal judges. See J. BORKIN, *THE CORRUPT JUDGE* 194, 195 (1962) [hereinafter cited as BORKIN]. Senator Tydings points out that in view of the numerous other responsibilities that senators are obligated to meet, it is no surprise that attendance has been low at the impeachment trials of federal judges. Tydings, *supra* note 15, at 323. (As a sidenote, it is interesting to observe that both California impeachments were very well attended. See Stewart, *supra* note 1, at 64; BEEK, *supra* note 5, at xii).

17. See Burke, *Judicial Discipline and Removal: The California Story*, 48 J. AM. JUD. SOC'Y 167, 169 n.1 (1965) [hereinafter cited as Burke]; Stewart, *supra* note 1, at 168.

18. JOINT JUDICIARY COMMITTEE ON THE ADMINISTRATION OF JUSTICE, *PARTIAL REPORT ON THE CALIFORNIA JUDICIARY* 48 (1959) [hereinafter cited as *PARTIAL REPORT*] (testimony of Justice Wood before the Committee), *quoted in* Frankel—*Judicial Conduct*, *supra* note 3, at 75.

19. CAL. CONST. art. 23, § 1 defines recall as "the power of the electors to remove an elective officer." In substance the California provisions require the filing of a petition with the Secretary of State setting out the reasons for recall. "Sufficiency of reason is not reviewable." *Id.* § 2. Petitioners then have 160 days to get the required number of signatures, which is 20% of the number of votes cast for the particular office in the last election. Once the petition is filed, the Governor must call an election within 60-80 days. *Id.* § 3. A majority vote will be sufficient for removal. *Id.* (Present article 23 was added and former article 23 was repealed Nov. 5, 1974). For the remainder of the provisions concerning recall, see *id.* §§ 4-7.

20. A full account of the proceedings from the inception of the investigations up to

tion's Judiciary Committee revealed substantial evidence that these three judges were using their positions to further their own economic and political goals in total disregard for established judicial ethics. One of the specific charges was that they had named acquaintances (in some cases altogether incompetent) to certain lucrative receiverships under their appointment. In other instances, the judges were alleged to have awarded their appointee-acquaintances unduly large fees, and at least one of the three was accused of attempting to persuade his appointees to bank at an institution in which he had previously owned an interest.<sup>21</sup>

Using the information gathered against the judges as support, a specially appointed Recall Committee was successful in gathering more than 100,000 signatures for each recall petition. Subsequently, an appropriate measure was placed upon the November, 1932 ballot.<sup>22</sup> After a vigorous campaign on both sides, all three of the judges were recalled from office.

Undoubtedly, the removal of Judges Fleming, Stafford, and Guerin was a satisfying victory for the outraged public and one much needed to restore respectability to the judiciary. Yet, when the committee's reports are studied, it is painfully clear that recall was—in terms of money, time, and manpower expended—probably an even worse method of removal than impeachment had been.<sup>23</sup> Equally distressing, “. . . the recall authority provides no reasonable or orderly [or inde-

---

the filing of the final report by the Recall Committee can be found in 7 L.A.B. BULL. 227-45 (1932) and in 8 L.A.B. BULL. 3-10, 24, 67, 69 (1932).

21. 7 L.A.B. BULL. at 242; 8 L.A.B. BULL. at 4-8.

22. 8 L.A.B. BULL. at 5. The accounts indicate there was strong public support for the removal of the judges. A large number of civic groups and law-related organizations pledged their support to the Committee. It is also interesting to note that 87% of the persons solicited for signature cooperated by signing the recall petitions, and of those an exceptionally high 86% proved to be valid. *Id.*

23. In addition to the countless man-hours that went into the investigations by the Judiciary Committee, as well as those that went into the petition solicitations (the cost of which amounted to \$8,648.57), it soon became apparent to the Recall Committee that a full scale campaign would have to be launched in order to counteract the individual campaigns “of considerable proportions” which the three judges had undertaken. Much confusion resulted both from the electorate's unfamiliarity with the procedure as well as from the conflicting propaganda. Great expenditures of time and money were necessitated on all sides. The cost to the Recall Committee was \$2,248.96; it is not reported what amounts the judges spent. *Id.* at 67, 69. One also wonders what price the administration of local justice paid in all this. Judges Fleming, Stafford, and Guerin were still in office and theoretically, at least, carrying out their judicial duties during this bitter struggle.

As it turned out, one of the more ironic facts was that the Board chose to use the recall only because, on studying impeachment, it concluded that such “proceedings against members of the Bench in California clearly shows that it is cumbersome and ineffective.” *Id.* at 4, 5.



pendent] way for charges of misconduct or mental or physical unfitness of a judge to be properly initiated, examined, and adjudicated."<sup>24</sup>

### C. Concurrent Resolution<sup>25</sup>

California's single aborted experience with concurrent resolution as an implement of removal came in 1936, just four years after the removal of Judges Fleming, Stafford, and Guerin.<sup>26</sup> In 1935, Judge Gavin W. Craig of the California District Court of Appeal was convicted in federal court of conspiring to obstruct the administration of justice. He was fined \$1,000 and sentenced to one year in prison.<sup>27</sup> In 1937 at the insistence of the California State Bar, the legislature initiated concurrent resolution proceedings in order to remove Judge Craig from office.<sup>28</sup> Just five days before the hearings by a joint convention were scheduled to convene, however, Judge Craig resigned his position, obviating the need for any further action on the part of the legislature.<sup>29</sup> Likewise, simultaneous efforts (based upon different provisions of the law) by the California Attorney General to remove Judge Craig from office were also mooted.<sup>30</sup>

24. Frankel—*Judicial Conduct*, *supra* note 3, at 76.

25. CAL. CONST. art. 6, former § 10, which was repealed Nov. 8, 1966, provided in part: "Justices of the Supreme Court and of the District Courts of Appeal, and judges of the superior courts may be removed by concurrent resolution of both houses of the Legislature adopted by a two-thirds vote of each house. All other judicial officers, except justices of the peace, may be removed by the Senate on recommendation of the Governor; . . ."

26. There is some indication that during the twenties the public image of the judiciary had suffered considerably; the general feeling was that the "ability, efficiency, and dignity" of America's judges was on the wane. BEEK, *supra* note 5, at 1346 (Senator George W. Rochester's explanation of his vote in the Carlos S. Hardy impeachment trial). This would partially explain the run in California on judicial removals during the ten year period from 1926 to 1936. One thing is certain: The total absence of removal proceedings between 1862 and 1929 cannot have been due to the fact that none of the judges in the state misbehaved or was otherwise incapacitated. More likely, it was simply because the judiciary was not in the public eye.

27. *Craig v. United States*, 81 F.2d 816 (9th Cir. 1936).

The evidence tended to show that one John McKeon and others were being prosecuted in federal court for having perpetrated a corporate mail fraud. Justice Craig, in return for a large campaign contribution to a certain U.S. Senator's fund, was found to have offered to open channels in Washington that might lead to a dismissal of the indictment. It was Craig's position that the charges were unfounded, as McKeon's dismissal was to be based on the merits.

28. See ASSEM. DAILY J., Jan. 12, 1937 at 67; SEN. DAILY J., Jan. 11, 1937, at 22; ASSEM. DAILY J., Jan. 6, 1937 at 14-16. The concurrent resolution proceedings were brought pursuant to the provisions of CAL. CONST. art. 6, former § 18 (repealed Nov. 8, 1966), which are now contained in present § 17 (added Nov. 8, 1966).

29. See McCoy, *supra* note 3, at 252; Frankel—*Judicial Conduct*, *supra* note 3, at 74.

30. See McCoy, *supra* note 3, at 252; Frankel—*Judicial Conduct*, *supra* note 3, at 74.

Once again, despite the beneficial result ultimately obtained, much of the time, effort, and expense that went into achieving Justice Craig's resignation could have been spared had there been a more simplified, efficient, and expeditious procedure available.

By 1937 then, each of California's three traditional methods for removing unfit judges, although not totally ineffective, had proven itself to be awkward, inefficient, and incapable of meeting the demands of a viable system of judicial discipline.<sup>31</sup> During the 1940's, profound tremors of change began rumbling from within the judiciary and with-

---

The Attorney General filed suit against Craig in an action which sought his removal pursuant to what is now CAL. GOV'T CODE § 1770(h) (West 1966). This section of the code declares an office vacant upon the official's conviction of a felony or other offense involving a violation of his official duties. Although the Attorney General was successful at the trial court level, the supreme court reversed on appeal, saying that the statute didn't apply to justices of the district court of appeal who could be removed only pursuant to constitutional provisions. *People v. Craig*, 61 P.2d 934 (1936), *vacated*, 9 Cal. 2d 615, 72 P.2d 135 (1937). Rehearing was granted, but before the case came up for hearing, Justice Craig had resigned. The issue was then held to be moot. 9 Cal. 2d 615, 72 P.2d 135 (1937). On the heels of the supreme court's holding, the State Bar proposed a constitutional amendment, adopted the following year, which gave the supreme court power to remove a judge upon conviction of a crime involving moral turpitude. From the time of its adoption in 1937, the provision was not used until 1962 when Judge Marvin Sherwin was removed after conviction on three counts of income tax evasion and making false declarations under oath. *In Re Sherwin*, S.F. No. 21064 (Minute Order dated 6/4/62). This provision was also used the following year to remove two judges in the Mendocino area who had engaged in an illegal "warrant battle." *In re Tindall*, *In re Evans*, 60 Cal. 2d 469, 386 P.2d 473, 34 Cal. Rptr. 849 (1963). Unfortunately, Justice Craig had yet another due to pay: Disbarment proceedings were brought against him. In September of 1938, his name was formally removed from the rolls of the California State Bar Association. For a good general discussion of this area of development, see Frankel—*Judicial Conduct*, *supra* note 3, at 76, 77; and McCoy, *supra* note 3, at 251-52.

31. See Frankel—*Judicial Conduct*, *supra* note 3, at 76. Speaking of the problem from a national standpoint, Winters and Allard have stated:

All three devices have glaring defects. They provide an inflexible remedy, outright removal, and hence are unsuitable for dealing with the most common types of judicial misconduct, which warrant some form of discipline short of removal. . . . In situations involving anything less than the most flagrant violations of judicial ethics, or indisputable incompetency, legislators and citizens hesitate to take the trouble to initiate removal procedures.

Winters and Allard, *supra* note 16, at 167-68.

California's Senator Weller made similar observations in the late 1920's when, by way of explanation to his vote in the impeachment trial of Judge Carlos S. Hardy, he stated:

I am not satisfied that the accused acted with a wilfull or corrupt motive. However, I am convinced that . . . he voluntarily placed himself in such a position . . . that he was guilty of unethical conduct, and conduct unbecoming a . . . judge of our superior court. . . .

BEEK, *supra* note 5, at 1346. See generally BORKIN, *supra* note 16, at 194-95; PARTIAL REPORT, *supra* note 18; Brand, *supra* note 15, at 1315 n.2; Tydings, *supra* note 15, at 321.

out, and by the mid-1950's they had reached such an intensity that serious reform could no longer be avoided.<sup>32</sup> Finally, in 1960, under

---

32. For an excellent and exhaustive treatment of the California developments in this area from 1936 to 1960, see Frankel—*Judicial Conduct*, *supra* note 3, at 77-87.

Briefly, there were several attempts during the period from 1936 until 1958 to effect the badly needed changes in the judicial system. Unfortunately, none of them were successful. It was finally the shocking conduct of certain judges, as incredible as it was intolerable, coupled with growing interest and pressure from all sides, that in the middle and late fifties finally brought matters to a point where the problem could no longer be left unsolved. For example, "[i]n one county we had three judges, none of whom had been on the bench for a year. One of them hadn't been on the bench for two years. One of them was in an institution. And they were all drawing salary." Testimony of Chief Justice Gibson before the Joint Judiciary Committee on the Administration of Justice, PARTIAL REPORT, *supra* note 18, at 50. That same report relates the case of one 68 year old municipal court judge "who, pleading ill health, ceased holding court in December, 1955, remained idle throughout 1956 and the first eight months of 1957, held sessions for nine mornings during the next month, then laid off again. As of the end of 1957 he had received more than \$33,000 in salary for nine mornings' work." *Id.* Apparently, the same judge, although suffering from a heart condition, was seen frequently on the golf course during the period of absence from the bench. Frankel, *Removal of Judges: California Tackles an Old Problem*, 49 A.B.A.J. 166, 169 (1963) [hereinafter cited as Frankel—*Removal*]. In another county, serious difficulties had arisen due to the prolonged absence from the bench of one lower court judge because of crippling illness, and the inability of a second judge to perform his duties due to age and poor health. *Id.* at 169. In PARTIAL REPORT, *supra* note 18, at 29 the following finding was made: "A handful of judges, superior and municipal, have conducted a flourishing marriage business in their courts, some of them frequently interrupting trials to perform the nuptial rites. [It is reported in *Remedies for Judicial Misconduct and Disability: Removal and Discipline of Judges*, 41 N.Y.U.L. REV. 149, 176 (1965) [hereinafter cited as *Remedies*] that one female judge interrupted her court on seventeen occasions in a single day to perform weddings, in a pink robe!] Despite an express constitutional provision against accepting fees, some judges have habitually demanded a fee after the ceremony . . . . Such fees have grossed some judges up to \$10,000 a year." See generally Farley, *Court Survey*, 33 CAL. ST. BAR J. 271, 272-74 (1958). In addition, there was extensive evidence in the San Francisco area of probate judges appointing as many as two additional, unneeded appraisers to evaluate a single estate. These superfluous appointees did nothing, but were paid the full statutory fee. PARTIAL REPORT, *supra* note 18, at 14-19. Finally the report noted additional examples of judges being drunk on the bench, refusing to hear certain types of cases, failing to decide or try cases within a reasonable time (in some instances due to the judge having taken up to a three month vacation), and of holding unusually short court hours. These findings were corroborated by the testimony of Chief Justice Gibson. *Id.* at 49.

In spite of the fact that the number of misbehaving or unfit judges was quite small in relation to the total, the effect of their being permitted to remain on the bench was to cast an undeserved but tainting shadow on the entire judiciary. It was also during this period that the well known Holbrook Report was published, recommending the adoption of new methods of removal. J. HOLBROOK, *A SURVEY OF METROPOLITAN TRIAL COURTS—LOS ANGELES AREA* (1956). See also White, *Should Judges be Subject to Disciplinary Action?*, 32 L.A.B. BULL. 99 (1957).

The ills mentioned in this footnote were by no means peculiar to California. Every state in the nation, as well as the federal system, was suffering similar problems. See Frankel, *The Case for Judicial Disciplinary Measures*, 49 J. AM. JUD. Soc'y 218, 222-

the ever increasing strain of adverse public and professional opinion, the California Commission on Judicial Qualifications was created.<sup>33</sup>

23 (1966) [hereinafter cited as Frankel—*Measures*]; Frankel, *Removal of Judge—Federal and State*, 48 J. AM. JUD. Soc'y 177 (1965) [hereinafter cited as Frankel—*Federal and State*].

In view of the events transpiring in California, former Chief Justice Gibson of the California Supreme Court, along with able members of the bench, the bar, and the legislature, renewed an already determined effort to provide more functional means to remove unfit judges. The goal was to relieve both the legislature and the public of their cumbersome responsibility by substituting independent executive machinery that could make quick and efficient investigations and recommendations with respect to the continuing abilities of any judge in the state whose capacities had been properly challenged.

33. The fruit of the labors of Chief Justice Gibson and his fellow workers resulted in a proposed amendment to article VI of the California Constitution, which read as follows:

PROPOSED AMENDMENT REGARDING CREATION OF COMMISSION ON  
JUDICIAL QUALIFICATIONS:  
ARTICLE VI

SECTION 1b. There shall be a Commission on Judicial Qualifications. It shall consist of: (i) Two justices of district courts of appeal, two judges of superior courts, and one judge of a municipal court, each selected by the Supreme Court for a four-year term; (ii) two members of the State Bar, who shall have practiced law in this State for at least 10 years and who shall be appointed by the Board of Governors of the State Bar for a four-year term; and (iii) two citizens, neither of whom shall be a justice or judge of any court, active or retired, nor a member of the State Bar, and who shall be appointed by the Governor for a four-year term. Every appointment made by the Governor to the commission shall be subject to the advice and consent of a majority of members elected to the Senate, except that if a vacancy occurs when the Legislature is not in session, the Governor may issue an interim commission which shall expire on the last day of the next regular or special session of the Legislature. Whenever a member selected under subdivision (i) ceases to be a member of the commission or a justice or judge of the court from which he was selected, his membership shall forthwith terminate and the Supreme Court shall select a successor for a four-year term; and whenever a member appointed under subdivision (ii) ceases to be a member of the commission or of the State Bar, his membership shall forthwith terminate and the Board of Governors of the State Bar shall appoint a successor for a four-year term; and whenever a member appointed under subdivision (iii) ceases to be a member of the commission or becomes a justice or a judge of any court or a member of the State Bar, his membership shall forthwith terminate and the Governor shall appoint a successor for a four-year term. No member of the commission shall receive any compensation for his services as such, but shall be allowed his necessary expenses for travel, board and lodging incurred in the performance of his duties as such.

No act of the commission shall be valid unless concurred in by a majority of its members. The commission shall select one of its members to serve as chairman.

SECTION 10b. A justice or judge of any court of this State, in accordance with the procedure prescribed in this section, may be removed for willful misconduct in office or willful and persistent failure to perform his duties or habitual intemperance, or he may be retired for disability seriously interfering with the performance of his duties, which is, or is likely to become, of a permanent character. The Commission on Judicial Qualifications may, after such investigation as the commission deems necessary, order a hearing to be held before it concerning the removal or retirement of a justice or a judge, or the commission may in its discretion request the Supreme Court to appoint three special masters, who shall be justices or judges of courts of record, to hear and take evidence in any such matter, and to report thereon to the commission. If, after hearing, or after considering the record and report of the masters, the commission finds good cause therefor, it shall recommend to the Supreme Court the removal or retirement, as the case may be, of the justice or judge.

The Supreme Court shall review the record of the proceedings on the law and facts and in its discretion may permit the introduction of additional evidence and

### D. *The Commission*<sup>34</sup>

The Commission on Judicial Qualifications<sup>35</sup> is composed of nine

shall order removal or retirement, as it finds just and proper, or wholly reject the recommendation. Upon an order for retirement, the justice or judge shall thereby be retired with the same rights and privileges as if he retired pursuant to statute. Upon an order for removal, the justice or judge shall thereby be removed from office, and his salary shall cease from the date of such order.

All papers filed with and proceedings before the Commission on Judicial Qualifications or masters appointed by the Supreme Court, pursuant to this section, shall be confidential, and the filing of papers with and the giving of testimony before the commission or the masters shall be privileged; but no other publication of such papers or proceedings shall be privileged in any action for defamation except that (a) the record filed by the commission in the Supreme Court continues privileged and upon such filing loses its confidential character and (b) a writing which was privileged prior to its filing with the commission or the masters does not lose such privilege by such filing. The Judicial Council shall by rule provide for procedure under this section before the Commission on Judicial Qualifications, the masters, and the Supreme Court. A justice or judge who is a member of the commission or Supreme Court shall not participate in any proceedings involving his own removal or retirement.

This section is alternative to, and cumulative with, the methods of removal of justices and judges provided in Sections 10 and 10a of this article, Sections 17 and 18 of Article IV, and Article XXIII, of this Constitution.

The proposed constitutional amendment appeared as Proposition 10 on the November 8, 1960 ballot. It had been given much publicity and was adopted by a three-to-one vote of the people. (For an opinion voicing opposition to such a plan, see Walker, *Desirability of Proposals for Disciplining Judges*, 32 L.A.B. BULL. 73 (1957). But see Frankel, *Judicial Discipline and Removal*, 44 TEX. L. REV. 117 (1966) [hereinafter cited as Frankel—*Discipline*]; Frankel—*Removal*, *supra* note 32, at 169-70; *Remedies*, *supra* note 32, at 167-74).

In 1961 implementing legislation was enacted, Cal. Stats. 1961, ch. 564, at 1682-85, and pursuant thereto the California Judicial Council promulgated appropriate procedural regulations governing the Commission's activities. Cal. Stats. 1961, ch. 564; CAL. GOV'T CODE ANN. §§ 68701-55 (West 1961); CAL. R. CT. 901-19 (effective August 1, 1961).

34. The Commission's day to day operations have been extensively treated elsewhere and will only be sketched herein. See generally REPORTS OF THE COMMISSION ON JUDICIAL QUALIFICATIONS (1961-1975) [hereinafter cited as COMM'N REPORT]; W. BRAITHWAITE, WHO CAN BEST JUDGE THE JUDGES? 89-95 (1971) [hereinafter cited as BRAITHWAITE—JUDGES]; Bray, *Judging Judges—The California Commission on Judicial Qualifications*, 33 NEV. ST. B. J. 28 (1968); Buckley, *The Commission on Judicial Qualifications: An Attempt to Deal with Judicial Misconduct*, 3 U.S.F.L. REV. 244 (1969) [hereinafter cited as Buckley] (This article has some unusual aspects because it is written from the point of view of a Los Angeles Deputy Public Defender); Burke, *supra* note 16, at 168-72; Frankel—*Removal*, *supra* note 32, at 168-71; Frankel—*Federal and State*, *supra* note 32, at 181-82; Frankel—*Discipline*, *supra* note 33, at 1128-32; Frankel—*Measures*, *supra* note 32, at 220-22; Frankel, *What's in a Name?—California Sets the Style*, 41 L.A.B. BULL. 189 (1966) [hereinafter cited as Frankel—*Name*]; Frankel, *Judicial Ethics and Discipline for the 1970s*, 54 JUD. 18 (1970) [hereinafter cited as Frankel—*Ethics*]; Healy, *Judicial (Dis)qualifications*, 4 TR. JUDGES J. 3, 18 (1965) (this article, written by a judge, contains an amusing parody on judicial misconduct); *Remedies*, *supra* note 32, at 175-84; Traynor, *Rising Standards of Courts and Judges*, 40 CAL. ST. B.J. 677, 687-88 (1965); Traynor, *Who Can Best Judge the Judges?* 42 CAL. ST. B.J. 225, 238-39 (1967).

35. The former name is actually a misnomer because the Commission has never had

members and an executive secretary.<sup>36</sup> Five of the members are judges selected and appointed from various levels of the state judiciary by the California Supreme Court.<sup>37</sup> Of the remaining four members, two are experienced attorneys chosen by the Board of Governors of the California State Bar Association,<sup>38</sup> and the other two members are lay persons appointed by the Governor of California upon the approval of the State Senate.<sup>39</sup> The Commission maintains a permanent office in San Francisco which is staffed by the Executive Secretary and a stenographer.<sup>40</sup> Although Commission related expenses are met by the State, none of the members receives a salary.<sup>41</sup>

The principal task of the Commission is to receive, consider, and investigate complaints lodged against judges. Where necessary, the Commission may institute formal proceedings and recommend appro-

---

anything to do with qualifying judges for office. On the contrary, its sole concern has been with the sanction and removal of those judges already on the bench who are unfit, disabled, or in need of discipline. The Commission's new name was conferred by the California electorate on November 2, 1976, when it adopted Proposition 7 on the General Ballot. See CAL. ASSEM. CONST. AM. 96 (1976) (hereinafter cited as ACA 96). For a summary of the important changes embodied in ACA 96, see text accompanying notes 157-63 *infra*. COMM'N REPORT (1968) *supra* note 34.

36. To assure geographic equality of representation, members of the Commission are selected from all parts of the State. For example, the composition as of Jan. 1976 included residents of Sacramento, San Francisco, Napa, Los Angeles, Bakersfield, and San Mateo. COMM'N REPORT (1975), *supra* note 34.

37. CAL. CONST. art. 6, § 8 (West Supp. 1975). Two of the judges are selected from the court of appeal, two from the superior court, and one from the municipal court. Neither this provision nor those mentioned in the text accompanying notes 38 & 39 *infra* were affected by ACA 96.

38. *Id.* It is required that the appointed attorneys have had at least 10 years experience practicing law in California before they are eligible.

39. The decision to include laymen caused some initial controversy because it was felt that, being unknowledgeable in this area, they would judge the judges too harshly. As a matter of experience, the lay members of the Commission have been a valued asset. Burke, *supra* note 17, at 172. All members' terms are 4 years, but if a member's qualifying basis ceases to exist, his membership likewise terminates. CAL. CONST., art. 6, § 8 (West Supp. 1975).

40. The office is located at: 3041 State Building, 350 McAllister Street, San Francisco, California 94102.

41. CAL. GOV'T. CODE ANN. § 68703 (West 1966). Although the specific language relating to non-payment of salaries to Commission members was deleted from section 68703 in subsequent amendments, the policy of non-payment remains unchanged. One of the objections to creating a Commission was that it would soon develop into an expensive bureaucracy, but experience has shown this not to be the case. During its first nine years, the average annual budget of the Commission was approximately \$40,000. This figure included the salary of both the Executive Secretary and the staff stenographer. Frankel—*Ethics*, *supra* note 34, at 18.

appropriate disciplinary measures.<sup>42</sup> The final decision, however, as to whether sanctions should be imposed is presently left to the California Supreme Court.

Complaints are accepted from all sources—including members of the public, state and local officials, attorneys, and from judges themselves.<sup>43</sup> Upon receipt of a complaint, the Executive Secretary performs an initial screening. Those complaints which are insubstantial on their faces or which deal with subject matter not within the Commission's jurisdiction are eliminated at once.<sup>44</sup> The file is closed and an explanatory notice is sent to the complainant. Approximately 70% of the complaints received during the years 1961 through 1974 were disposed of in this manner.<sup>45</sup> Where a complaint appears to have prima facie validity, the Executive Secretary will commence an informal, but highly confidential series of inquiries to determine the exact depth and substance of the charges.<sup>46</sup> Usually, this consists of contacting persons

---

42. COMM'N REPORT (1969), *supra* note 34, at 1.

43. The proper format is to submit a statement of charges to the Executive Secretary. Although written, signed complaints are preferred, the Commission will not disregard telephone complaints or those which are made anonymously, as long as the latter contain allegations of specific misconduct. Buckley, *supra* note 34, at 253. While the greatest number of complaints is received from the public, those with the most substantive merit come from members of the bench and bar. COMM'N REPORT (1961-1975), *supra* note 34, *passim*; Buckley, *supra* note 34, at 253 n.12. It is interesting that many of the frivolous complaints lodged by members of the public arise "in connection with traffic and small claims courts, forums in which the citizen litigates without an attorney," COMM'N REPORT (1969), *supra* note 34, at 3. See *Remedies*, *supra* note 32, at 178.

44. COMM'N REPORT (1964), *supra* note 34, at 1; The 1970 Commission Report stated:

The Commission has no power to review claims of judicial error or mistake, which may be the subject of appeal, nor can it supervise local court administration, nor evaluate the legal learning or judicial ability of judges, nor monitor judicial performance. Nonetheless, all these issues are put to the Commission from time to time, as well as complaints based solely upon litigants' disagreement with rulings or their feelings of dislike for a particular judge.

COMM'N REPORT (1970), *supra* note 34, at 2. While complaints of this type are dismissed out of hand, there is a beneficial effect nevertheless. The public is reassured that there is *someone there* to hear and look into their complaints. This in itself relieves much of the discontent. COMM'N REPORT (1963), *supra* note 34, at 3; Burke, *supra* note 17, at 171.

45. COMM'N REPORT (1961-75) *supra* note 34, *passim*. During the 15 years of the Commission's existence approximately 2,200 complaints have been lodged against judges. Of these, nearly 1,600 have been summarily dismissed as unpursuable. *Id.*

46. CAL. R. Cr. 902. This rule requires that strictest confidence be maintained in all proceedings until a formal disciplining recommendation by the Commission has been filed with the supreme court. It is unanimously agreed that extreme confidentiality in the Commission's work is absolutely essential. "[T]he success that the Commission has had . . . would not have been possible without the constitutional requirement of confi-

"close" to the judge who would be best able to verify or dispel the truth of the accusations. At this early stage the judge would not be questioned, nor would he know that his associates had been contacted.<sup>47</sup>

Where the informal inquiries indicate that no real problem exists, the file is closed. If, on the other hand, the inquiries result in uncovering facts which tend to support the charges, the matter will be brought to the Commission's attention at its next regularly scheduled meeting.<sup>48</sup> At this juncture, the Commission may decide to proceed along any of several courses, depending on the nature and extent of the infraction and the attitude and cooperation of the judge.<sup>49</sup>

dentiality. The commission's rigorous adherence to this fundamental . . . has been a substantial factor in carrying forward a constructive program of discipline." COMM'N REPORT (1965), *supra* note 34, at 2; *see also* Burke, *supra* note 16, at 172. While confidentiality is no longer a constitutional mandate, it is still provided for in the Rules of Court. CAL. R. CT. 902. Confidentiality has a twofold purpose: It "protects the reputation of judges against irresponsible accusations and shields complainants from reprisals at the hands of the judge." Frankel—*Ethics*, *supra* note 34, at 18, 19. To further protect complainants and thereby encourage people to come forward, the Commission acts on its own initiative once it has received impetus from an outside source. Buckley, *supra* note 34, at 256. In fact, it is said that in the initial stages, confidentiality is so strictly maintained that, in most instances, unless the judge himself divulges he is under investigation, no one other than those questioned will know of the proceedings. *Remedies*, *supra* note 32, at 180. *See also* Buckley, *supra* note 34, at 255-56. This certainly, however, did not prove to be the case when Judge James McCartney was under investigation in 1973. Shortly after the Formal Notice of Hearing was filed a newspaper article appeared detailing almost every charge. It was openly agreed by all parties that the proceedings were widely known to the public. COMMISSION ON JUDICIAL QUALIFICATIONS: INQUIRY CONCERNING A JUDGE—No. 13, *Prehearing Proceedings* 18, 19 (Oct. 27, 1972).

47. *Remedies*, *supra* note 32, at 180.

48. Where necessary, of course, an emergency meeting can be called. In addition, the Executive Secretary is in close contact with the Chairman between meetings so that any situation needing immediate attention can be dealt with at once. *See generally Remedies*, *supra* note 32, at 180.

49. Although the Commission is empowered at this point to undertake a full investigation, the practice has usually been to proceed in stages. If the offense is a minor one and has been apparently established, the Executive Secretary might send an informal "Staff Letter" to the judge bringing his attention to the fact that allegations have been made against him and that the matter has been taken under advisement by the Commission; the judge is invited to give an explanatory reply.

If the charges are more serious and the initial inquiries appear conclusive, the Executive Secretary might be authorized to send a "Staff Inquiry Letter" to the judge. The alleged charges would be mentioned therein. A.F. Bray, former Chairman of the Commission, noted in this regard:

[I]n quite a number of instances, . . . complaints disclose situations, which, while not serious enough to warrant the removal of the judge . . . nevertheless disclose practices indicating that the particular judge has a poor idea or none at all, of public relations or the proper relationship between judge and counsel, or judge and witness, or party; or they may indicate a lack of knowledge of the Code of Judicial Ethics of the American Bar Association and the Conference of California Judges, of such matters, for example, as continued failure to start court on time, taking unlimited



If the matter is a serious one involving some kind of criminal conduct or other intolerable behavior, a full-scale preliminary investigation will be launched at once.<sup>50</sup> The judge involved will be notified through a formal letter from the Commission of the charges being investigated and of his rights under the law,<sup>51</sup> one of which is that he be provided an opportunity to present evidence on his own behalf.<sup>52</sup> Upon con-

---

recesses, constant wisecracking in court, short court hours, etc. In these instances we notify the judge of the charge and tactfully suggest that if the practice complained of exists, it be discontinued.

Quoted in Burke, *supra* note 17, at 171; see COMM'N REPORT (1966), *supra* note 34, at 3. In instances such as these, a reply from the judge is requested. Oftentimes, the explanatory reply offered by the judge will satisfy the Commission that no further action need be taken and the file is closed. Occasionally the file might be kept open for a subsequent check and then closed. Frankel—*Measures*, *supra* note 32, at 221. The strongest approach is for the Commission to send a formal "Letter of Inquiry" to the judge. This letter delineates in concise language the specific charges and the alleged facts upon which they are founded. It also sets out the Commission's constitutional and statutory authority and informs the judge of his rights under the law. While this ominous procedure is generally reserved for those instances where a full preliminary investigation is to be undertaken (*see* notes 50-53 *infra* and accompanying text), it is sometimes used when the Commission feels that the judge needs a good shaking-up to get him back on the right course of conduct. It is well established the above-described "Letter Procedure" has been one of the most efficacious informal tools in the Commission's arsenal. As noted, in most situations the misconduct of the judge is simply not of the kind or degree that justifies the time and expense of a major proceeding: A simple letter, however, lets the judge know very definitely that his behavior is under scrutiny by the Commission. If the judge was aware of his wrong-doings, he will now be likely to curb them. If he was unaware of his behavior patterns, the letter will serve to awaken him so that he may make the necessary adjustments. In the case of disability, the judge might be led for the first time to consider retiring. Where there have been mental failings, the "Letter Procedure" has been especially helpful because an incapacitated judge will rarely be aware of his shortcomings. Under certain circumstances the Commission might decide to approach the Judge personally and suggest his retirement. COMM'N REPORT (1961-1974) *supra* note 34, *passim*; Frankel—*Discipline*, *supra* note 33, at 1132; *Remedies*, *supra* note 32, at 175-84; Burke, *supra* note 17, at 171.

50. CAL. R. CT. 904(b). It is at this point, wishing to avoid publicity or possible humiliation, that most judges will retire or resign. In fact, since 1961 approximately 60 judges have been induced to leave the bench. The Commission Reports have made it very clear that the majority of the terminations have been caused by disability rather than misconduct. Certainly this process of forced natural selection is necessary if a vital judiciary is to be maintained. The prospect of retirement is also made more attractive by the generous retirement pensions available to California judges. All retirements effected this way and even those ordered by the Court are considered voluntary. CAL. CONST. art. 6, § 18(d).

51. CAL. R. CT. 904(b). Pursuant to statutory authority, the Commission may employ any person that is needed to assist it in carrying out its investigations. CAL. GOV'T. CODE ANN. § 68702 (West Supp. 1975). In addition, the legislature has provided that all state and local agencies and officers and employees thereof give any reasonable assistance to the Commission that is needed. Commission Reports indicate that such assistance has been invaluable to its success. *See, e.g.*, COMM'N REPORT (1964), *supra* note 34, at 3.

52. CAL. R. CT. 904. Following the decision in *McCartney v. Commission on Judi-*

clusion of the preliminary investigation, the Commission must determine whether a formal administrative hearing should be instituted.<sup>53</sup>

When such a hearing is deemed necessary,<sup>54</sup> the Commission may choose to hear the matter itself, or it may petition the supreme court to appoint special masters to conduct the proceedings.<sup>55</sup> Although a Deputy Attorney General will usually serve as examiner and present evidence against the judge, the Commission may employ special outside counsel for this purpose if it so desires.<sup>56</sup>

Upon submission of all of the evidence, the special masters are required to make and report findings of fact and conclusions of law; they may also make recommendations as to what disposition should be made of the matter.<sup>57</sup> If a timely appeal objecting to the masters'

---

cial Qualifications, 12 Cal. 3d 512, 520 P.2d 268, 116 Cal. Rptr. 260 (1974), the impact of this rule was considerably weakened. See notes 81-94 *infra* and accompanying text.

53. CAL. R. CT. 905(a).

54. *Id.*, Rule 905(b). This rule requires that formal notice be sent to the judge. The notice must include a concise statement of the charges and the alleged facts upon which they are based. Pursuant to Rule 906, the judge is given fifteen days to answer the charges. No demurrers or other pleadings are permitted. Rule 910 provides that a full panoply of procedural rights be given to the judge.

55. Special masters are appointed from among judges of courts of record. CAL. R. CT. 904. While the usual number of special masters is three, where the judge under examination agrees, the number may be lowered to one. *Id.* The use of the special masters has been regular and seems preferable in that it helps guarantee that the accused will be examined before a well-trained yet completely uninformed and therefore unbiased panel. This ensures a "fair trial." The Commission may require attendance of witnesses and may exercise its subpoena power by petitioning the Superior Court. CAL. GOV'T. CODE ANN. §§ 68725-26, 68750-53 (West 1964). Interestingly, the Commission has not been given the power to compel a judge to submit to a medical examination. As noted below, however, failure of a judge to comply with the Commission's request may be considered against him.

56. CAL. GOV'T. CODE ANN. § 68702 (West Supp. 1975).

57. CAL. R. CT. 912. Recently, however,

[a]t the request of the Commission on Judicial Qualifications, the Judicial Council tentatively approved the deletion from the rules of a provision that masters appointed to conduct a hearing on the removal, censure or retirement of a judge may include in their report to the commission a recommendation for censure, removal or retirement, or for dismissal of the proceedings. The Council is of the view that this provision may be unnecessary and that it may distract from the essential fact-finding duty of the masters and may potentially impinge on the constitutional authority of the commission.

*Judicial Counsel Proposes New Rules: Asks Attorneys' Comments*, 51 CAL. ST. BAR J. 54, 55, 56 (1976). See note 113 *infra* and accompanying text. Under Rule 908, the hearing will proceed whether or not the judge files a formal answer to the charges. The failure of the judge to answer or appear, however, cannot by itself be taken as evidence to the truth of the charges. On the other hand, the failure of the judge to take the stand on his own behalf or to submit to a medical examination may be considered, unless the failure was for a reason beyond his control. CAL. R. CT. 812. Under Rule 909, only legal evidence is admissible. Pursuant to Rule 911, the charges

findings and conclusions is filed,<sup>58</sup> the Commission will review all the evidence and transcripts and then hear oral argument from both sides before making its own findings of fact, conclusions of law, and recommendation to the supreme court.<sup>59</sup> If the Commission's recommendation is objected to, a petition seeking its modification or rejection may be filed with the supreme court. In that event, another hearing will be held after which a final determination on the issue is made.<sup>60</sup>

### III. THE COMMISSION AND THE COURT

#### A. Overview

This section deals mainly with the evolution of the Commission in terms of decisional law developed by the California Supreme Court. The consideration of the cases will be divided into an analysis of the major procedural and substantive issues that have arisen as a result of the Commission's activities. In order that later developments in this area might be solidly founded, a particular effort is made to note potential weaknesses that can, and should, be remedied at this early stage. But first, it is necessary to present a brief summary of the Commission's experiences during the years from 1961 through August, 1970 when, with one noteworthy exception, the court remained completely in the background.

#### B. 1961-1970

Pursuant to the original constitutional provision, the Commission was empowered to recommend discipline only when a judge's behavior could be characterized as "wilful misconduct in office or wilfull and persistent failure to perform his judicial duties or habitual intemperance;" and only when the misconduct was of such severity to justify the judge's removal.<sup>61</sup> As a result of this fairly limited basis for discipline, the Commission's primary area of effectiveness in its early years was in securing the retirement of disabled judges.<sup>62</sup> In fact, through the first

---

against the judge may be amended at any time to conform to the proof or to set forth additional facts. Although in such instances, the judge is permitted to amend his answer and to prepare new defenses, the constitutionality of the rule has been questioned. See notes 101-112 *infra* and accompanying text.

58. CAL. R. CT. 914. The Commission is also empowered, under Rule 916, to remand for further findings by the masters where the case was originally heard before them.

59. *Id.*, Rule 917.

60. *Id.*, Rule 920.

61. CAL. CONST. art. 6 (former § 10b) (repealed, Nov. 8, 1966). See note 34 *supra*.

62. Former section 10b also provided that a judge may be "retired for disability seri-

three years of its existence, no recommendations of discipline were made.<sup>63</sup> In 1964, the Commission did seek to have Charles F. Stevens, an Oceanside Municipal Court Judge, removed. Following a one week formal hearing, the Commission found that Judge Stevens had willfully misconducted himself. Evidence clearly demonstrated that he had shown extreme bias against the prosecution in many criminal cases, as well as having committed other ethically questionable acts such as dismissing a criminal case in which he had formerly appeared as the defendant's attorney, and allowing attorneys to appear in his courtroom who owed him money and were representing him in another lawsuit.<sup>64</sup> In a three sentence opinion, the California Supreme Court stated that it found no basis in the record to support the Commission's recommendation and dismissed the proceeding.<sup>65</sup>

There was conjecture at this time that the supreme court must have found Judge Stevens' behavior reprehensible, but it was of the opinion that his offenses did not warrant the extreme sanction of removal and, finding itself powerless under the constitution to impose any lesser discipline, the court dismissed the action.<sup>66</sup> In the wake of *Stevens* and five years of practical experience (which clearly showed that most misconduct among judges was not of a removal magnitude) the Commission noted in its 1965 Report to the Governor that "certain weaknesses and uncertainties" in the constitutional language had come to light.<sup>67</sup> Accordingly, it urged support of the proposed revisions then being drafted by the legislature's Constitutional Revision Commission.

Two of the proposals were of paramount importance. First, it was

---

ously interfering with the performance of his duties, which is, or is likely to become, of a permanent character." *Id.* From 1961 through 1966, the Commission was responsible for inducing 39 retirements or resignations. COMM'N REPORT (1961-1966), *supra* note 34, *passim*.

63. COMM'N REPORT (1961-63), *supra* note 34, *passim*.

64. BRAITHWAITE—JUDGES, *supra* note 34, at 90.

65. *Stevens v. Commission on Judicial Qualifications*, 61 Cal. 2d 886, 393 P.2d 709, 39 Cal. Rptr. 397 (1964). All of the California opinions in this area have been per curiam. Compare with *In re Deiner*, 304 A.2d 587 (Md. Ct. App. 1973). It seems the California Supreme Court may have also adopted a per curiam approach at the hearing level, as well. For example, at the June 15, 1975 hearing before the court in *Cannon v. Commission on Judicial Qualifications*, 14 Cal. 3d 678, 537 P.2d 898, 122 Cal. Rptr. 778 (1975) (which this author attended) Chief Justice Wright was the only member of the court to make any comments. It appeared that the other justices had deferred to him. In *Stevens*, the formal hearing was conducted personally by the members of the Commission, not by special masters. COMM'N REPORT (1964), *supra* note 34, at 1.

66. Frankel—*Discipline*, *supra* note 33, at 1129.

67. COMM'N REPORT (1965), *supra* note 34, at 3.

recommended that "conduct prejudicial to the administration of justice bringing the judicial office into disrepute" be added to the list of offenses subject to discipline.<sup>68</sup> It was felt that this new category would serve as something of a catch-all for the milder yet plainly objectionable and more prevalent judicial transgressions. Second, it was believed that "public censure" should be provided as an additional sanction.<sup>69</sup> From the *Stevens* "decision" it had become apparent that the supreme court was not going to exercise its removal authority lightly. Thus, the addition of the public censure power was absolutely essential if the Commission was to be at all effective in the area of discipline, as opposed to disability. The above-noted major changes, along with several minor ones,<sup>70</sup> were put to the electorate in the form of a constitutional amendment in November, 1966. The amendment was passed effective on January 1, 1967, and with it was ushered in the second stage of the Commission's development.<sup>71</sup>

---

68. *Id.*

69. *Id.* at 3-4.

70. The *minor* changes included: (1) making an offense committed "in office" include any offense "occurring not more than six years prior to the commencement . . ." of the judge's current term; (2) making a judge who has been removed from office thereafter ineligible for judicial office; (3) to provide that when a judge faces serious criminal charges or when a removal recommendation is pending before the supreme court, the judge will be disqualified from office but without loss of salary during the pendency. CAL. CONST. art. 6, § 18. Presently, when a recommendation for his retirement is pending before the court, a judge will be disqualified. CAL. CONST. art. 6, § 18(a).

71. Frankel, *Judicial Accountability—Unfitness, Transgression, and the Misfit: The State of Art in California*, 4 L.A.B. BULL. 411, 412 (1974) [hereinafter cited as Frankel—*Accountability*]. As before, the Commission continued to induce the voluntary retirement of disabled judges, and from 1967 through 1974, the Commission induced the resignations or retirements of more than 20 judges. COMM'N REPORT (1967-74), *supra* note 34, *passim*. Three more years passed and no disciplinary proceedings were instituted. After its "setback" in *Stevens*, the Commission may have felt reluctant to make another recommendation on any but the most overwhelming grounds. Then in 1970, a superior court judge of Santa Clara County was publicly censured by the supreme court on the Commission's recommendation. *In re Chargin*, 2 Cal. 3d 617, 471 P.2d 29, 87 Cal. Rptr. 709 (1970). (The formal hearing in *Chargin* was conducted by special masters, as have been all others since). The formal hearing produced incontrovertible evidence that the judge had directed a searing, racist diatribe at one of the defendants in his courtroom. This was the first application of the new sanction. See BRAITHWAITE—JUDGES, *supra* note 34, at 92, 93. In 1971 a San Francisco judge was publicly censured for having "become uncontrollably angry and chastised a victim in a rape case in a wholly unacceptable manner." *In re Glickfield*, 3 Cal. 3d 891, 479 P.2d 638, 92 Cal. Rptr. 278 (1971); see Frankel—*Accountability*, *supra* note 34, at 413. These cases both involved single instances of open court misconduct prejudicial to the administration of justice that brings the judicial office into disrepute. The fact that the behavior in both cases occurred only in single instances and was only "prejudicial conduct," as opposed to "willful misconduct," indicated that the public censure was the appropriate sanction.

### C. 1970-Present

The October 1973 decision in *Geiler v. Commission on Judicial Qualifications*<sup>72</sup> marked the first in-depth analysis of the California Supreme Court in the area of judicial discipline. Although there were five earlier opinions by the court (four of which meted out sanctions), none of them exceeded a short paragraph, nor did any of them involve the removal of a judge.<sup>73</sup> Since *Geiler*, there have been three decisions by the court: *McCartney v. Commission on Judicial Qualifications*;<sup>74</sup> *Spruance v. Commission on Judicial Qualifications*;<sup>75</sup> and, most recently, *Cannon v. Commission on Judicial Qualifications*.<sup>76</sup> Two of these opinions, *McCartney* and *Spruance*, must be regarded as significant (which is not to say clear and consistent) developmental works, while the other, *Cannon*, needed little more than a recitation of the facts in order to reach the conclusion that removal was warranted. It is the more salient issues in these four cases that will now be addressed.

## IV. PROCEDURAL ISSUES

Inasmuch as *Geiler*<sup>77</sup> was the seminal case in the area of California judicial discipline, it was necessary for the court to establish broad and fundamental procedural guidelines upon which later proceedings would be structured. With respect to the burden of proof, the court analo-

---

Two years later, in August of 1973, a pair of Los Angeles Superior Court judges were severely censured for having supplied blank, presigned orders to certain bail bondsmen for release of prisoners on bail, the amount of the bonds to be fixed at the bailbondsmen's discretion. *In re Sanchez*, 9 Cal. 3d 844, 512 P.2d 302, 109 Cal. Rptr. 78 (1973); *In re Chavez*, 9 Cal. 3d 846, 512 P.2d 304, 109 Cal. Rptr. 79 (1973). These acts were in flagrant contravention of court rules and were found to have constituted a course of "willful misconduct." Yet, since there was no evidence of either judge having received any "kick-backs" or the like, removal was deemed inappropriate.

If there had been any question as to the necessity and appropriateness of public censure as a sanction, it certainly proved itself functionally indispensable in these four situations, none of which required removal but all of which demanded discipline.

72. 10 Cal. 3d 270, 515 P.2d 1, 110 Cal. Rptr. 201 (1973).

73. *In re Chavez*, 9 Cal. 3d 846, 512 P.2d 303, 109 Cal. Rptr. 79 (1973); *In re Sanchez*, 9 Cal. 3d 844, 512 P.2d 302, 109 Cal. Rptr. 78 (1973); *In re Glickfield*, 3 Cal. 3d 891, 479 P.2d 638, 92 Cal. Rptr. 278 (1971); *In re Chargin*, 2 Cal. 3d 617, 471 P.2d 29, 87 Cal. Rptr. 709 (1970); *Stevens v. Commission on Judicial Qualifications*, 61 Cal. 2d 886, 393 P.2d 709, 39 Cal. Rptr. 397 (1964). For a brief discussion on the former four cases, see note 71 *supra*. The *Stevens* case is discussed in the text accompanying note 65 *supra*.

74. 12 Cal. 3d 512, 526 P.2d 268, 116 Cal. Rptr. 260 (1974).

75. 13 Cal. 3d 778, 532 P.2d 1209, 119 Cal. Rptr. 841 (1975).

76. 14 Cal. 3d 678, 537 P.2d 898, 122 Cal. Rptr. 778 (1975).

77. 10 Cal. 3d 270, 515 P.2d 1, 110 Cal. Rptr. 201 (1973).

gized judicial disciplinary proceedings to those involving members of the Bar. Accordingly, it was declared "[t]he standard of proof in . . . an inquiry before the Commission [is] to be proof by clear and convincing evidence sufficient to sustain a charge to a reasonable certainty."<sup>78</sup> Also stressed were the points that "[t]he commission, not the masters, is invested by the constitution with the ultimate power to recommend . . . the [discipline] of a judge,"<sup>79</sup> and in coming to its recommendation, the Commission may disregard the masters' findings and make independent findings of fact and conclusions of law.<sup>80</sup> It was held proper, however, for the Commission in its discretion to give considerable weight to the opinion of the special masters. They heard the testimony firsthand and were conceivably in a better position to evaluate it.<sup>81</sup> Similarly, the court announced that it, too, would make independent findings of fact. From these findings, it would draw conclusions of law and make the final determination of whether to dismiss the proceeding or order the judge disciplined.<sup>82</sup>

Regarding the overall standard of behavior to which California judges would be required to conform, the court stated:

The ultimate standard for judicial conduct must be conduct which constantly reaffirms fitness for the high responsibilities of the office.<sup>83</sup>

Whereas the procedural rulings in *Geiler* were of a general nature, those raised in *McCartney*<sup>84</sup> focused upon very specific and interesting points of law.

#### A. Rule 904(b)

Except as to one charge, the Commission during the McCartney investigation had failed to comply with Rule 904(b) of the California Rules of Court which essentially requires that the Commission shall notify the judge as to the nature of each charge against him whenever a full preliminary hearing is to be undertaken. Presumably Rule 904(b) was designed to provide the judge with an opportunity to present matter

---

78. *Id.* at 275, 515 P.2d at 4, 110 Cal. Rptr. at 204.

79. *Id.*

80. *Id.* at 275-76, 515 P.2d at 4, 110 Cal. Rptr. at 204. The validity of this holding was questioned in *McCartney v. Commission on Judicial Qualifications*, 12 Cal. 3d 512, 540, 526 P.2d 268, 288, 116 Cal. Rptr. 260, 279 (1974), where the court seemed to rely more on the recommendation of the special masters than on its own opinion. See note 140 *infra*.

81. 10 Cal. 3d 270, 275-76, 515 P.2d 1, 4, 110 Cal. Rptr. 201, 204 (1973).

82. *Id.* at 275-76, 515 P.2d at 4, 110 Cal. Rptr. at 204.

83. *Id.* at 281, 515 P.2d at 8, 110 Cal. Rptr. at 208.

84. 12 Cal. 3d 512, 520 P.2d 268, 116 Cal. Rptr. 260 (1974).

on his own behalf from the earliest stages of the proceedings.<sup>85</sup>

McCartney claimed a denial of due process because of the Commission's failure to notify him under Rule 904(b), and asserted that the whole proceeding was therefore invalid.<sup>86</sup> The court rejected this contention, pointing out that the requirement of Rule 904(b) goes beyond any constitutional mandates of the due process clause. Thus, it was held that in the absence of a showing of "actual prejudice," there could be no violation of a judge's rights. This was especially so under the facts of *McCartney*, because once the Commission decided to go ahead with a formal hearing, the judge was given notice as to every general and specific charge against him and had three full months to prepare his defenses.<sup>87</sup>

Judge McCartney's second and far more compelling Rule 904(b) argument was that since the great majority of the evidence obtained through the preliminary investigation was one-sided and since he had not been able to defend himself at that stage, he could not possibly have received a fair and impartial hearing.<sup>88</sup> The reason for this was obvious: It would be the very same members of the Commission who heard the uncontested, unopposed, and highly prejudicial preliminary evidence (much of which was hearsay and inadmissible at the formal hearing) that would eventually be called upon to make or withhold a disciplinary recommendation. Judge McCartney was understandably concerned with the Commission's ability to subsequently make an unbiased determination regarding his situation.

The court found this argument unpersuasive as well. Making reference to the Federal Trade Commission, it noted the common practice of administrative bodies to perform both investigative and adjudicative functions in the same matter. These two functions, the court stated, were clearly separate and in no way mutually exclusive.<sup>89</sup> Moreover, while the Commission was technically conducting the investigation, it was the special investigators of the Attorney General who were actually

---

85. It is also possible that sufficient evidence presented by the judge at this stage might obviate the need for further investigation and a formal hearing.

86. Petitioner's Brief at 14-18, *McCartney v. Commission on Judicial Qualifications*, 12 Cal. 3d 512, 526 P.2d 268, 116 Cal. Rptr. 260 (1974) [hereinafter cited as Pet'n Br., *McCartney*].

87. 12 Cal. 3d at 519, 526 P.2d at 273, 116 Cal. Rptr. at 265.

88. Pet'n Br., *McCartney*, *supra* note 86, at 14-18.

89. 12 Cal. 3d at 519 n.5, 526 P.2d at 273 n.5, 116 Cal. Rptr. at 265 n.5; *see*, K. DAVIS, ADMINISTRATIVE LAW TREATISE § 1310, at 237-39 (1958); Respondent's Brief at 9, *McCartney v. Commission on Judicial Qualifications*, 12 Cal. 3d 512, 526 P.2d 268, 116 Cal. Rptr. 260 (1974) [hereinafter cited as Resp. Br., *McCartney*].



executing it. Taken together, there was no indication to the court that the Commission's admitted "procedural irregularity" at the investigative stage would in any way adversely affect its fairness and impartiality at the recommendation level of the proceedings.<sup>90</sup>

The court's supportive reasoning completely fails to meet the real thrust of McCartney's argument; nonetheless, its holding is still justifiable. The fact that it is common practice for administrative agencies to perform both administrative and adjudicative functions does not have the slightest tendency to lessen the strong possibility of Commission prejudice and partiality over which McCartney was worried; nor does the fact special investigators "dig up" the evidence alleviate the problem: The Commission must still listen to the information gathered. The perhaps unfortunate, but better rationale for rejecting the second Rule 904(b) argument is the same as that for the first. At its present level of evolution, constitutional due process simply does not require a separation of functions in agencies of this kind; nor does it give to a judge the right of representation at the investigative stage of a judicial discipline proceeding.<sup>91</sup>

The effect of the court's holding in this regard was to relegate Rule 904(b) to the status of a mere procedural nicety. Recognizing the situation for what it is, the logical and proper thing to do would be either to amend the rule or to eliminate it altogether. At the very least, that portion of the rule which states "shall notify" the judge of charges against him should be changed to "may notify" the judge. This would clearly establish that notification is a matter of discretion with the Commission, not obligation.<sup>92</sup> Such an approach is preferable to the present language, because as the rule now stands, it is demonstrably unenforceable. Of what use or good is a rule for the breach of which there is no remedy? Its undesirability becomes further

---

90. 12 Cal. 3d at 519, 526 P.2d at 273, 116 Cal. Rptr. at 265. Apparently, the same view is held in other jurisdictions which have considered the question in this regard. See *Cincinnati Bar Ass'n v. Heitzler*, 291 N.E.2d 477, 482 (Ohio 1972); *In re Deiner*, 304 A.2d 587, 597-98 (Md. 1973); *Keiser v. Bell*, 332 F. Supp. 608 (E.D. Pa. 1971); Resp. Br., *McCartney*, *supra* note 89, at 10-12.

91. Cf. note 87 *supra*.

92. The examiners in *McCartney* suggested to the court that "when viewed in the context of the entire process involved, the rule should be viewed as one designed primarily for the benefit of the Commission . . ." Resp. Br., *McCartney*, *supra* note 89, at 18-19. Although it seems doubtful that such was the purpose of the rule, there is certainly no question left that after the holding in *McCartney*, such has become its effect. On this basis, the language of the rule should be made commensurate with the meaning given to it.

apparent when it is realized that, under existing law, Rule 904(b) "actual prejudice" could only be demonstrated where the notice of formal hearing was defective. In that instance, failure to give proper notice at the preliminary investigation stage would still be a non-pivotal lesser included offense and any remedy would have to be fashioned on the failure of the formal notice. Perhaps the better choice would be to strike the rule entirely. This would avoid the possibility of claims later arising that the Commission has denied equal protection by granting the notice to some while not to others.

### B. Discovery

Another point of contention in *McCartney* centered around the Commission's refusal to permit the judge to use certain forms of discovery, *viz.*, written interrogatories, depositions, and requests for admissions. Under the Commission's established discovery procedures, either party, with certain exceptions, is allowed to obtain any information in the possession of the other party relating to witnesses, charges and other relevant matters. This includes, but is not limited to, the contents of investigative reports, reports of interviews with potential and actual witnesses, and other relevant writings.<sup>93</sup> On the other hand, there is apparently no discovery procedure whereby a judge may, on his own, compel persons with information to divulge it. The Commission does have the power, however, to grant broader discovery privileges, although these are not available as a matter of right.

Judge McCartney argued that because of the limitations imposed by the Commission, he could not adequately prepare his case without great difficulty.<sup>94</sup> Counsel's briefs on this point were directed mainly to a discussion of what standard of discovery, civil or criminal, should apply,<sup>95</sup> but the court carefully sidestepped this issue, holding that the petitioner's requests for broader discovery were so general and vague (lacking even a minimal showing of good cause) that it would be impossible to find that the Commission had abused its discretion in denying them.<sup>96</sup> The argument in favor of the civil discovery standard was that insofar as the court saw fit in *Geiler* to analogize judicial disciplinary proceedings to similar proceedings of the State Bar concerning

---

93. DISCOVERY PROCEDURE, COMMISSION ON JUDICIAL QUALIFICATIONS 1-2 (June, 1969); see Resp. Br., *McCartney*, *supra* note 89, App.

94. Pet'n. Br., *McCartney*, *supra* note 86, at 18-19.

95. Resp. Br., *McCartney*, *supra* note 89, at 21-27.

96. 12 Cal. 3d at 520, 526 P.2d at 273, 116 Cal. Rptr. 265.

the burden of proof involved, there was no reason why the same analogy should not have been made with respect to discovery privileges. In *Brotsky v. State Bar*,<sup>97</sup> it had been established that the civil standard would apply in State Bar proceedings. The Attorney General (*i.e.*, the Commission) took the position that in a normal administrative setting, there is no broad right to a civil discovery standard; similarly, there should be none here. Moreover, it was contended that in relation to *discovery*, the holding in *Brotsky v. State Bar* was not controlling in *McCartney*. The main ground for this assertion was a factual distinction between the two cases. At the time *Brotsky* was decided, the State Bar had no clearly defined rules for discovery; whereas at the time of *McCartney*, the Commission already had a well established policy for discovery that had been in effect for several years. It was also argued that by allowing broad discovery, such as McCartney sought, the confidentiality of the proceedings might be jeopardized. Finally, the respondent said, Judge McCartney had not in fact been prejudiced by the limited discovery and was able to glean all the information he needed.<sup>98</sup>

It seems that the Commission's position is without substantial merit. The Commission, like the State Bar, is probably more *sui generis* than administrative. As such, the comparison between it and other administrative agencies should not be overworked.<sup>99</sup> Also, those warnings given by the Executive Secretary at the initial inquiry level, claimed to be effective, could be equally well employed at the discovery stage.<sup>100</sup>

In answer to the argument that, in fact, the petitioner had not been prejudiced because he was able to discover all the information he

---

97. 57 Cal. 2d 287, 368 P.2d 697, 19 Cal. Rptr. 153 (1962).

98. Resp. Br., *McCartney*, *supra* note 89, at 21-27.

99. It was openly admitted in *McCartney* that within days of the formal notice of hearing, a confidential document, there wasn't a scintilla of confidentiality left to be protected. From the outset, newspapers in the San Bernardino area had been carrying inexplicably detailed accounts of everything that was transpiring. Apparently, the same thing, although to a lesser degree, occurred in *Cannon*.

100. Deputy Attorney General Kent L. Richland, an examiner in the *Cannon* hearing, stated that he found the admonition of confidentiality to be generally effective in the interviews he conducted and thus questions the validity of this argument against discovery. Interview with Kent L. Richland, Deputy Attorney General of California (examiner in *Cannon*), in Los Angeles, July 17, 1975 [hereinafter cited as Richland Interview, 7/17/75]. Special thanks are due Mr. Richland for his generous contribution of time and insight. He also pointed out that there is really no remedy for a violation, if one can be detected. In this regard, Judge Older, Presiding Master in the *Cannon* case, made every witness sign a "gag-order" before testifying. *Id.*

needed, this was not petitioner's complaint. Rather, his contention was that the burden created by such unsatisfactory procedures made his defense much more difficult than it fairly should have been. That Judge McCartney was able to make adequate discovery is a reflection on the quality of his counsel, not the fairness of the Commission's attitude. Viewed from this standpoint, the question becomes: Is making a judge's discovery and research job less burdensome a sufficient cause for broadening the rules? In view of the expense involved to the judge, the answer should be affirmative.

### C. Rule 911

Perhaps the most significant, albeit improperly raised, objection of Judge McCartney concerned Rule 911.<sup>101</sup> This rule provides, in essence, that examiners may amend the accusatory pleading at any time in a formal proceeding to conform with the proof or to add new charges based on recently discovered information; upon any such amendment the judge is to be given adequate time to prepare a defense.

During the course of the proceedings, due to unexpected testimony of witnesses which revealed offenses theretofore unknown, the McCartney examiners made four amendments to the charges.<sup>102</sup> The Commission found the judge guilty of either "wilfull misconduct" or "prejudicial conduct" as to each of these amendments. At the time the

---

101. CAL. R. CT. 911.

102. Resp. Br., *McCartney*, *supra* note 89, at 13-18. The four new charges concerned two cases in which Judge McCartney had been involved. McCartney's behavior in one of them was already under examination by the masters and the three specific amendments relating to that case merely charge *additional* acts of misconduct. The activity involved in the second case was completely unknown to the examiners and the single amendment in that regard constituted a wholly *new* charge. The second case was unusual because of the offense itself and because of the treatment given it by the court: the defendant was a very active trial attorney in the San Bernardino area and his work naturally required that he make numerous court appearances. In one of his cases before Judge McCartney, a continuance had been granted. Due to an office error, the defendant failed to appear on the specified day. The next time he came into Judge McCartney's court, he was found in contempt. He asked for a hearing which McCartney granted. The matter was put on the Master Calendar. On the day of the hearing, Judge McCartney cleared his own calendar, took off his judicial robes and proceeded to prosecute the attorney for contempt. The District Attorney had not been notified of the case and was not present at the hearing. In spite of the extreme irregularity of the action taken by McCartney, the court did not even mention it in its opinion. It has been suggested that both the Commission, and the court were too embarrassed to discuss the incident in any depth. Telephone interview with Robert F. Katz, Deputy Attorney General of California and Chief Examiner in the McCartney, in Los Angeles, June 30, 1975, [hereinafter cited as Katz Interview].

amendments were introduced, Judge McCartney specifically acknowledged Rule 911 and declined to challenge its validity. This was a fatal mistake for the court ultimately refused to rule on McCartney's *subsequently raised* objection because it was deemed untimely made; nevertheless, the court conceded in *dicta* that "[T]here may be some force to [McCartney's] point that the provision for such amendment in rule 911 bears reconsideration in light of . . . *In re Ruffalo*."<sup>103</sup>

*In re Ruffalo*<sup>104</sup> involved an Ohio disbarment proceeding. One of the charges alleged that Ruffalo had solicited FEELA plaintiffs through his part-time investigator, Michael Orlando, an employee of the Baltimore and Ohio Railroad Company. In attempting to refute the charged allegation, both Ruffalo and Orlando testified that Orlando's duties were strictly limited to investigation and did not entail solicitation of potential plaintiffs. It also came out that in several instances Orlando had conducted investigations for Ruffalo against the Baltimore and Ohio Railroad Co., Orlando's employer. Immediately following this testimony, the examining board amended the pleadings to include a charge of unethical conduct by Ruffalo in having Orlando investigate his own employer. No additional evidence was introduced beyond the initial inadvertent statements of Orlando and Ruffalo.<sup>105</sup>

It was upon the amended charge that Ruffalo was ultimately suspended from practicing in the federal courts of Ohio. On appeal to the United States Supreme Court, Justice Douglas, speaking for five members, said:

These are adversary proceedings of a quasi-criminal nature . . . . The charge must be known before the proceedings commence. They become a trap when, after they are underway, the charges are amended on the basis of testimony of the accused. He can then be given no opportunity to expunge the earlier statements and start afresh. . . .

[The argument of the examiners that due process was not denied because Ruffalo was given several months to prepare a defense to the new charge] overlooks the fact that serious prejudice to [Ruffalo] may well have occurred because of the content of the original . . . specifications of misconduct. He may well have been lulled 'into a false sense of security.' . . . the absence of fair notice as to the reach of the . . . procedure and [as to] the precise nature of the charges deprived [him] of procedural due process.<sup>106</sup>

---

103. 12 Cal. 3d at 521-22, 526 P.2d at 274-75, 116 Cal. Rptr. at 266-67.

104. 390 U.S. 544 (1968).

105. *Id.* at 546-47.

106. *Id.* at 551.

A narrow interpretation of the language and reasoning in *Ruffalo* suggests that an amended charge violates due process only when based upon incriminating, inadvertent testimony of the defendant or his witness given in an attempt to exculpate the defendant from another, known charge.<sup>107</sup> This is where the element of trick or entrapment lies and must be protected against. An amendment based upon information independently discovered, however, would not be similarly objectionable and should, therefore, be admissible. At this point, the only issue which arises is the sufficiency of time given to the defendant to prepare his new defenses.<sup>108</sup>

On the other hand, there is some support in *Ruffalo* for the assertion that the strategy of the defense is and can be effectively planned only if all the charges are presented at the outset.<sup>109</sup> Moreover, fundamental fairness requires that at some point there be an end to the charges for which a person must be held to answer.<sup>110</sup> It is, therefore, unjust to permit any kind of substantive amendment, regardless of the source of the information.

From a practical standpoint, however, as was shown in *McCartney*, sometimes the important information simply does not come out at the investigation stage, because tentative witnesses and interviewees are often reluctant to speak at this point and are not compelled to do so.<sup>111</sup> The Commission, the examiners, and most importantly, the general public should not be deprived of a full evaluation of a judge's behavior simply because some of the witnesses are reluctant to come forward until coerced to do so at the last possible moment. Nor should a judge be exonerated because the examiners, through no fault of their own,

---

107. This was not the situation in *McCartney*, where the new information came from the examiner's witnesses. See, *Javits v. Stevens*, 382 F. Supp. 131, 138-39 (S.D.N.Y. 1974).

108. The record in *McCartney* was clear that the petitioner had ample time to prepare defenses to the amended charges. Resp. Br., *McCartney*, *supra* note 89, at 16-18.

109. Cf. *In re Sarelas*, 360 F. Supp. 794, 797 (N.D. Ill. 1973).

110. This was the only objection that *Ruffalo's* attorney made at the original hearing; he contended that morally and legally the procedure was improper. It is instructive that the due process issue upon which the court decided this case was not actually before it, not having been raised in the briefs of counsel or in the federal proceedings below. On the contrary, it was *Ruffalo's* sole contention on appeal that reasonable men could differ as to whether the act was unethical or not, thus making disbarment improper. 390 U.S. at 552-56 (White, J., concurring).

111. Katz Interview, *supra* note 102. It is suggested that this provides further support for the view that the discovery standard in these proceedings should be the same as in civil cases, so that potential witnesses may be compelled to disclose what they know before the hearing begins.

were "late" in discovering the existence of an offense. To contend otherwise is self-defeating.

It is also very much open to question whether there is a viable alternative to allowing such amendments. Suppose, for example, that a very serious matter which would warrant removal, in and of itself, came to light during the formal proceedings. Must the Commission then wait until the present proceeding is concluded to start another one? Or must it forgo the newly found information completely? Since it is the public interest which is ultimately sought to be protected in this type of proceeding, the obvious advantage of allowing amendments in all but clearly unfair situations should be recognized. Also, the cost of having to hold another formal hearing must be carefully considered. In comparison to the available alternatives the more narrow reading of *Ruffalo* is to be preferred.<sup>112</sup>

#### D. *The Open Hearing, Venue, and a Problem at Home*

In addition to the issues noted above, two other significant procedural points were raised by Judge McCartney. The first was his attack against the requirement of a "closed hearing" under Rule 902.<sup>113</sup>

---

112. It seems appropriate here that the Court adopt an "actual prejudice" test similar to the one adopted with regard to Rule 904(b). While this rule may seem harsh, there is no doubt that the public interest being protected is great, especially because of the enormous power that judges wield. On the other hand, although a judge might lose his job, he is not subject to the same kind of deprivation of liberty as a criminal whose due process had been abused. Therefore, in a questionable situation the crucial balance should be struck more on the side of the public than on that of the judge. Richland Interview, 7/17/75, *supra* note 100. See CAL. GOV'T CODE ANN. §§ 11507, 11516 (West 1966) (concerning the amendment of formal charges in hearings under the California Administrative Procedures Act).

Several years later, Judge Noel Cannon also raised numerous "Ruffalo" objections throughout the course of proceedings against her. Petition for Review of Findings, Conclusions and Recommendation of Commission on Judicial Qualifications in Inquiry Concerning a Judge, No. 18, (Mar. 28, 1975), *passim* [hereinafter cited as, Cannon, Pet'n]. However, only one of these objections was mentioned by the court, and in spite of the fact that Judge Cannon prevailed as to that objection its nature was such as not to call in issue the more critical and far-reaching question raised in *McCartney*. In part, the Commission had broadly charged petitioner with unlawful interference with the attorney-client relationship on several occasions. Based on the evidence presented, the Commission drew the conclusions that: (1) Judge Cannon had not only tampered with the attorney-client relationship, as charged; but that (2) she had also interfered with the operation of the Public Defender's Office. Since there was no basis for the second conclusion in the charges, the *Cannon* court held that due process as defined in *Ruffalo* required that it be stricken, despite the fact that there was ample evidence supporting it. 14 Cal. 3d at 696, 537 P.2d at 910, 122 Cal. Rptr. at 790.

113. CAL. R. Cr. 902.

McCartney contended that the confidentiality of the proceedings ensured by Rule 902 was for his benefit alone and that he had the right to waive that benefit. The court properly rejected this argument, noting that "the provision for confidentiality also protects witnesses and citizen complainants from intimidation."<sup>114</sup> Moreover, since the proceedings were not criminal in nature there was no constitutional necessity of a public hearing.<sup>115</sup>

Secondly, McCartney objected to the Commission having set venue in Pomona when the majority of the witnesses involved lived in San Bernardino where Judge McCartney sat. The court supported the Commission, holding that under Rule 907 the Commission had discretion as to where the hearing would take place, and in the absence of a showing of abuse, the Commission's decision would be upheld.<sup>116</sup>

A more unusual problem arose in *Spruance* which required the court to determine whether the examiners had any power independently of the Commission to present charges of a judge's misconduct. The issue arose because there were several charges which the examiners felt had been clearly and convincingly proven, but which the Commission determined were "not sustained" by the evidence. The examiners urged that since the court undertakes an independent review of the record, the court was free to make findings and conclusions on any charge as to which evidence was presented, regardless of what the Commission's disposition of the matter had been.<sup>117</sup> The court emphatically disagreed, and stated that its power to sanction was contingent upon a Commission recommendation and that "[i]t would be entirely inconsistent . . . for us to consider in passing on the Commission's recommendation any allegations of . . . misconduct other than those which formed the basis of that recommendation."<sup>118</sup> It was also pointed out that, insofar as this proceeding was concerned, the examiners were counsel representing the Commission and, as such, they couldn't urge a position which their client did not take. Similarly, the Commission could not urge a position *sub silentio* through its agent, the examiners, which it had previously specifically rejected and had failed to raise.<sup>119</sup>

---

114. *McCartney v. Commission on Judicial Qualifications*, 12 Cal. 3d 512, 521, 526 P.2d 268, 274, 116 Cal. Rptr. 260, 266 (1974).

115. *Id.* at 520-21, 526 P.2d at 274, 116 Cal. Rptr. at 266.

116. *Id.* at 521, 526 P.2d at 274, 116 Cal. Rptr. at 266.

117. *Spruance v. Commission on Judicial Qualifications*, 13 Cal. 3d 778, 784-88 n.5, 532 P.2d at 1209, 1212-13 n.5, 119 Cal. Rptr. 841, 844-45 n.5 (1975).

118. *Id.*

119. *Id.*



## V. SUBSTANTIVE ISSUES

In 1973, Judge Leland W. Geiler of the Los Angeles Municipal Court achieved the dubious distinction of becoming the first judge in California history to be removed by order of the supreme court pursuant to a Commission recommendation.<sup>120</sup> Judge Geiler's proven offenses, constituting both "willful misconduct" and "prejudicial conduct," fell into three main categories: (1) use of vulgar and obscene language or gestures while acting in a judicial capacity; (2) committing vulgar and obscene acts and use of improper language while engaged in judicially related activities; and (3) committing arbitrary prejudicial acts in the courtroom which violated the attorney-client relationship between certain deputy public defenders and their indigent clients.<sup>121</sup>

Since the Commission had found that Judge Geiler's misdeeds constituted both "willful misconduct in office" (willful misconduct) and "conduct prejudicial to the administration of justice that brings the judicial office into disrepute" (prejudicial conduct), the court was constrained to define these offenses, a task which it had curiously avoided for eight years. It was concluded at once that "willful misconduct" was a graver offense than the lesser included "prejudicial conduct."<sup>122</sup> The court said "willful misconduct" should be

reserved for unjudicial conduct which a judge acting in his judicial capacity commits in bad faith, while . . . [prejudicial conduct] should be applied to conduct which a judge undertakes in good faith which nevertheless would appear to an objective observer to be not only unjudicial conduct but conduct prejudicial to public esteem for the judicial office. . . . [Prejudicial conduct] would also apply to willful misconduct out of office, i.e. unjudicial conduct committed in bad faith by a judge not then acting in a judicial capacity.<sup>123</sup>

---

120. *Geiler v. Commission on Judicial Qualifications*, 10 Cal. 3d 270, 515 P.2d 1, 110 Cal. Rptr. 201 (1973).

121. *Id.* at 277-80 n.6, 515 P.2d at 5-6 n.6, 110 Cal. Rptr. 205-06 n.6, (setting out the complete findings of the court as to Judge Geiler's bizarre activities).

122. *Id.* at 283-84, 515 P.2d at 9, 110 Cal. Rptr. at 209; see note 61 *supra*. The question has been raised as to whether "prejudicial conduct" is actually a "lesser included offense." The very definitions of "prejudicial conduct" and "willful misconduct" given by the court (see text immediately following this footnote), suggest that these offenses are mutually exclusive; *cf.* *People v. Thomas*, 58 Cal. 2d 121, 128, 373 P.2d 97, 100, 23 Cal. Rptr. 161, 164 (1962), *Richland Interview*, 7/17/75, *supra* note 100.

123. 10 Cal. 3d 284 & n.11, 515 P.2d at 9 & n.11, 110 Cal. Rptr. at 209 & n.11. Despite its classification as a "lesser offense," this was not to be taken as meaning the court would refuse to follow a removal recommendation based solely on "prejudicial conduct."

### A. *Bad Faith*

By "bad faith," the *Geiler* court said it meant a "pervasive course of conduct [by a judge] of overreaching his authority over subordinates," or that the judge had "intentionally committed acts which he knew or should have known were beyond his lawful power."<sup>124</sup> Upon this basis, the court concluded that those proven acts of Judge Geiler which fell into categories (1) and (3), above, constituted willful misconduct, whereas the category (2) acts constituted only prejudicial conduct.<sup>125</sup>

In *Spruance v. Commission on Judicial Qualifications*,<sup>126</sup> the court was again faced with a recommendation for removal based upon substantial bad faith misconduct. After a thorough review of the evidence presented to the special masters, the court concluded that

[t]aken as a whole the record indicates that [Spruance] engaged in a pervasive course of conduct of overreaching his judicial authority by deciding cases for reasons other than the merits, by improperly influencing another judge, and by using the judicial process to gain special favors for friends and political supporters. The record also shows that

124. *Id.* at 286, 515 P.2d at 11, 110 Cal. Rptr. at 211. The court was careful to point out that it had made no difference whether the judge's abuse of power resulted in just or unjust treatment of a particular defendant; nor did it matter that the judge had not intentionally sought to harm the interests of any defendants. What did matter was that the judge had used his power for personal ends. *Id.*

125. *Id.* at 284-85, 515 P.2d at 9-11, 110 Cal. Rptr. at 209-11. The court pointed out that the standard of a judge's behavior was to be viewed objectively, not subjectively. It was also clearly implied that all judges should know and would be held responsible for acting in accordance with the canons included in the ABA CODE OF JUDICIAL ETHICS. 10 Cal. 3d at 281-82, 515 P.2d at 8, 110 Cal. Rptr. at 208; *see*, *Spruance v. Commission on Judicial Qualifications*, 13 Cal. 3d 778, 796 & n.17, 532 P.2d 1209, 1221 & n.17, 119 Cal. Rptr. 841, 853 & n.17 (1975). In *Cannon v. Commission on Judicial Qualifications*, 14 Cal. 3d 678, 707 n.22, 537 P.2d 898, 918 n.22, 122 Cal. Rptr. 778, 798 n.22 (1975), the court noted that the CALIFORNIA CODE OF JUDICIAL CONDUCT was adopted by the Conference of California Judges effective January 1, 1975. The court went on to state that although the Code could not be relied upon in evaluating Judge Cannon's behavior, which occurred prior to its adoption, that it would apply to any judicial conduct occurring subsequent to its inception. *Id.*

In *Geiler* the impression was given that while the vulgar and obscene misconduct of Judge Geiler was certainly outlandish, it would not have resulted in removal but for the fact that his admitted prejudice against the Public Defender's office had rendered him incapable of administering justice in a fair and unbiased way, especially where indigents were concerned. Such conduct, the court said, "entailed the most insidious kind of official lawlessness . . .," 10 Cal. 3d at 286, 515 P.2d at 11, 110 Cal. Rptr. at 211. In spite of this and because Judge Geiler presented evidence showing a somewhat diligent record with no blemish of dishonesty or corruption upon it, he was not forbidden from thereafter practicing law in California. *Id.* at 287, 515 P.2d at 12, 110 Cal. Rptr. at 212.

126. 13 Cal. 3d 778, 532 P.2d 1209, 119 Cal. Rptr. 841 (1975).

[Spruance] has under the color of judicial office committed petty, vindictive, vulgar and otherwise unjudicial acts.<sup>127</sup>

In reaching its determination as to the appropriate sanction for Judge Spruance, the court inexplicably re-worded the already clear definition of "bad faith" that had been put forward in *Geiler*. This was all the more surprising because the offenses committed by Spruance were flagrant violations of the *Geiler* standards, and thus, with the possibility of confusion in the balance, there was no apparent need for redefinition.

Recall that in *Geiler* the court declared:

By 'bad faith,' . . . we mean a pervasive course of conduct [by a judge] of overreaching his authority over subordinates, [in which the judge] intentionally committed acts which he knew or should have known were beyond his lawful power.<sup>128</sup>

In contrast to this simple yet effective definition, the court in *Spruance* stated:

'[B]ad faith' entails actual malice as the motivation for a judge's acting ultra vires. The requisite intent must exceed mere volition; negligence alone, if not so gross as to call its genuineness into question, falls short of 'bad faith.' 'Bad faith' also encompasses acts within the lawful power of a judge which nevertheless are committed for a corrupt purpose, i.e., for any purpose other than the faithful discharge of judicial duties. In sum, 'bad faith' is quintessentially a concept of specific intent, requiring consciousness of purpose as an antecedent to a judge's acting maliciously or corruptly.<sup>129</sup>

The *Spruance* definition of "bad faith" interjected several new and potentially confusing concepts: (1) "actual malice;" (2) "exceeding mere volition;" (3) "specific intent;" and (4) "consciousness of purpose."

As a result of the new language in *Spruance*, some concern has arisen as to whether the court intended to merely restate the original *Geiler*

127. *Id.* at 795, 532 P.2d at 1220-21, 119 Cal. Rptr. at 852-53, Judge Spruance, like Judges Geiler and McCartney, wilfully mistreated Deputy Public Defenders, as well as other persons in his courtroom. He also had dismissed or otherwise favorably altered the disposition of cases involving friends, or relatives of friends. He tampered with the court records in one case involving his own traffic offense. In addition, he appointed private attorneys on many occasions to defend persons, at the court's expense, without first determining whether the Public Defender should be called in. Moreover, the appointments were primarily given to his acquaintances and political backers and not distributed fairly among the eligible attorneys on the basis of merit. *Id.* at 789-94, 532 P.2d at 1216-20, 119 Cal. Rptr. at 845-52.

128. 10 Cal. 3d 270, 286, 515 P.2d 1, 11, 110 Cal. Rptr. 201, 211 (1973).

129. 13 Cal. 3d at 796, 532 P.2d at 1221, 119 Cal. Rptr. at 853.

definition in new words, or whether the court actually intended to convey some new meaning and thereby change the test of "bad faith" in judicial disciplinary proceedings.<sup>130</sup> If there is a new meaning intended, the further question arises: In view of the "actual malice" and "specific intent" language in *Spruance*, what has become of that part of the *Geiler* definition of "bad faith" which says, "petitioner intentionally committed acts which he . . . [reasonably] should have known were beyond his lawful power?"<sup>131</sup> In other words, are each of the phrases "actual malice," "specific intent" and "consciousness of purpose" under *Spruance* equivalent to the one phrase used in *Geiler*, "intentionally committed?" Or does the language in *Spruance* now limit a finding of "bad faith" to just those situations where a judge specifically intends to and does commit an act which he *knew* to be beyond his lawful power?<sup>132</sup> If the court has intended to create a new meaning for "bad faith," then the *Spruance* rule is considerably stricter than that of *Geiler*; the unfortunate and inevitable effect of such a change would be to limit the Commission's effectiveness by making fewer those acts classifiable as "willful misconduct."

In spite of the plain meaning of "actual malice," "specific intent," and "consciousness of purpose," there are certain factors in *Spruance* that indicate the court really did not intend to change the *Geiler* definition. First, the *Spruance* language was stated immediately after and in apparent explanation of the *Geiler* definition of "bad faith."<sup>133</sup> Second, the court, finding "willful misconduct" in Judge Spruance's abusive mistreatment of one attorney (who had filed a motion to disqualify Spruance) stated "[i]t goes without saying that as a judge, petitioner *should have known* the proper method of handling [such a motion.]"<sup>134</sup> Third, there is the sentence in *Spruance* concerning "negligence . . . so gross as to call its genuineness into question . . .";<sup>135</sup> it is not clear, however, whether mere gross negligence would be sufficient to sustain a finding of specific intent, or whether it simply raises a question as to bad faith, but is not conclusive of it under *Geiler*. Regardless of what the court's intention actually was, one thing remained certain: Following *Spruance* the concept of "bad faith" was in a state

130. Interview with Kent L. Richland, Deputy Attorney General of California (examiner in *Cannon*), in Los Angeles, July 8, 1975. [Hereinafter cited as Richland Interview 7/8/75].

131. 10 Cal. 3d 270, 286, 515 P.2d 1, 11, 110 Cal. Rptr. 201, 211 (emphasis added).

132. Richland Interview 7/8/75, *supra* note 130.

133. 13 Cal. 3d 778, 795-96, 532 P.2d 1209, 1221, 119 Cal. Rptr. 841, 853.

134. *Id.* at 797, 532 P.2d at 1222, 119 Cal. Rptr. at 854.

135. *Id.* at 796, 532 P.2d at 1221, 119 Cal. Rptr. at 853.

of confusion. It was hoped by many concerned that this problem would be taken care of by the court in *Cannon*, but unfortunately this was not done.

### B. Mitigation

Concerning the substantive charges of misconduct in *McCartney*, the petitioner was found to have committed numerous acts constituting both "willful misconduct" and "prejudicial conduct." He was also found to have committed many unjudicial acts which, although not classifiable as "prejudicial conduct," because they were not damaging to the public esteem of the courts, were nevertheless wholly deplorable.<sup>136</sup> Much of Judge McCartney's wrongful conduct arose out of an on-going feud between him and the Public Defender's office as well as certain defendants. As a first line of defense, the judge alleged that his conduct was excusable because he had been seriously provoked by those persons whom he had eventually mistreated. The court vehemently rejected this contention, saying that under no circumstances may a judge allow his personal reactions over behavior in his courtroom to interfere with his impartial administration of justice.<sup>137</sup> Secondly, the judge stressed that he had been on the bench for only one and one-half years when the initial proceedings in the matter were begun. The court felt per-

---

136. 12 Cal. 3d at 531-36, 526 P.2d at 281-85, 116 Cal. Rptr. at 273-77. Briefly, Judge McCartney was found by clear and convincing evidence to have grossly mistreated many persons in his courtroom (including attorneys, defendants, and court employees) by addressing them in abusive language; to have improperly prevented certain defendants and their counsel from filing motions under CAL. CODE CIV. PRO. § 170.1 (West 1970) (to have him disqualified as a judge on their particular matter); to have assumed the role of an advocate in matters in which he was the judge; and to have become a witness in such matters. He was also proved to have been incessantly whistling, humming, and muttering profanities aloud "to himself" during courtroom proceedings; and on at least one occasion he was disrespectful and offensive toward the court's presiding judge in the presence of others. As to these last three items the court could not find official misconduct that was sanctionable. This was because there had been no showing of a substantial impairment to the public esteem for the judicial office as a result of these acts. In view of the fact that members of the public were constantly present in Judge McCartney's courtroom and were forced to endure his displeasing idiosyncrasies, it is astonishing that the court reached the conclusion it did, especially after describing the activities as deplorable. See note 152 *infra*. This type of behavior is innately cancerous to the judicial image and one wonders whether there was any public esteem left in Judge McCartney's court to be substantially impaired. Was such a showing really required? It seems obvious that the very occurrence of the acts is sufficient proof of their adverse effect upon the public image of the judiciary. Similarly, the court found itself unable to do anything about the gross inefficiency in the way Judge McCartney apparently ran his court. See note 141 *infra*.

137. 12 Cal. 3d at 537-39, 526 P.2d at 286-87, 116 Cal. Rptr. at 278-79.

suaed that much of the *prejudicial conduct* could have been due to mere inexperience and to some extent was excusable. What was even more significant to the court was the fact that, in many ways, Judge McCartney had demonstrated "unusual care in attempting to 'do justice' in the cases before him . . ." and had striven for "fundamental fairness in his sentencing."<sup>138</sup> It was the court's opinion that "[s]uch obvious commitment to fairness and innovative procedural reform . . . is to be encouraged and may . . . properly be considered . . . in mitigation of proven misconduct . . ."<sup>139</sup> On the strength of these mitigating factors, the court denied the Commission's recommendation for removal and imposed the sanction of public censure.<sup>140</sup>

Although not specifically stated by the court, it was nonetheless clear that what had been said regarding mitigation applied only to prejudicial conduct of the judge. It could not have held true for his willful misconduct, because those acts were committed in manifest bad faith.

Reviewing the substantive aspects of the *McCartney* decision, several important points emerge: (1) There were certain very bad acts committed by the judge as to which the court felt powerless to impose disciplinary sanctions;<sup>141</sup> (2) it was established that *provocation* can be

138. *Id.* at 539-40, 526 P.2d at 287, 116 Cal. Rptr. at 279.

Where a jail sentence for a minor misdemeanor violation might result in defendant's loss of employment he imposed a weekend sentence. If a fine was to be imposed upon a defendant for whom payment in one sum would be unduly harsh, petitioner often permitted payment . . . over a period of time. He was liberal in assigning first-time vehicle offenders to traffic school. He has also showed (sic) unusual initiative in creating opportunities for rehabilitative treatment of alcoholic defendants. He personally established a system whereby the municipal court judges could routinely refer alcoholics to local . . . programs and [he personally] monitored the defendants' participation in rehabilitation.

*Id.* at 539-40, 526 P.2d at 287, 116 Cal. Rptr. at 279.

139. *Id.* at 540, 526 P.2d at 288, 116 Cal. Rptr. at 280.

140. *Id.* In denying the Commission's recommendation, the court was persuaded to give greater weight to the recommendation of the special masters that censure rather than removal be imposed. *Id.* This seemed somewhat contrary to the implications made in *Geiler* (see note 80 *supra* and accompanying text), and, in effect, served to undermine the Commission. It was probably this holding that prompted the Commission's recommendation that CAL. R. CT. 912 be amended. See note 57 *supra* and accompanying text.

141. As pointed out in note 136 *supra*, Judge McCartney was also charged and found to have run his courtroom in a grossly inefficient manner. For example, it often took him as long as fifteen minutes to rule upon a simple evidentiary objection. Despite the substantial evidence in this regard, the court found that since no bad faith was involved (quite the contrary—the court found that his ineptness stemmed from "an effort to attain a degree of diligence and studiousness . . . which was unrealistic and frequently unjustified"), this form of judicial "misconduct" was not the proper subject of discipline. 12 Cal. 3d at 536, 526 P.2d at 285, 116 Cal. Rptr. at 277. The burden of handling the problem was placed on the presiding judges of the local courts who were thought

no defense for bad faith misconduct; (3) shortness of tenure is clearly only available to "mitigate" certain offenses falling into the "prejudicial conduct" category and not those constituting "willful misconduct;" and (4) those highly commendable actions of Judge McCartney which the court found could be considered in mitigation of his "proven misconduct" must be recognized as truly exceptional and unusual—even among judges.<sup>142</sup>

Just as the court's opinion in *Spruance* had muddied the waters with respect to "bad faith," so it stirred them up in the area of "mitigation." Discussing the judge's attempt to exonerate himself, the court stated in unequivocal terms consistent with the implied statement of *McCartney*:<sup>143</sup> "[T]here can be no mitigation for maliciously motivated judicial conduct."<sup>144</sup> Accordingly, since Judge Spruance was found to have acted in bad faith on numerous occasions, and since the court could not ". . . conceive that there are any circumstances in which bad faith itself can be excused by extraneous circumstances," no credit whatsoever was given to Spruance's assertions of mitigating circumstances.<sup>145</sup>

This very desirable holding was brought into serious question, however, by a remark later in the court's opinion:

We find . . . [Judge Spruance's] motives far worse than in . . . *McCartney*, where we were persuaded that mitigating factors successfully rebutted any inference of bad faith.<sup>146</sup>

Placed alongside one another, these two pronouncements appear to be and in fact are contradictory. One wonders what the court intended in this regard. Is it saying that when *McCartney* was decided, mitigation of willful misconduct *was* possible through an extraordinary showing of *redeeming qualities*, but that under *Spruance* even such a showing *would not* serve to mitigate *maliciously motivated* judicial con-

---

better able to cope with it. *Id.* This raises the question of whether there is a basis in both these areas of judicial shortcomings for expanding the Commission's powers to provide suitable remedies. It is doubtful that presiding judges could be effective in this regard. See Boisvert, *The Unwritten Appeal: An Injustice to Judges*, L.A. Times, Sept. 3, 1975, Part II, at 7, cols. 1-5.

142. In view of the extraordinary nature of Judge McCartney's mitigating behavior, this writer questions to what extent the potentially dangerous doctrine of "mitigating behavior" should be employed, if the Commission is not to be functionally weakened. See text accompanying note 147 *infra*.

143. See text following note 140 *supra*.

144. 13 Cal. 3d at 800, 532 P.2d at 1224, 119 Cal. Rptr. at 856.

145. *Id.*

146. *Id.* at 802, 532 P.2d at 1225, 119 Cal. Rptr. at 857.

duct? Or is the court saying that it is only because Judge Spruance's motives were "far worse" than McCartney's that no consideration was given to possible mitigating circumstances? That is, are there now two levels of willful misconduct, the *maliciously motivated* and *far worse Spruance* variety which is non-mitigable, and the *ordinary, not-so-bad McCartney* variety which is mitigable? To put it another way, has the prerequisite for allowing mitigation been changed from a finding of extraordinary *redeeming qualities*, as it was in *McCartney*, to one of non-malicious motivation, as was apparently used in *Spruance*? Or are both standards now a prerequisite? Or did the court even stop to consider the ramifications of what it was saying?

In an attempt to reconcile the confusion spawned in the *Spruance* opinion, one must commence with an assessment of the ultimate desirability of "mitigation" as a defense in judicial disciplinary proceedings. This writer suggests that there *might* be certain rare instances (such as in *McCartney*) where mitigation could be justified, but as a general proposition it should be abandoned. Even in *McCartney*, where the mitigating circumstances were of a highly unusual and commendable nature, the actual suffering and abuse endured by those persons whom Judge McCartney so cavalierly mistreated was in no manner lessened because of the so-called "mitigating circumstances." Keeping sight of the fact that it is the general public and court personnel who suffer as a result of a judge's misbehavior and are the ones sought to be protected by the Commission, it is inherently destructive of the Commission's purpose to allow mitigation in any but the most extreme circumstances.<sup>147</sup>

---

147. It is also important to note that the doctrine of "mitigation," by definition, has nothing whatever to do with "rebutting" inferences of "bad faith," as the *Spruance* Court suggested. *Id.*

In *McCartney*, the court concluded that in at least four general areas the petitioner had committed numerous specific acts of "willful misconduct." In every instance, a finding of "bad faith" was a *prerequisite* to drawing such a conclusion. Thus, the so-called "mitigating circumstances" played no part in making the initial determination as to whether any "willful (i.e., "bad faith") misconduct" had occurred. (In fact, in the absence of such a finding, there would have been nothing to "mitigate"). It is only *after* a finding of "willful misconduct" had been made that the "mitigating circumstances" were permitted for consideration in counter-balancing, or neutralizing, the effect of the proven "bad faith" involved. The distinction is critical, because if the "rebuttal" language of *Spruance* is taken literally, then in making its determination as to "bad faith" in any given instance, the court will have to consider whether extraneous acts of good faith "rebut" the inference of "bad faith" which arise out of the act itself. Yet, such was declared not to be the rule in another part of the opinion. *Id.* at 800, 532 P.2d at 1124, 119 Cal. Rptr. at 856. On the other hand, if the *McCartney* rule is to be followed, as would be proper, then the determination of "bad faith" should be made



### C. Prejudicial Conduct

The court in *Cannon v. Commission on Judicial Qualifications*<sup>148</sup> seems inadvertently to have worked itself into a problematic posture with regard to prejudicial conduct. One of the charges relating to Judge Cannon's so-called "bizarre conduct" alleged that in 1974, she

[h]ad summoned security and maintenance personnel to her apartment to lodge a complaint. During a half hour confrontation she directed profanities to the manager, including, 'I'm going to shoot you, George, you son of a bitch. And you are going to slowly die.'<sup>149</sup>

Judge Cannon argued unsuccessfully that such conduct, while admittedly proven, could not constitute "prejudicial conduct" because it was committed in the privacy of her own home. The court reasoned obscurely that since she had summoned the men and had raucously tiraded them, the event was somehow *not* carried out in the privacy of her abode.<sup>150</sup> The real problem, apparently overlooked by the Judge Cannon, was that since she was not acting in a judicial capacity, in order to label her action as "prejudicial conduct" under the controlling *Geiler* definition, it was required that the evidence prove that she had willfully misconducted herself (i.e. that she had acted out of actual malice, or that she knew or should have known that what she was doing was unlawful).<sup>151</sup> But there was no proof to this effect. Consequently, the court's conclusion of prejudicial conduct in this regard appears unfounded according to the standards set in *Geiler*.

This raises important questions of policy: What precisely is the meaning of "bad faith" in this context, and what should it be? If the judge must act beyond his lawful power, or with actual malice, as present rules dictate, very little of the non-judicially related behavior which the *Geiler* court was obviously aiming to include under "prejudi-

---

entirely apart from any considerations of "mitigating circumstances." Regretably, the opinion in *Cannon* sheds no new light on the subject.

In passing, it is noteworthy that the idea of "mitigation" is already being grossly abused, for example, Judge Cannon offered in mitigation of her atrocious behavior the facts that she had graduated from Stanford Law School and that she had once been employed by the California Department of Corporations.

148. 14 Cal. 3d 678, 537 P.2d 898, 122 Cal. Rptr. 778 (1975). The *Cannon* opinion consists mainly of a thorough recitation of the court's own findings and conclusions. The full details of Judge Cannon's incredible behavior are set out in extensive footnotes in the opinion. See especially *id.* at 682 n.4, 537 P.2d at 900 n.4, 122 Cal. Rptr. at 780 n.4.

149. *Cannon Pet'n*, *supra* note 112, at 50-51.

150. 14 Cal. 3d at 704-05, 537 P.2d at 916, 122 Cal. Rptr. at 796.

151. *Geiler v. Commission on Judicial Qualifications*, 10 Cal. 3d 270, 284 n.11, 515 P.2d 1, 9 n.11, 110 Cal. Rptr. 201, 209 n.11 (1973).

cial conduct" would come within the definition. Yet, as the *Cannon* holding clearly indicates, the court considers that certain improper out-of-court activity by a judge should be subject to discipline. In light of this conflict, it is suggested that, at the very least, a separate definition of "bad faith" (as it relates to "prejudicial conduct") is needed.

A preferable approach would be to eliminate the concept of "bad faith" entirely from this phase of judicial misconduct. It seems sufficient that *any* conduct committed *anywhere* by a judge which is so offensive as to bring the judiciary into disesteem ought to be sanctionable, regardless of the mens rea involved. There is certainly ample support for this position in the various codes of judicial ethics and conduct.<sup>152</sup>

There were also two other proven charges of "bizarre conduct" which easily came within the *Geiler* rule, but were found by the court not to constitute "prejudicial conduct." In one instance Judge Cannon had for a number of months in 1972 kept a "[m]echanical canary in her chambers. The chirping of the device was audible during proceedings in the courtroom through the partially open chamber door."<sup>153</sup> In the other instance, "[p]etitioner . . . , during the summer and fall of 1972 and early part of 1973, brought a small dog to the courtroom. She either held the dog or maintained it under the bench while court was in session."<sup>154</sup> Unquestionably, this conduct was committed while the judge was acting in her judicial capacity. Although no inference of

---

152. Canon Two of the ABA CODE OF JUDICIAL CONDUCT states: "A Judge Should Avoid Impropriety and the Appearance of Impropriety in All His Activities" (emphasis added). Paragraph one of Canon Two enlarges the basic precept: "A judge should respect and comply with the law and should *conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary*" (emphasis added). The commentary to Canon Two adds: "*Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. He must expect to be the subject of constant public scrutiny. He must therefore accept restrictions on his conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.*"

This general proposition was noted with approval both in *Geiler* and *Spruance*. See note 125 *supra*; cf. *Cannon v. Commission on Judicial Qualifications*, 14 Cal. 3d 678, 697 n.22, 537 P.2d 898, 918 n.22, 122 Cal. Rptr. 778, 798 n.22 (1975).

153. As the Attorney General phrased it, "[t]he bird's sound was a source of comment and wonderment for those in the courtroom." Respondent's Brief at 66, *Cannon v. Commission on Judicial Qualifications*, 14 Cal. 3d 678, 537 P.2d 898, 122 Cal. Rptr. 778 (1975) [hereinafter cited as Resp. Br., *Cannon*]. See *Cannon v. Commission on Judicial Qualifications*, 14 Cal. 3d 678, 703-04, 537 P.2d 898, 915-16, 122 Cal. Rptr. 778, 795-96 (1975).

154. *Cannon Pet'n*, *supra* note 112, at 48-9; Resp. Br., *Cannon*, *supra* note 153, at 65, 69; see *Cannon v. Commission on Judicial Qualifications*, 14 Cal. 3d 678, 703-04, 537 P.2d 898, 915-16, 122 Cal. Rptr. 778, 795-96 (1975).

"bad faith" can be drawn here, there is little doubt that the aural presence in the courtroom of a mechanical bird (kept chirping all day long at the judge's specific instruction) and the physical presence of a canine is detrimental to the judicial image. As such, it is "prejudicial conduct." The court itself emphatically stated that this conduct was "clearly improper in a judicial atmosphere."<sup>155</sup> One wonders how it could have reached this conclusion and still found the behavior to be not "prejudicial to the public esteem of the judicial office."<sup>156</sup>

On reflection, it appears that what the court has done in these instances is to look at the "gut-level" seriousness of the particular conduct, rather than at the rules it has established, in determining what constitutes "prejudicial conduct." That is, having applied the wrong test as to the apartment conduct, a relatively more serious offense, and having found it to be "prejudicial," the court, using the same standard, could not very well have found that the canary-and-dog conduct, a relatively less serious offense, was also prejudicial, although it took place in the courtroom and clearly came within the *Geiler* rule.

In both *Spruance* and *Cannon* the evidence was so strong and the misconduct was so egregious that removal was inevitable. Unfortunately, but probably on this account, the court has become inattentive, failing to apply consistently the rules it has established and disregarding the dangers of carelessly chosen language. Some confusion and contradictions have already resulted from this, and it is hoped the court will recognize and remedy the situation before more problems arise. This is particularly crucial in the formative years of this new area of law.

## VI. ACA 96

The most recent major development in the area of California judicial discipline occurred in November, 1976, when the electorate adopted ACA 96, a proposed constitutional amendment which embodies expansive revisions of the existing system.<sup>157</sup> One sorely needed change effected by the amendment was the bestowal upon the Commission of a new name: The Commission on Judicial Performance.<sup>158</sup> Hopefully, this modification will enable the general public and practicing attorneys to identify the Commission with its actual function—the monitoring of judicial performance.

---

155. 14 Cal. 3d at 703-04, 537 P.2d at 915-16, 122 Cal. Rptr. at 795-96.

156. See note 125 *supra*.

157. ACA 96, *supra* note 35.

158. *Id.*

Another, and perhaps the most significant change, brought by the passage of ACA 96 involved a provision which empowers the Commission to issue (not merely to *recommend*) a form of sanction called "private admonishment" in situations where a judge is found to have engaged in an improper action or a dereliction of duty.<sup>160</sup> This addition to the Commission's powers is especially meaningful because it increases the Commission's capacity to deal with disciplinary problems of a relatively less serious nature. Although these problems constitute the majority of judicial offenses, they have previously not fallen within the constitutional criteria for discipline, as defined by the California Supreme Court.<sup>160</sup> Regrettably, however, the private admonition has been made subject to supreme court review.<sup>161</sup> Although this feature will detract somewhat from the usefulness of the sanction, its mere existence marks the taking of a considerable step forward.

A third change was made with regard to enlarging the grounds upon which a judge could be disciplined. Now, a judge may be sanctioned for an "inability" to perform judicial duties, whereas in the past only a "willful and persistent failure" of performance could lead to discipline. Moreover, the requirement of a "willful" failure has been dropped, making state of mind irrelevant—as it should be.<sup>162</sup>

The final noteworthy modification embodied in ACA 96 is that from now on a panel of seven appellate court justices will determine matters of discipline involving a member of the supreme court.<sup>163</sup>

## VII. CONCLUSION

Before drawing conclusions from which constructive recommendation may be fashioned, it is meaningful to consider judicial discipline contextually—in light of the overall administration of justice. On the one hand, the power judges wield is undeniably awesome. It is also undeniable that *some* judges abuse that power by misbehaving, while others are incapacitated and some incapable of handling it.<sup>164</sup> Because

---

159. *Id.*

160. Frankel—*Accountability*, *supra* note 71, at 414, 430.

161. ACA 96, *supra* note 35.

162. *Id.*

163. *Id.*

164. [W]e must be realistic enough to recognize that judges, like all of us . . . are human. Some are lazy. Some become ill and fail to realize that they are no longer capable of performing their duties properly. Some, after many years of distinguished service, become senile. Some drink too much. And some—very few—may succumb to temptation and sell justice to the highest bidder.

Excerpt from Senator Joseph D. Tydings' address to the 1966 Nat'l Conf. of Bar Presidents, reprinted in 49 J. AM. JUD. Soc'y 236 (1966).

of this, the public's compelling need to have these types of judges eliminated or rehabilitated is self-evident, and itself justifies a strong regulatory body.

On the other hand, the importance of an independent judiciary is tremendous: In a very real sense the continued success of American jurisprudence depends on it. Inevitably, however, the greater a commission's power of discipline over judges becomes, the greater is the chance that their independence will be compromised.<sup>165</sup> Finally, the inherent and insurmountable limitations of any regulatory body such as the Commission must be acknowledged and respected, for a "commission" can only be expected to do so much. Prior to and beyond certain points there must be other safeguards to ensure progressive development in the administration of justice.<sup>166</sup>

Given that the institution of judicial discipline is here to stay, and that the opposing public policies and natural limitations noted above are always at work, the question which must be constantly asked and re-answered is: Should the Commission be given more or less power? Similarly, should it be extended more or less independence? It is clear that the general public, the bar, and the bench as well, will be best served to the extent that the Commission's *fullest* potential is actualized.

Realistically, the most that can presently be said of judicial discipline in California is that a modest and commendable beginning has been made.<sup>167</sup> Essentially, there are two ways in which the Commission's effectiveness can be increased. One is by the legislature, and the other

---

165. See *Palmore v. United States*, 411 U.S. 389, 410 (1972) (Douglas, J., dissenting).

166. In this regard California could do much to improve the process by which judges are *selected*. If selections were made solely on the basis of qualifications, instead of the numerous other factors which result in judgeships, then many of the judges who might become the subject of Commission inquiry and court discipline could be screened out initially. See Hufstedler, *A Better Method of Approving Appointment of Appellate Judges*, 49 CAL. ST. B.J. 104 (1974); Thompson, *Selection of Judges of the California Court of Appeal*, 48 CAL. ST. B.J. 381 (1973); cf. Brown, *Governor's View of Judicial Selection*, 49 L.A.B. BULL. 405 (1974); see also Nelson, *Variations on a Theme—Selection and Tenure of Judges*, 36 S. CAL. L. REV. 4 (1962).

Another mode of improving judicial performance is through educational programs designed to give judges the specialized knowledge they need to function efficiently. (Here, there is little difference between a medical specialist and a judge; medical specialists are required to have extended training, why aren't judges?). California has begun to do quite a lot in this area. A Center for Judicial Education and Research (CJER) has been established in Berkeley. Many courses and materials, similar to those given by the Continuing Education of The Bar, are supplied by the CJER. See Li, *New Look in California Judicial Education*, 49 L.A.B. BULL. 421 (1974).

167. See Frankel—*Accountability*, *supra* note 71, at 430.

is by the court. As pointed out in some detail above, there is much that the California Supreme Court can presently do to help solidify and improve the system as it now exists. For instance, instead of refusing to utilize sanctions as it has in the past,<sup>168</sup> the court could start playing a more active and meaningful role by taking genuine responsibility and initiative in this area. Additionally, the court will have the continuing opportunity in future years to thoughtfully and creatively work with the new tools provided through ACA 96.

Finally, an openness to new and better forms of discipline and procedure, and a willingness to try them, should be maintained. Through adopting these attitudes, and carrying them into action, the position of California as a leader in the field of judicial discipline will be assured. Such results are more than worth the relatively small amount of time and consistent effort required to achieve them.

*Wilbank J. Roche*

---

168. See *McCartney v. Commission on Judicial Qualifications*, 12 Cal. 3d 512, 535-37, 526 P.2d 268, 284-85, 116 Cal. Rptr. 260, 276-77 (1974) (where the court found the judge's behavior deplorable but would not sanction him); note 136 *supra*.

In some respects, it is just as well that the court has decided not to take initiative. Having failed to do so, the burden is placed squarely upon the legislature to broaden the Commission's powers. If such expansion is made, it will tend to be more secure than a judicial broadening that could easily be reversed with a change of the court's make-up. In this manner, a recurrence of the unfortunate result in *Stevens* (see text accompanying notes 37-38 *supra*) would be virtually impossible. Telephone Interview with Jack E. Frankel, Executive Secretary of the California Commission on Judicial Qualifications, in San Francisco August 6, 1975 [hereinafter cited as Frankel Interview 8/6/75] (Grateful acknowledgment is made to Mr. Frankel for his kind cooperation in supplying various information and materials used in the preparation of this article. It should be noted, however, that the opinions stated herein are the author's alone, and they do not necessarily reflect those of Mr. Frankel or any past or present member of the Commission, unless specifically so indicated).