No. _____

**IN THE**
**Supreme Court of the United States**

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**In re**
**THE LAW OFFICES OF NINA RINGGOLD AND NINA RINGGOLD,** *Petitioners,*

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**On Petition for a Writ of Mandamus to the California Court of Appeal Second Appellate District**

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# APPENDIX TO PETITION FOR A WRIT OF MANDAMUS

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**APPENDIX A**

Filed 7/10/19

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.115(a), prohibits courts and parties from citing or relying on opinions courts and parties from citing or relying on opinions not certified for publication or ordered published for purposes of rule 8.111(a)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT DIVISION FOUR

LISA TURNER et al.,
Plaintiffs and Appellants,

v.

THE RULE COMPANY et al.,
Defendants and Respondents.

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B248667, B250084,
B261032

(Los Angeles County Super. Ct. No. BC463850)

LISA TURNER et al.,
Plaintiffs and Appellants,

v.

HARTFORD CASUALTY
INSURANCE COMPANY,
Defendant and Appellant;

THE RULE COMPANY et al.,
Defendants and Respondents

---

B256763

(Los Angeles County Super. Ct. No. BC463850)
CONSOLIDATED APPEALS from judgments and orders of the Superior Court of Los Angeles County, Yvette M. Palazuelos, Judge. Affirmed.

Law Offices of Amy P. Lee and Amy P. Lee for Plaintiffs and Appellants Marian Turner and Lisa Turner.

Law Offices of Nina R. Ringgold and Nina R. Ringgold for Plaintiff and Appellant Cornelius Turner.

Cozen O'Connor, Gilcrist & Rutter, Frank Gooch III and Carolyn Alifragis, for Defendant and Respondent The Rule Company, Inc.

Smith Ellison, Michael W. Ellison and Susan L. Goodkin, for Respondent Craig Ponci and Cross-Appellant Hartford Casualty Insurance Company.

Soltman, Levitt, Flaherty & Wattles and Philip E. Black for Defendant and Respondent Thornhill & Associates, Inc.

## INTRODUCTION

On July 24, 2008, plaintiff and appellant Lisa Turner (LTurner) was seriously injured in a fall in the shower of the Los Angeles home owned by her parents, plaintiffs and appellants Marian Turner (MTurner) and Cornelius Turner (CTurner). The shower stall glass was not tempered. [1] and the lacerations required the amputation of one arm.

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[1] Appellants refer to themselves MTurner, and CTurner, and we will maintain these individually as LTurner, designations. We refer to appellants collectively as the Turners. LTurner's sister, Dorian Turner, was also an owner of the home and for a time was a defendant in the federal litigation. She is not a party to these proceedings.

The litigation arising out of LTurner's accident and pre- and post-accident insurance coverage issues has spanned many years and gone back and forth between the federal and state court systems, as well as up and down the appellate ladders in both. The Turners sued a number of parties. A final judgment was entered on April 25, 2016; every defendant prevailed.

In these consolidated appeals, we dismiss several purported appeals taken from nonappealable orders and affirm the following: monetary discovery sanctions payable to respondent The Rule Company (Rule); judgments in favor of Rule, Craig Ponci, and Thornhill & Associates, Inc. (Thornhill); and the postjudgment order awarding Rule costs as the prevailing party. We also grant Rule's motion for sanctions for a frivolous appeal in case number B256763. (Cal. Rules of Court, rule 8.276). We assess sanctions jointly and severally against counsel for appellants, the Law Offices of Nina R. Ringgold and Nina R. Ringgold, the Law Offices of Amy P. Lee and Amy P. Lee, in the sum of $21,366; payable to Rule, and in the additional sum of $8,500, payable to the clerk of this court.

These matters were argued and submitted for decision on May 10, 2019. On June 13, 2019, counsel for CTurner advised this court that her client had died; she requested a stay pending appointment of a personal representative. To date, no notice of appointment has been received. As these appeals were already under submission, however, a stay is not required. Pursuant to this court's inherent power, and because there is no prejudice to any party, this opinion is deemed filed nunc pro tunc, effective May 13, 2019. (See *McPike v. Heaton* (1900) 131 Cal. 109, 111.) For the purpose of all post-appeal matters, time shall run from July 10, 2019.

## PROCEDURAL OVERVIEW

### I. Federal Lawsuits

This litigation began in federal court. Because one of appellants' jurisdictional challenges to state court proceedings is based on orders and decisions made in the federal forum, we outline the federal proceedings in some detail. Our sources for these facts include petitions for extraordinary relief filed by appellants in this court, an unpublished opinion in LTurner's state court personal injury action

(*Turner v. Turner* (Sept. 19, 2013, B241264) [nonpub. opn.] (*Turner I*)), various orders in the United States District Court, and an unpublished per curiam opinion by the United States Court of Appeals for the Ninth Circuit (Ninth Circuit) (*In re Hartford Litigation Cases* (2016) 642 Fed.Appx. 733):

On July 22, 2010, Californian LTurner sued her father, Mississippian CTurner, for personal injuries in the United States District Court for the Central District of California. LTurner soon added her mother and sister, also residents of Mississippi, as defendants.

CTurner initiated a third party complaint against Hartford Casualty Company, his homeowner's insurer; Craig Ponci, Hartford claims adjuster; Rule, the independent insurance broker that arranged for coverage through Hartford; Rule employees Nadja Silletto, Norma Pierson, Tony Gaitan, and Elaine Albrecht; Thornhill & Associates, Inc., the insurance adjusting company retained by Rule to investigate LTurner's claim; and Western Surety Company.[2] Together, LTurner and MTurner filed

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[2] It is not clear from the record, but it appears Western Surety Company was the Turners' homeowner's insurance carrier before Hartford. Western is not a party to these proceedings.

their own third party complaint against the same third party defendants.

The two third party complaints initially asserted only state law claims; the federal court characterized "the primary dispute" as whether the third party defendants were required to provide insurance coverage for LTurner's accident. The federal court accepted pendent jurisdiction over both third party complaints.

In April 2011, LTurner presented the federal district court with a stipulation for entry of judgment against MTurner in the amount of $4.1 million and a dismissal of the complaint against Dorian Turner. The proposed judgment did not address LTurner's allegations against her father, however; and the federal trial judge declined to sign it. Third party defendants Hartford and Ponci also objected, contending the proposed stipulated judgment was collusive and not reasonable.

In reviewing the stipulation, the federal trial judge noted the third party complaints alleged state law claims against California entities and individuals and involved "complex issues that [were] far from being resolved." Although the personal injury suit was based on diversity jurisdiction, the pendent claims were

not; and they appeared to "substantially predominate" over the personal injury allegations. The federal trial judge scheduled a hearing to determine whether the parties should be realigned and the entire matter dismissed for lack of diversity jurisdiction.

In response, the Turners filed an amended third party complaint that added federal discrimination causes of action. On May 19, 2011, the federal district court realigned the parties and dismissed LTurner's personal injury action without prejudice to her filing a state court personal injury lawsuit. (*Turner I, supra,* B241265, at p. 4.)

The two third party complaints were consolidated under one case number and remained in federal court. Appellants then voluntarily dismissed the federal claims. With only state claims remaining, the federal court dismissed the consolidated third party complaint on November 10, 2011, also without prejudice to the Turners' pursuing the claims in state court. This order momentarily ended litigation in the federal district court.

**II. State Court Litigation**

Meanwhile, appellants already had begun filing lawsuits in the Los Angeles County

Superior Court. On June 17, 2011, while the federal third party complaints were still pending, CTurner filed a similar action here, against the same defendants, alleging state and federal claims (*Turner v. Hartford,* Super. Ct. Los Angeles County, 2011, No. BC463639). Three days later, on June 20, 2011, two new state court actions were filed: LTurner sued for her personal injuries (*Turner v. Turner,* Super. Ct. Los Angeles County, 2011, No. BC463103) and all three Turners initiated this lawsuit (*Turner v. Hartford*, Super. Ct. Los Angeles County, 2011, No. BC463850), which mirrored the state claims in the still pending federal third party complaints, as well as the CTurner complaint filed three days earlier. Rule removed only the CTurner lawsuit (case no. BC463639) to federal court.

On December 6, 2011, one month after the federal court dismissed the consolidated third party complaint, the Turners filed a first amended complaint (FAC) in this action. Two other events occurred the same day: LTurner and MTurner initiated yet another lawsuit against the same defendants based on the same allegations as in this action (*Turner v. Hartford*, Super. Ct. Los Angeles County, 2011, No.

BC474698), and CTurner voluntarily dismissed without prejudice his lawsuit that had been removed to federal court (case no. BC263639). After CTurner voluntarily dismissed his individual state court complaint, notices of related cases were filed in the trial court.[3]

LTurner soon proposed to resolve her state court personal injury action on the same terms she presented to the federal district court. By ex parte application, a superior court judge signed the $4.1 million stipulated

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[3] The notices of related cases complied with rule 3.300(a) of the California Rules of Court: "A pending civil case is related to another pending civil case, or to a civil case that was dismissed with or without prejudice . . . if the cases: [¶] (1) Involve the same parties and are based on the same or similar claims; [¶] (2) Arise from the same or substantially identical transactions, incidents, or events requiring the determination of the same or substantially identical questions of law or fact." All state court actions were assigned to one department. Appellants maintain this case is really "two cases [that] remain separate and were consolidated for pre-trial proceedings while the cases were pending in the United States District Court." The Turners have not explained this statement or why they filed three separate state court actions, in addition to the personal injury lawsuit, other than to suggest the federal judge ordered them to do so. But the United States District Court made no such order; it did no more than dismiss the federal actions without prejudice to appellants' initiating a state court action. (See fn. 5.)

judgment the federal court previously rejected. Hartford moved to vacate the stipulated judgment, but the superior court denied the motion.[4]

The FAC in this action included 19 causes of action against eight defendants[5]: Hartford and its claims adjuster Ponci; Rule and Rule employees Silletto, Pierson, Gaitan, and

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[4] Our colleagues in Division Three reversed this ruling, reviving LTurner's personal injury action. (*Turner I, supra,* B241265) [nonpub. opn.].)

[5] Appellants' appendix does not include the original complaint in this action. The Turners filed a second "first amended complaint" in this case on June 22, 2012. The trial court struck this pleading on June 29, 2012, the date of the hearing on defendants' demurrers to the FAC. The caption page for the stricken pleading differed from the earlier first amended complaint; it read, "First Amended Complaint Following Consolidation Order of United States District Court for the Central District." This statement, although accurate, is a bit misleading. The federal judge consolidated the separate third party complaints and ordered the filing of a single consolidated third party complaint in that forum. The federal consolidated complaint was subsequently dismissed without prejudice to appellants initiating a state court action. The federal judge never ordered the filing of a consolidated lawsuit in state court.

Albrecht; and Thornhill. This pleading was more than 100 pages long and contained 469 paragraphs. There were two distinct aspects to the lawsuit: The Turners alleged racial discrimination, bad faith, and various torts as a result of (1) conduct that predated the Hartford homeowner's policy; (2) the issuance, annual renewals, and eventual nonrenewal of the Hartford policy; and (3) the investigation of LTurner's accident.

Specifically, the FAC alleged MTurner and CTurner purchased the property in 1989. Rule and Silletto provided insurance brokerage services for the Turners from the time they purchased the home. In October 2004, Siletto and Rule "changed insurance carriers for the property to Hartford." At some point, not specified, Rule advised MTurner and CTurner that they were being overcharged for the Hartford policy.

As noted, LTurner's accident occurred on July 24, 2008. Grace Farrell reported the accident to Rule on August 13, 2008.[6]. Farrell also provided Ponci with LTurner's medical records.

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[6] The pleading does not explain Farrell's relationship to the Turners.

For her part, MTurner alleged she "assigned all rights and interest in [her] claims and causes of action of any possible nature, past and future, against [Hartford, Rule, Thornhill] . . . any individual, and/or any third party that are transferrable by law to LTurner." Most of the post-accident allegations concerned conduct by Hartford, Rule, and Rule employees. Very few allegations involved Ponci or Thornhill. Ponci was alleged to have written a letter to MTurner and CTurner "falsely claiming that LTurner presented a claim to Hartford on August 13, 2008." Thornhill was alleged to have been retained and "used" by Rule. Thornhill staff photographed LTurner and her home, even though Thornhill knew "[LTurner] had not signed a claimant designation and there was not then a claim pending."

Defendants demurred to the FAC. The demurrers were sustained without leave to amend as to six causes of action and with leave to amend as to the remaining causes of action.

The Turners filed a true second amended complaint (SAC) in this action on August 1, 2012. (See fn. 5.) Defendants again demurred. This time the trial court sustained the

demurrers without leave to amend as to all causes of action against Ponci and Thornhill, and the trial court ordered the dismissal of those parties. Appellants appealed (case no. B248667).

Demurrers by Hartford, Rule, and Silletto to the causes of action in the SAC for mistake, reformation, broker negligence, breach of contract, and breach of the covenant of good faith and fair dealing were sustained with leave to amend. The Turners filed a third amended complaint against those parties.[7] The third amended complaint remained the operative pleading until judgments were entered in defendants' favor. Appellants appealed from these judgments (case nos. B252461, B256763, B268792).

As vigorous as the pleading challenges were, they were secondary to the discovery clashes that began soon after the litigation moved to state court. On June 17, 2013, the trial court denied appellants' request for a protective order;

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[7] Appellants purported to add Ponci and Thornhill as defendants in three of the third amended complaint's causes of action. The effort was for naught, as the trial court had already sustained their demurrers to the SAC without leave to amend and signed orders dismissing these two respondents with prejudice.

granted Rule's discovery motions to compel further responses, without objection, to form and special interrogatories, a request to produce documents, and requests for admission; granted in part and denied in part Rule's motion to compel plaintiffs to attend their depositions; and assessed $6,304.31 in joint and several monetary sanctions against appellants and their counsel. Appellants filed a notice of appeal challenging each of these orders (case no. B250084).

Appellants failed to comply with the discovery orders. Instead, they filed a number of petitions for extraordinary relief in this court. Rule eventually moved for terminating sanctions. Hartford filed a request for joinder.

Before Rule's motion could be heard, appellants removed the lawsuit to federal court. The federal district court remanded this action; appellants unsuccessfully appealed from that order (*In re Hartford Litigation Cases, supra,* 642 Fed.Appx. at p.733). The Turners also sought to disqualify the trial judge (§ 170.1). In support of the statement of disqualification, CTurner submitted a declaration stating he was a defendant in this action. The trial judge struck the statement of disqualification. Appellants challenged this order with another petition for

extraordinary relief (§ 170.3, subd. (d)), which this court (case no. B255209), the California Supreme Court (case no. S271912), and the United States Supreme Court (case no. 14-224) summarily denied.

The trial court granted the motion and dismissed the litigation against Rule as a terminating sanction for not obeying the earlier discovery orders. The trial court denied Hartford's request for joinder. Appellants and Hartford appealed (case no. B256763).

As the prevailing party, Rule sought costs. Appellants filed a motion to strike or tax costs. On October 27, 2014, the trial court awarded Rule $8,171.55 in costs. Appellants appealed from this order (case no. B261032).

The final judgment in this matter was entered April 25, 2016. Appellants filed a notice of appeal (case no. B278508).

On our own motion, we ordered the appeals in case numbers B248667, B250084, B256763, B261032, and B268792 consolidated for the purposes of oral argument and decision.

## III. Dismissed Appeals

A number of the Turners' appeals already have been dismissed. They are as follows:

### *A.* Case number B252461

In this appeal, the Turners challenged the order dismissing Rule employees Silletto, Pierson, Gaitan, and Albrecht. Appellants failed to file a civil case information statement, and we dismissed the appeal. We denied appellants' motion for relief from default; the remittitur issued.

### *B.* Case number B261032 (partial dismissal)

Appellants filed two notices of appeal under this case number.[8] In the second, filed January 20, 2015, appellants claimed the trial court erred on November 19, 2014, when it sustained demurrers to the Turners' cross-complaint, which duplicated in many respects allegations in the FAC and SAC that previously had been dismissed. We dismissed that appeal on March 23, 2015, after appellants failed to designate the record on appeal.

The dismissal order provided that any request to reinstate the appeal must be made by motion filed within 15 days. No such motion was

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[8] The first notice of appeal, filed December 29, 2014, challenged the October 27, 2014 denial of appellants' motion to strike or tax costs claimed by Rule. That appeal is active, and we address it in part VI of the Discussion, *post*.

filed within that time frame; the remittitur issued May 27, 2015.

Almost a year later, appellants moved to recall the remittitur for that portion of the appeal based on the order sustaining defense demurrers to the Turner cross-complaint. We denied the motion on May 17, 2016.

Nonetheless, in their opening brief in case number B261032, appellants belatedly insist they filed the form designating the record for the second appeal. We granted appellants' request for judicial notice of a series of documents related to this dismissed appeal. Exhibits 5 and 6 establish that appellants designated the record only for the first notice of appeal.

### *C.* Case number B268792

This appeal challenged the summary judgment in Hartford's favor. It was included in our consolidation order, but subsequently dismissed on September 8, 2016, based on appellants' failure to file an opening brief. We denied appellants' motion to reinstate the appeal; the remittitur issued.

### *D.* Case number B278508

Here, the Turners appealed from the final judgment entered April 25, 2016, as well as all interim orders. The appeal was dismissed for

appellants' failure to file an opening brief. The remittitur issued on September 14, 2017.

## DISCUSSION

### I. This Court Is Without Jurisdiction to Entertain Purported Appeals from Nonappealable Orders

"An appealable judgment or order is essential to appellate jurisdiction." (*Art Movers, Inc. v. Ni West, Inc.* (1992) 3 Cal.App.4th 640, 645 (*Art Movers*).) "[W]e are dutybound to consider" appealability on our own motion. (*Olson v. Cory* (1983) 35 Cal.3d 390, 398.) When an appeal encompasses appealable and nonappealable orders, we must dismiss the notice of appeal from the nonappealable order. (*Martin v. Johnson* (1979) 88 Cal.App.3d 595, 608.)

We begin our analysis with Code of Civil Procedure sections 904.1 and 906.[9] Section 904.1 "codifies the 'one final judgment rule . . . [which] is based on the theory that piecemeal appeals are oppressive and costly, and that optimal appellate review is achieved by allowing

[9] All undesignated statutory references are to the Code of Civil Procedure.

appeals only after the entire action is resolved in the trial court." (*Art Movers, supra,* 3 Cal.App.4th at 645.) on appeal from a final judgment, section 906 authorizes reviewing courts to review "any intermediate ruling . . . which involves the merits or necessarily affects the judgment." The optimal efficiency of these two provisions is easily lost when multiple parties have been sued and their liabilities—or not—are determined at different stages of the litigation, frequently after a number of pivotal interim rulings.

This lawsuit presents one such example. Four appeals have already been dismissed in their entirety, and one appeal has been partially dismissed. Four consolidated appeals remain (case nos. B248667, B250084, B256763, B261032). Nevertheless, we do not have jurisdiction over every order challenged in the appeals. We asked the parties to file supplemental briefs to address appealability. (Gov. Code, § 68081.)

### *A.* No Appeal Lies from Issuance of the Discovery Order and Denial of A Protective Order (case no. B250084)

On June 17, 2013, fairly early in the state court proceedings, the trial court made three rulings adverse to appellants and in favor of Rule. First, it denied appellants' motion for a discovery stay/protective order; second, it granted many of Rule's discovery motions; and third, it imposed monetary discovery sanctions of $6,304.31, jointly and severally against appellants and their attorneys.

Only the monetary sanctions order is appealable. (§ 904.1, subd. (a)(11), (12); *Rail-Transport Employees Assn. v. Union Pacific Motor Freight* (1996) 46 Cal.App.4th 469, 475.) We consider the merits of the sanctions award in part IV of the Discussion, *post*. The purported appeals from the two nonappealable orders must be dismissed.

The order compelling appellants to respond to discovery is not appealable.[10]

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[10] Appellants did file a petition for extraordinary relief in this court to contest the discovery order (case no. B249850). This court summarily denied the petition, as did the California

(*Montano v. Wet Seal Retail, Inc.* (2015) 7 Cal.App.5th 1248, 1259 ["There is no statutory provision for appeal of an order compelling discovery"].) Although the discovery order would have been reviewable on appeal from the final judgment (*Pacific Tel. & Tel. Co. v. Superior Court of San Diego County* (1970) 2 Cal.3d 161, 169; § 906), that appeal (case no. B278508) was dismissed after appellants did not file an opening brief.[11]11 The purported appeal from the discovery order must be dismissed as having been taken from a nonappealable order. (*Montano*, at p 1260.)

The denial of appellants' motion for a protective order also is not appealable; review of that order is available solely by way of a petition for writ relief. (*Dodge, Warren & Peters Ins. Services, Inc. v. Riley* (2003) 105 Cal.App.4th 1414, 1421 (*Dodge, Warren*).) Appellants filed such a petition, and this court

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Supreme Court (case no. S212280) and the United States Supreme Court (case no. 13-605).

[11] To the extent the discovery order was reviewable from the judgment entered in Rule's favor after the trial court granted the motion for terminating sanctions, the Turners forfeited the issue by failing to brief it. (*Christoff v. Union Pacific Railroad Co.* (2005) 134 Cal.App.4th 118, 125.)

summarily denied it on July 11, 2013 (case no. B249850).

In their opening brief, appellants seek to establish appealability by arguing the request for a protective order was actually a request for a mandatory injunction that, once denied and appealed, stayed the entire action and divested the trial court of jurisdiction to proceed. (§ 904.1, subd. (a)(6).). The argument is belied by the record (see, e.g., appellants' petition for writ relief (B249850), where they describe the request as one for a protective order, not an injunction) and is not supported by any applicable authority.

Appellants did not respond to our request for supplemental briefing on the appealability question. Rule asserted the protective order is not reviewable on appeal. For the reasons that follow, we agree the purported appeal from the denial of appellants' request for a protective order also must be dismissed as having been taken from a nonappealable order.

**1. Background**

Appellants first asked the trial court, by ex parte application filed May 25, 2012, to stay this action and issue a protective order to shield them from responding to discovery propounded by Rule. The request was denied without

prejudice to the filing of a noticed motion. Appellants noticed that motion, specifically asking for "a stay of the requirement to respond to discovery prejudicial to its position in" LTurner's personal injury action and for a protective order and the development of "a coordinated discovery plan." Appellants' proposed order sought a stay and protective order, but not injunctive relief. The trial court concluded appellants did not satisfy their burden for issuance of a protective order and denied the request without prejudice.

Six months later, still not having responded to discovery, appellants renewed their motion for a discovery protective order, a temporary stay pending approval of a discovery coordination plan and completion of LTurner's personal injury action, and sanctions authorized by discovery statutes. The caption page for the motion did not request injunctive relief. The motion recited that a proposed order granting a protective order and temporary stay and awarding sanctions under the discovery statutes was attached. This summary of the proposed order did not include injunctive relief, and the proposed order itself was not included in appellants' appendix.

At a reported hearing on June 4, 2012, CTurner's counsel stressed the need for a protective order to insulate appellants from discovery while LTurner's personal injury action against her father was pending. Counsel did not ask the trial court to issue an injunction, but she sought a stay of any order granting Rule's discovery motions. The trial court responded that any stay should come from the Court of Appeal. The trial court again denied the request for a protective order and stay, noting the motion presented the "exact same legal and factual arguments [appellants previously presented and sought] the exact same forms of relief."

**2. Analysis**

As appellants assert, appealability depends on the substance and effect of an order, not its label. (*Daugherty v. City and County of San Francisco* (2018) 24 Cal.App.5th 928, 942.) Here, there is no disconnect between the substance and effect of the trial court's order and its label. Appellants' request in the trial court was for issuance of a protective order and stay. The notice of motion did not seek injunctive relief, counsel did not argue for that remedy, and the appellate record does not include any document that could support the issuance of an

injunction (e.g., a verified complaint or declaration demonstrating sufficient grounds; see also § 657). Appellants' writ petition to this court sought redress for denial of the request for a protective order, not injunctive relief (case no. B249850).

The belated bid to recast a straightforward protective order motion as an application for injunctive relief-specifically, a mandatory injunction-came after a series of setbacks and additional adverse rulings in the trial court. It fails. (*Dodge, Warren, supra,* 105 Cal.App.4th at p. 1421 ["denial of a protective order is not appealable"]; see also *Scottsdale Ins. Co. v. Superior Court* (1997) 59 Cal.App.4th 263.) Because the purported appeal from this order never conferred jurisdiction in this court, this portion of the appeal must be dismissed. (*Art Movers, supra,* 3 Cal.App.4th at p. 645.)

We decline appellants' alternative request to treat the notice of appeal from the nonappealable order denying appellant's request for a protective order as a second petition for extraordinary relief. Once the final judgment was entered in Rule's favor, the need for a protective order became moot.

Denial of Hartford's Joinder Request Is Not Appealable (case no. B256763)

Before Hartford obtained summary judgment, it noticed an appeal from the trial court's denial of its request to join Rule's successful motion for terminating sanctions (case no. B256763). Hartford's statement of appealability cited section 906, which authorizes the review of intermediate rulings upon an appeal from a final judgment. At the time Hartford noticed its appeal, a final judgment had been entered in favor of Rule, but not yet in favor of Hartford. Accordingly, section 906 did not authorize Hartford's appeal.

In response to our Government Code section 68081 letter, Hartford agreed this appeal should be dismissed. We dismiss it as having been taken from a nonappealable order. (*Art Movers, supra,* 3 Cal.App.4th at p. 645.)

## II. Appellants' Jurisdictional Challenges Fail

In each appeal after the first one, appellants serially and cumulatively raise multiple challenges to the superior court's jurisdiction. Each is devoid of merit. As discussed in part VII, *post,* we conclude all reasonable attorneys would agree these challenges are "totally and completely without

merit." (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650 (*Flaherty*).)

### *A.* Trial Court Retained Jurisdiction After Purported Appeal from Order Denying Protective Order

Appellants maintain the purported appeal from the nonappealable order denying the request for a protective order automatically stayed all litigation in the trial court. They are incorrect. A notice of appeal from a nonappealable order does not "depriv[e] the trial court of the power to proceed further in the cause pending the purported appeal." (*Central Sav. Bank v. Lake* (1927) 201 Cal. 438, 442; see *Hearn Pacific Corp. v. Second Generation Roofing, Inc.* (2016) 247 Cal.App.4th 117, 146 [automatic stay applies only when appeal is "'duly perfected'"].)

### *B.* Trial Court Jurisdiction Not Lost as a Result of Appeal from the Orders of Dismissal as to Ponci and Thornhill

Appellants next contend their appeal from the Ponci and Thornhill dismissals automatically stayed all subsequent superior court proceedings as to every other party. Although this appeal was duly perfected, appellants' argument collapses under the controlling language in section 916, subdivision (a): "[With exceptions not pertinent here,] the perfecting of an appeal stays proceedings in the trial court upon the judgment or order appealed from or upon the matters embraced therein or affected thereby, including enforcement of the judgment or order, *but the trial court may proceed upon any other matter embraced in the action and not affected by the judgment or order*." (Emphasis added.) Appellants cite no relevant authority[12]and present no other

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[12] Appellants' reliance on *Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180 is misplaced. *Varian* addressed the limited issue of "whether 'an appeal from the denial of a special motion to strike under the anti-SLAPP statute (§ 425.16) effects an automatic stay of the

argument to support their conclusion that proceedings against parties other than Ponci and Thornhill were "within the scope of the stay." (*Cunningham v. Magidow* (2013) 219 Cal.App.4th 298, 303.)

The orders of dismissal in favor of Ponci and Thornhill did not affect the proceedings against Rule; and none of the proceedings against Rule "affected the effectiveness" of appellants' appeal as to the two dismissed parties. (*In re Marriage of Horowitz* (1984) 159 Cal.App.3d 377, 381.) The trial court did not lose jurisdiction to proceed further as to every party other than Ponci and Thornhill.

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trial court proceedings.'" (*Id.* at p. 188.) *Davis v. Thayer* (1980) 113 Cal.App.3d 892, 912, also fails to support appellants' position. In *Davis*, the defendants appealed from the denial of their motion to set aside a default and default judgment. Several months later, the defendants returned to the trial court with another motion to set aside the default and default judgment. The Court of Appeal held the trial court's ruling on the second motion was a nullity; the pending appeal deprived the trial court of jurisdiction to consider any issue related to the default and default judgment. (*Id.* at p. 912.)

### *C.* Absence of Remand Order in Related Case Dismissed by CTurner Did Not Deprive Trial Court of Jurisdiction in this Action

As discussed above, litigation against the defendants began in the United States District Court, where appellants initiated a number of actions. All were dismissed without prejudice, entitling appellants to pursue the same theories in state court. Appellants initiated three such state court actions: The first was filed by CTurner (*Turner v. Hartford,* Super. Ct. Los Angeles County, 2011, No. BC463639) on June 17, 2011; the second was this lawsuit, filed by all the Turners on June 20, 2011; and the third was filed by LTurner and MTurner on December 6, 2011 (*Turner v. Hartford*, Super. Ct. Los Angeles County, 2011, No. BC474698). Rule removed only the CTurner action to federal court. The superior court subsequently determined all three actions were related. (See fn. 3, *ante*.)

Because the appellate record does not demonstrate that the entirely separate CTurner lawsuit was ever remanded back to the superior court, appellants insist the trial court had no jurisdiction to proceed with this action.

Appellants cite no authority for the proposition that the federal court's failure to remand one lawsuit deprives a trial court of jurisdiction to proceed with a different action.

More to the point, though, the record establishes the argument is frivolous. CTurner voluntarily dismissed his state court action on December 6, 2011, the day the Turners filed the FAC in this lawsuit. CTurner confirmed the voluntary dismissal of his lawsuit in a separate December 6, 2011 filing, the "Report for Non-Appearance Case Review."[13]13 CTurner's affirmative act of dismissing his state court action meant there was no longer a state court action the federal court could remand. Nonetheless, appellants have promoted this argument at every opportunity, without once acknowledging that CTurner's voluntary dismissal made a remand legally and practically impossible.

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[13] Having granted appellant's request for judicial notice of the superior court case summary for CTurner's lawsuit, we also take judicial notice of these two documents described therein.

### *D.* Trial Court Did Not Lose Jurisdiction Based on "Judicial Disqualification" and "Acceptance of Public Employment" Arguments

In the trial court and in their briefs here, appellants repeatedly conflate disparate concepts to urge that the superior court as a whole, and the trial judge in particular, could not exercise jurisdiction in this lawsuit. They include a truncated discussion of the benefits the County of Los Angeles provides to all superior court judges within its jurisdiction, a Los Angeles County Superior Court's policy to require civil litigants to furnish their own court reporters, the ability of retired judges to engage in post-retirement public employment, and a failure to disclose and obtain appellants' informed consent before assuming jurisdiction over them and this action.

At the reported hearing on Rule's motion for terminating sanctions, CTurner's counsel articulated the argument as follows: "[A]fter *Sturgeon I* [*Sturgeon v. County of Los Angeles* (2008) 167 Cal.App.4th 630] was decided, it was deemed that the judges in the County of Los Angeles have public employment. And,

therefore, under the California Constitution[,] article [VI], section 17, that means that there is a resignation of office. [¶] . . . But what SBX-211 section 5 does is it shields the judge from criminal penalties and disciplinary action based on whatever judicial benefits they have received. [¶] . . . What the Turners are challenging . . . is . . . that they need . . . disclosure and consent under [the] California Constitution[,] article [VI], section 21 because upon acceptance of public employment or office, there is a requirement to comply with the constitutional requirements."

The superior court described these arguments as "perplexing." Appellants presented the same arguments in federal court after one of their removals of this action, and the Ninth Circuit labeled them "nonsensical." (*In re Hartford Litigation Cases, supra,* 642 Fed.Appx. at p. 736). This court has not previously addressed these contentions, although appellants advanced them in two petitions for writ relief, both of which we summarily denied.[14] Addressing the contentions now, we agree with our fellow jurists.

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[14] See case numbers B254756 and B255209. The California Supreme Court also summarily denied review of both these petitions (case nos. S217406, S217912). The United States

Appellants' written arguments are indecipherable. Their effort to cobble together what are essentially "sound bites" from diverse and unrelated lawsuits, legislation, opinions by the Commission on Judicial Performance, and a number of noncitable sources (Cal. Rules of Court, rule 8.1115), fail to meld into any cogent argument. Appellants' arguments depend in large part on documents the trial court and this court declined to judicially notice. Their postulations are not supported by record citations or apt authority. "We are not required to examine undeveloped claims or to supply arguments for the litigants[;] . . . it is not the court's function to serve as the appellant's backup counsel." (*Allen v. City of Sacramento* (2015) 234 Cal.App.4th 41, 52 (*Allen*); see also (*Orange County Water Dist. v. Sabic Innovative Plastics US, LLC* (2017) 14 Cal.App.5th 343, 383 ["'The absence of cogent legal argument or citation to authority allows this court to treat the contention as waived'"] (*Sabic*).)

Having rejected appellants' jurisdictional challenges, we turn to substantive appellate issues.

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Supreme Court denied appellant's petition for writ of certiorari challenging the denial of the second petition (case no. 14-224).

## III. Demurrers by Ponci and Thornhill (case no. B248667)

Here, appellants challenge the orders of dismissal after the trial court sustained without leave to amend the demurrers of Ponci and Thornhill.[15] As to these respondents, the trial court sustained demurrers without leave to amend to the following causes of action in the FAC: (11) invasion of privacy; (12) intentional infliction of emotional distress; (13) negligent infliction of emotional distress; (17) violation of the Ralph Civil Rights Act; (18) violation of the Tom Bane Civil Rights Act; and (19) violation of the Gender Tax Repeal Act and sexual harassment. Demurrers by Ponci and Thornhill to the SAC were sustained without leave to amend to the remaining causes of action in

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[15] Appellants also argue the rulings were erroneous as to Hartford, Silletto, Pierson, Gaitan, and Albrecht. The notice of appeal and case information statement under case number B248667 does not reference Hartford or the individual defendants, and this court is without jurisdiction to review any claims of error as to them. (*Ellis v. Ellis* (2015) 235 Cal.App.4th 837, 846 [appellate jurisdiction is "'limited in scope to the notice of appeal and the judgment appealed from"'].) As noted above, the Turners' separate appeals from judgments entered in favor of the individual defendants (case no. B252461) and Hartford have been dismissed (case no. B268792).

which one or both of these respondents were named: (1) fraud; (2) negligent misrepresentation; (9) violation of Business and Professions Code section 17200 et seq.; (10) Civil Code sections 1761 and 3345 and Insurance Code section 785; (14) implied contractual indemnity and equitable indemnity; (15) violation of the Fair Employment and Housing Act (FEHA); and (16) violation of the Unruh Civil Rights Act.

Our standard of review is de novo. We exercise our independent judgment to determine whether the respective complaints state facts sufficient to constitute causes of action as to these two respondents.[16] (*Boyd v. Freeman* (2017) 18 Cal.App.5th 847, 853 (*Boyd*).) We accept as true all well-pleaded factual allegations. (*Kearney v. Salomon Smith Barney, Inc.* (2006) 39 Cal.4th 95, 101.) We do not, however, accept as true appellants' "contentions, deductions, or conclusions of fact or law." (*Lin v. Coronado* (2014) 232 Cal.App.4th 696, 700.) We "must also consider

[16] De novo review does not include our determining whether appellants alleged facts sufficient to withstand demurrers by any other defendants; our only concern is whether the pleadings stated causes of action against Ponci and Thornhill.

judicially noticed matters." (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) We may affirm "'whether or not the trial court relied on proper grounds or the defendant asserted a proper ground in the trial court proceedings.'" (*Rossberg v. Bank of America, N.A.* (2013) 219 Cal.App.4th 1481, 1491.)

We review the denial of leave to amend for abuse of discretion. (*Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 44 (*Rakestraw*).) However, if we conclude the pleadings do not state causes of action, appellants are entitled on appeal to demonstrate they can amend to cure the deficiencies. "'To meet this burden . . . on appeal, [appellants must] enumerate the facts and demonstrate how those facts establish a cause of action." (*Boyd, supra,* 18 Cal App 5th at p. 854.) "The assertion of an abstract right to amend does not satisfy this burden. [Citation.] [Appellants] must clearly and specifically set forth the 'applicable substantive law' [citation] and the legal basis for amendment, i.e., the elements of the cause of action and authority for it." (*Rakestraw,* at p. 43.)

The Turners provided a reporter's transcript for the hearing on the demurrers

to the SAC. There is no reporter's transcript for the hearing on the demurrers to the FAC.

### *A.* FAC

#### 1. Judicial Notice

In conjunction with its demurrer to the FAC, Thornill asked the trial court to take judicial notice of eight complaints the Turners filed in state and federal courts arising out of LTurner's accident and the defendants' pre- and post accident conduct. The trial court did so, and the Turners challenge the ruling.[17]

There was no error. Trial courts are entitled to take judicial notice of court records of state and federal court proceedings. (Evid. Code, § 452, subd. (d).) Judicial notice means no more than that the trial court acknowledges the existence of various pleadings. (*StorMedia Inc. v. Superior Court* (1999) 20 Cal.4th 449, 457, fn. 9.) Here, of course, all complaints were filed by appellants, and they do not deny the existence of the pleadings.

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[17] Rule also filed a request for judicial notice along with its demurrer. Because the Turners did not challenge the rulings on Rule's demurrers, Rule's request for judicial notice is not before us.

**2. 11th Cause of Action-Invasion of Privacy**

Article I, section 1 of the California Constitution guarantees a right to privacy. The elements of a cause of action for a violation of the right to privacy are: "(1) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by defendant constituting a serious invasion of privacy." (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 39-40.)

In the FAC, the Turners alleged Ponci and Thornhill violated their right to privacy by initiating an investigation into LTurner's accident before she signed a "claimant designation." Ponci was alleged to have "communicat[ed] with employees of the business of MTurner's husband [i.e., CTurner] without written authorization." Thornhill representatives took photographs of LTurner and her home. The Turners alleged that after LTurner's "life threatening and traumatic accident and CTurner . . . having medical difficulties . . . surrounding the accident of LTurner . . . defendants disregarded common decency and the standards set forth under California fair claims practice."

The trial court sustained the Ponci and Thornhill demurrers to this cause of action without leave to amend based on the federal district court's having previously dismissed the same cause of action. We are not concerned with the trial court's reasoning, however; our task is to independently review the pleading to determine whether it states facts sufficient to constitute a cause of action against Ponci and Thornhill. We have done so and conclude the 11th cause of action fails to state facts sufficient to allege a violation of the right to privacy.

LTurner sustained serious personal injuries in her home, and the accident was promptly reported to the homeowner's insurer. Under these circumstances, interviews and photographs on behalf of the insurer, without more, do not constitute an invasion of privacy. LTurner was an adult when the accident occurred, and appellants did not claim Ponci and Thornhill lacked her permission to interview and photograph her and photograph the home where she resided. Appellants did not contend Ponci or Thornhill engaged in subterfuge or misrepresentations during their investigation. The allegation that Ponci wrongfully interviewed CTurner's employees was vague

and lacked factual detail. As a matter of law, the FAC failed to include any factual allegations of conduct amounting to "an unreasonably intrusive investigation" that could have given rise to liability by Ponci or Thornhill. (*Noble v. Sears, Roebuck & Co.* (1973) 33 Cal.App.3d 654, 660.)

Without a reporter's transcript of the hearing on the demurrers to the FAC, we have no way to determine whether appellants asked the trial court for leave to amend and, if so, whether the trial court abused its discretion in denying the request. (*Rakestraw, supra,* 81 Cal.App.4th at p. 44.) Appellants nonetheless may demonstrate for the first time on appeal that the complaint can be amended to state a cause of action against Ponci and Thornhill. (*Id.* at p. 43.) To do so, they must identify facts that may be alleged and explain how those facts would establish a cause of action for violation of the right to privacy. (*Boyd, supra,* 18 Cal.App.4th at p. 854.) Appellants do not meet this burden. The demurrer to this cause of action was properly sustained without leave to amend.

### 3. 12th Cause of Action- Intentional Infliction of Emotional Distress

The elements of a cause of action for intentional infliction of emotional distress are: "(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct." (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1050, internal quotation marks omitted.)

Allegations to support this theory of liability against Ponci and Thornill were incorporated by reference from those in earlier causes of action. No new allegations were specifically directed to either respondent. Instead, appellants alleged "Defendants engaged in outrageous conduct. Such conduct was continuous, extreme, intentional, and outrageous and said conduct was done for the purpose of causing [appellants] to suffer humiliation, overwhelming grief, mental anguish and emotional distress and was done

with wanton and reckless disregard of the probability of causing such distress."

For the reasons discussed above concerning the cause of action for invasion of the right to privacy, the incorporated allegations were also insufficient to state a cause of action for intentional infliction of emotional distress. The new charging allegations were conclusory and in the nature of argument. They did not include well-pleaded facts, and we do not accept them as true. As above, appellants have not met their burden to demonstrate on appeal that they can amend to state a cause of action for intentional infliction of emotional distress.

**4. 13th Cause of Action-Negligent Infliction of Emotional Distress**

Negligent infliction of emotional distress is not an independent tort. (*Marlene F. v. Affiliated Psychiatric Medical Clinic, Inc.* (1989) 48 Cal.3d 583, 588.) In certain circumstances, though, a plaintiff without physical injury or economic losses may sue under traditional negligence theories and seek damages from a defendant whose negligence was a substantial factor in causing severe or serious emotional distress. "'The traditional elements of duty,

breach of duty, causation, and damages apply. [¶] Whether a defendant owes a duty of care is a question of law.'" (*Ibid.*)

Had conduct by either Ponci or Thornhill caused physical injury or economic damages, their duty of care to each of the Turners would be presumed. (Civ. Code, § 1714.) In the absence of physical injury or property damage, a duty from a defendant to a plaintiff may arise where the parties have a preexisting relationship. (*Burgess v. Superior Court* (1992) 2 Cal.4th 1064, 1074.) None of the Turners had a preexisting relationship with Ponci or Thornhill. These defendants did not owe appellants a duty of care.

An absence of duty notwithstanding, the allegations were insufficient as a matter of law to support a cause of action for severe or serious emotional distress. "'[S]evere' means substantial or enduring as distinguished from trivial or transitory. Severe emotional distress means, then, emotional distress of such substantial quantity or enduring quality that no reasonable man in a civilized society should be expected to endure it. [¶] 'It is for the court to determine whether on the evidence severe emotional distress can be found.'" (*Fletcher v. Western*

*National Life Ins. Co.* (1970) 10 Cal.App.3d 376, 397.)

Appellants again incorporated language from earlier causes of action and alleged all defendants without specifically calling out Ponci or Thornhill "engaged in conduct which caused [appellants] to suffer serious emotional distress." The allegations were conclusory and insufficient as a matter of law. Appellants have not proposed how they could amend to state a cause of action for negligence that proximately caused serious emotional distress.

**5. 17th and 18th Causes of Action-Violations of the Ralph Civil Rights Act of 1976 and Tom Bane Civil Rights Act**

We consider these two causes of action together. The 17th is based on the Ralph Civil Rights Act of 1976 (Civ. Code, § 51.7), which provides in relevant part, "All persons within the jurisdiction of this state have the right to be free from any violence, or intimidation by threat of violence, committed against their persons or property . . . on account of any characteristic listed or defined in [the Unruh Civil Rights Act,]" including sex, race, color, and ancestry. (Civ. Code, § 51.7, subd. (b).) Any person who

denies the rights provided by the Ralph Civil Rights Act of 1976 may be civilly liable for penalties, general and punitive damages, and attorney fees. (Civ. Code, § 52.)

The Tom Bane Civil Rights Act is codified in Civil Code section 52.1. It authorizes suits by individuals "whose exercise or enjoyment of rights secured by the Constitution or laws of the United States, or of rights secured by the Constitution or laws of this state, has been interfered with, or attempted to be interfered with [by threat, intimidation, or coercion]." (Civ. Code, § 52.1, subd. (c).) "Speech alone" cannot be a basis for a lawsuit under the Tom Bane Civil Rights Act unless "the speech itself threatens violence . . . ; and the person or group of persons against whom the threat is directed reasonably fears that, because of the speech, violence will be committed against them or their property and that the person threatening violence had the apparent ability to carry out the threat." (Civ. Code, § 52.1, subd. (k).)

Violence and threats of violence are the sine qua nons for causes of action under either Act. In this regard, although the FAC complained of more than 20 years of discriminatory conduct, which began long before

Hartford issued its policy, it was bereft of any facts suggesting violence. The FAC concluded that appellants "were intimidated, bullied, and terrorized and deprive[d] of basic information including the actual policy of insurance and . . . concealment of the actual denial of the claim submitted by LTurner (as a method of discrimination and process to allow further intimidation and threats of violence to property (i.e., thorough deprivation of essential element (insurance) to maintain ownership of property)." Appellants also alleged they "reasonably believed there was violence against their property and property right [*sic*] would occur and did occur." These contentions were insufficient to state causes of action under either the Ralph or Tom Bane Civil Rights Acts.

Appellants stood on their pleadings in the trial court. They maintained allegations that respondents, by contesting coverage for LTurner's accident, deprived them "of an essential element (insurance) to maintain ownership of property" and this conduct was sufficient to constitute violence. Appellants' written opposition to the demurrers included a boilerplate request for leave to amend, but failed

to recite any facts to support these legal theories.

On appeal, appellants' contention that the trial court abused its discretion by failing to give them an opportunity to amend is not cognizable, as we have no reporter's transcript of the hearing on the demurrers. Appellants' request in their opening brief for leave to amend is also boilerplate and insufficient. Appellant have not asserted specific factual allegations that they could add to be able to state causes of action under either Act.

**6. 19th Cause of Action - Gender Tax Repeal Act and Sexual Harassment**

MTurner alone was the plaintiff in this cause of action.[18] Civil Code section 51.6 prohibits business establishments from discriminating, "with respect to the price charged for services of similar or like kind, against a person because of the person's gender." Civil Code section 51.9 imposes liability on a defendant who is in "a business, service, or

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[18] As mentioned, MTurner previously "assigned all rights and interest in [her] claims and causes of action of any possible nature, past and future, against [Ponci] that are transferable by law to LTurner." She does not address this point on appeal.

professional relationship" with a plaintiff and "has made sexual advances, solicitations, sexual requests, demands for sexual compliance by the plaintiff, or engaged in other verbal, visual, or physical conduct of a sexual nature or of a hostile nature based on gender, that were unwelcome and pervasive or severe." (Civ. Code, § 51.9, subd. (a)(1), (2).)

No allegations were made against Ponci individually. MTurner alleged generally that she was overcharged for insurance coverage and not treated "as an insured and person in her own right, but was treated] as an appendage of her husband." She alleged the same conduct constituted "unlawful sexual harassment." The allegations were conclusory and fact- deficient. They did not state a cause of action against Ponci under either legal theory. Once again, although appellants made a boilerplate request for leave to amend, they did not meet their burden to provide this court with specific facts and the substantial law that entitle them leave to amend. (*Rakestraw, supra,* 81 Cal.App.4th at p. 43.)

### *B.* SAC

Appellants' appendix does not include a redlined version of the SAC. As part of our independent review, we compared the allegations between the FAC and SAC.

#### 1. First Cause of Action - Fraud

"The elements of fraud that will give rise to a tort action for deceit are: (a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage." (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 974, most internal quotation marks omitted.) Fraud allegations must be specific. General or conclusory allegations that fail to allege the "who, what, where, and how" particulars are insufficient. (*Morgan v. AT&T Wireless Services, Inc.* (2009) 177 Cal.App.4th 1235, 1262.)

Most of the fraud allegations predated Hartford's initial coverage and LTurner's accident and were directed at defendants other than Ponci or Thornhill. As to these respondents, appellants alleged Ponci was told, but failed to advise them, of irregularities in the pricing for

the Hartford homeowner's coverage. Thornhill sent a representative to LTurner's home to interview and photograph her after the accident, even though the claim was submitted by Grace Farrell. Ponci denied coverage based on Farrell's claim rather than a claim initiated by LTurner.

Although the Turners sued these respondents for fraud, they did not allege any facts to support the theory that either Ponci or Thornhill intended to harm them or to induce detrimental reliance. They did not allege they in fact relied to their detriment on any conduct by these respondents.

> The allegations were insufficient to support a cause of action for fraud against Ponci or Thornhill. Appellants have not suggested how this cause of action might be amended to withstand demurrers by these two respondents.

**2. Second Cause of Action - Negligent Misrepresentation**

The elements of a cause of action for negligent misrepresentation are akin to those for fraud, but without the "scienter or an intent to defraud." (*Tenet Healthsystem Desert, Inc. v. Blue Cross of California* (2016) 245 Cal.App.4th

821, 845.) A negligent misrepresentation cause of action does require that the defendant intend for the plaintiff to rely on the misrepresentation and that the plaintiff in fact did so. (*Ragland v. U.S. Bank National Assn.* (2012) 209 Cal.App.4th 182, 196.) As noted in the previous discussion, these allegations were lacking. Appellants have not suggested that any facts exist to support a cause of action for negligent misrepresentation against Ponci or Thornhill.

**3. Ninth Cause of Action -Violation of the unfair Competition Law (UCL) (Bus. & Prof. Code, § 17200 et seq.)**

The UCL creates an independent, cumulative remedy against parties that engage in unfair competition. (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 179.) UCL claims may be based on violations of "[v]irtually any law□federal, state or local." (*Troyk v. Farmers Group, Inc.* (2009) 171 Cal.App.4th 1305, 1335, internal quotation marks omitted.) A successful UCL plaintiff may be awarded

injunctive relief and restitution, but not damages or attorney fees.[19] (*Ibid*.)

The SAC includes a list of Insurance Code and California Code of Regulations provisions that Ponci and Thornhill allegedly violated. Rather than plead facts to support allegations that these statutes and regulations were violated, appellants merely concluded respondents engaged in discriminatory practices and unfair claims settlement practices, made unlawful referrals, conducted pretextual interviews, obtained information without proper authorization, and failed to provide pertinent policy information. The allegations are insufficient. (*Berryman v. Merit Property Management, Inc.* (2007) 152 Cal.App.4th 1544, 1554 [a "laundry list" of statutes without pleading facts to support their violation by a defendant cannot withstand demurrer].) Appellants have not suggested any facts that would support a UCL cause of action.

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[19] Attorney fees may be awarded to a plaintiff acting as a private attorney general. (*Zhang v Superior Court* (2013) 57 Cal.4th 364, 371, fn. 4.)

**4. 10th Cause of Action - Treble Damages**

Appellants linked this cause of action to the UCL. Relying on Insurance Code section 785, which states that insurers owe prospective insureds who are "65 years of age or older, a duty of honesty, good faith, and fair dealing," and Civil Code section 3345, they seek to treble the amount of any monetary award they receive under the UCL claim. This cause of action fails.

Setting aside for a moment that LTurner does not claim to be a senior citizen and there are no allegations against Ponci or Thornhill based on appellants' status as prospective insureds, Civil Code section 3345 authorizes a treble recovery only for plaintiffs who are awarded "a remedy that is in the nature of a penalty." (*Clark v. Superior Court* (2010) 50 Cal.4th 605, 614.) The restitution to which a private individual suing under the UCL may be entitled "is not a penalty and hence does not fall within the trebled recovery provision of Civil Code section 3345, subdivision (b)." (*Id.* at p. 615.)

In any event, because Civil Code section 3345 "constitutes a remedy [, it] is not itself a cause of action." (*Green Valley Landowners*

*Assn. v. City of Vallejo* (2015) 241 Cal.App.4th 425, 433, fn. omitted.)

**5. 14th Cause of Action -Implied Contractual Indemnity and Equitable Indemnity**

Ponci was not named in this cause of action. The gist of the 14th cause of action against Thornhill was that if MTurner and CTurner were liable to LTurner for her personal injuries, "Thornhill should provide implied contractual indemnity or in the alternative equitable indemnity" to them based on Thornhill's "unreasonable and authorized [*sic*] and intrusive investigation." In other words, appellants attempted to merge disparate tort and contract concepts. On one hand, they alleged MTurner and CTurner were joint, concurrent, or successive tortfeasors with Thornhill in causing LTurner's losses. On the other, they sought to hold Thornhill liable on the theory that Thornhill breached an implied contractual duty to them. (*West v. Superior Court* (1994) 27 Cal.App.4th 1625, 1633 [ "'An action for implied contractual indemnity is not a claim for contribution from a joint tortfeasor; it is not founded upon a tort or

upon any duty which the indemnitor owes to the injured third party. It is grounded upon the indemnitor's breach of duty *owing to the indemnitee* to properly perform its contractual duties"'].) Appellants cite no apt authority for either the tort or contract theory. They forfeited this issue. (*Sabic, supra,* 14 Cal.App.5th at p. 383.)

**6. 15th and 16th Causes of Action - Violation of Fair Employment and Housing Act (FEHA; Gov. Code, § 12900 et seq.) and Unruh Civil Rights Act (Civ. Code, § 51)**

These causes of action incorporated a number of earlier allegations. Otherwise, Ponci was not mentioned in either the 15th or 16th causes of action. As for Thornhill, the SAC reiterated the conclusory statement that it "conduct[ed] an intrusive and discriminatory investigation without a claimant designation from LTurner." The incorporated and new allegations are not sufficient to state causes of action against Ponci or Thornhill under either civil right.

Appellants' opening brief eschewed a discussion of any facts that would support suing these respondents and instead cited several appellate decisions without an attempt to explain their relevancy to these respondents. Appellants simply asserted that Hartford engaged in "a long and continuous pattern of discrimination." This issue, too, has been forfeited. (*Sabic, supra,* 14 Cal.App.5th at p. 383.)

## IV. Appeal from the Order Assessing Monetary Discovery Sanctions (case no. B250084)

As mentioned, on June 17, 2013, the trial court granted most of Rule's discovery motions. It determined appellants' responses to the discovery were timely, so their objections were not waived. Noting the objections were of the "general boilerplate" variety and appellants "failed to submit a responsive Separate Statement justifying the objections asserted against each discovery request," the trial court overruled them. Finding no substantial justification for appellants' objections, the trial court assessed monetary sanctions of $6,304.31,

jointly and severally, against appellants and their attorneys. Appellants did not post an undertaking. (§ 917.1, subd. (a)(1).)

We review the sanctions award itself for abuse of discretion. Factual findings that support the award are evaluated under the substantial evidence standard. (*Parker v. Harbert* (2012) 212 Cal.App.4th 1172, 1177.)

Appellants contest Rule's entitlement to sanctions, but do not challenge the amount of the award. Appellants contend the trial court could not impose monetary sanctions unless it found they "acted without substantial justification." That is not the legal standard. Section 2023.030, subdivision (a) *requires* a trial court to impose a monetary sanction "unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust." Appellants, on the losing end of the discovery dispute, had the burden to prove they acted with substantial justification. (*Doe v. United States Swimming, Inc.* (2011) 200 Cal.App.4th 1424, 1435.)

Appellants did not meet this burden; and on this record, we find no abuse of discretion. Appellants provide no citations to the record

concerning the discovery propounded by Rule or their objections to it.[20] Instead, they merely state the "actual objections . . . were provided to the [trial] court and they properly filed a motion for protective order that was directly related to the inability to file separate statements for discovery that exceeded 2,500 items." Again, we do not comb the record to find factual support for appellants' claims. (*Harshad & Nasir Corp. v. Global Sign Systems, Inc.* (2017) 14 Cal.App.5th 523, 527, fn. 3.)

Appellants conclude they "met and conferred in good faith, reasonably sought a protective order, were clearly engaged in trial proceedings, and as indicated above, the discovery was drastically burdensome and overbroad." The trial court found "[t]he parties complied with the good faith meet and confer requirements," but that alone did not satisfy appellants' burden to demonstrate they acted with substantial justification. The trial court also found appellants' multiple requests for a protective order were not reasonable and noted the weak rationale proffered by appellants for

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[20] Appellants only provide a block citation of almost 400 pages concerning their responses to discovery propounded by Thornhill.

not having time to respond to discovery—their engagement "in trial proceedings" referred to LTurner's separate personal injury action against her own father. The trial court overruled appellants' objections based on burden and overbreadth. Appellants failed to demonstrate they acted with substantial justification or that other circumstances existed that would make the imposition of sanctions unjust.

The record amply supports the trial court's predicate findings for an award of monetary sanctions. The trial court did not abuse its discretion in assessing monetary sanctions of $6,304.31, jointly and severally, against appellants and their attorneys.

## V. Terminating Sanctions (case no. B256763)

Disobedience of a discovery order constitutes an abuse of discovery (§ 2023.010, subd. (g)) and authorizes a trial court to impose one or more sanctions on the offending parties, including dismissal of the action (§ 2023.030, subd. (d)(3).). As this court previously has held, the "'decision to order terminating sanctions should not be made lightly. But where a violation is willful, preceded by a history of abuse, and the evidence shows that less severe

sanctions would not produce compliance with the discovery rules, the trial court is justified in imposing the ultimate sanction.'" (*Los Defensores, Inc. v. Gomez* (2014) 223 Cal.App.4th 377, 390 (*Los Defensores, Inc.*).) Willful disobedience of even one discovery order may be sufficient to impose terminating sanctions. (*Ibid.*) The trial court is entitled to consider "the totality of the circumstances [, including the disobeying party's conduct] to determine if the actions were willful." (*Ibid.*)

The abuse of discretion standard of review applies when an action is dismissed as a terminating sanction. (*Creed-21 v. City of Wildomar* (2017) 18 Cal.App.5th 690, 702.) We "reverse only if the trial court's order was arbitrary, capricious, or whimsical." (*Ibid.*) Moreover, "The question before us "'is not whether the trial court should have imposed a lesser sanction; rather, the question is whether the trial court abused its discretion by imposing the sanction it chose.'"" (*Liberty Mutual Fire Ins. Co. v. LcL Administrators, Inc.* (2008) 163 Cal.App.4th 1093, 1105.) Where the trial court has exercised "its discretion [based] on factual determinations, we examine the record for substantial evidence to support them." (*Los*

*Defensores, Inc., supra,* 223 Cal. App. 4th at p. 390.)

In the trial court, appellants' written opposition to Rule's motion for terminating sanctions was filed late and exceeded the allowable page limits. Appellants did not ask for an extension of time to file their points and authorities or for permission to file a longer memorandum. (Cal. Rules of Court, rule 3.1113(e).) The trial court exercised its discretion and accepted the late opposition, but considered only the first 15 pages. That treatment is expressly authorized by rule 3.1113(g), and the trial court's decision to proceed in this manner is properly reflected in its order. (Cal. Rules of Court, rule 3.1300(d).)

Appellants indicated on the caption page that their opposition was filed "under protest." The first 15 pages of the opposition ignored the merits of Rule's motion. Appellants did not challenge the sufficiency of the evidence to support a finding of willful disobedience, nor did they attempt to demonstrate their disobedience was inadvertent or other than willful. Instead, appellants reprised the familiar and consistently discredited jurisdictional complaints.

Despite a tentative ruling in Rule's favor, appellants did not address the willfulness vel non of their disobedience. The hearing was reported. Appellants' counsel first asked the trial court to dismiss the lawsuit without prejudice so they could refile in federal court.[21] Thereafter, appellants' counsel continued to press the jurisdictional claims.

The trial court took the matter under submission and issued a comprehensive written decision. The trial court addressed and rejected appellants' jurisdictional challenges and recounted much of the history of the lawsuit, including appellants' repeated attempts to evade their discovery obligations by removing the case to federal court and seeking to disqualify the trial judge. Based on the totality of the circumstances and the undisputed evidence of appellant's willful disobedience, the trial court granted the motion and dismissed the action as to Rule as a sanction for disobedience of its earlier discovery orders.

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[21] Appellants have never offered an explanation or rationale for seeking to proceed in the federal district court. Nor have appellants explained why they did not voluntarily dismiss this action without prejudice.

Appellants, having not contested the merits of the motion for terminating sanctions in the trial court, largely eschew them in this court as well. The entirety of their argument on the merits is that "Rule did not establish that [appellants] had misused the discovery process or that they had willfully refused to comply with a court order." Appellants include no citations to the record or any applicable authorities to support this conclusion. As in the trial court, appellants rely on their unsupported jurisdictional arguments.

We have already addressed appellants' jurisdictional claims in part II of the Discussion, *ante*. Appellants offered no additional arguments that this court could consider.[22] The trial court acted well within its discretion when it imposed terminating sanctions as to Rule. (*Los Defensores, Inc., supra,* 223 Cal. App. 4th at p. 390.)

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[22] Appellants contend the trial court abused its discretion when it denied their oral request at the hearing to "dismiss this case without prejudice so that it can be filed in what we believe to be the proper jurisdiction [i.e., federal district court]." Appellants also complain the trial court failed to sanction Rule pursuant to section 128.7, subdivision (c), for filing a frivolous motion for terminating sanctions. Appellants never sought such sanctions in the trial court.

## VI. Prevailing Party Costs to Rule (case no. B261032)

As the prevailing party, Rule sought and was awarded $8,171.55 in costs. Appellants contest the denial of their motion to strike and/or tax Rule's costs. Whether Rule is a prevailing party, which appellants dispute, presents a question of law we review de novo. (*Charton v. Harkey* (2016) 247 Cal.App.4th 730, 739 (*Charton*).) The award itself we review for abuse of discretion. (*Ibid.*)

As a matter of law, Rule was the prevailing party and entitled to costs "'as a matter of right.'" (*Charton, supra*, 247 Cal.App.4th at p. 737 ["a defendant in whose favor a dismissal is entered" is the prevailing party]; § 1032, subd. (a)(4).)

Determining the amount of costs to award the prevailing party typically involves a straightforward process. Section 1033.5 identifies the categories of costs that may be awarded to a prevailing party (subd. (a)), lists items that generally are not allowable as costs (subd. (b)), and provides that "[i]tems not mentioned in this section . . . may be allowed or denied in the court's discretion" (subd. (c)(4)). For costs expressly allowed pursuant to section 1033.5, the objecting party bears the burden to show they were unnecessary or unreasonable.

For costs not expressly allowed, the prevailing party claiming them has the burden to show they were reasonably necessary. (*Berkeley Cement, Inc. v. Regents of University of California* (2019) 30 Cal.App.5th 1133, 1139.)

A prevailing party claims costs by filing a memorandum of costs "verified by a statement of the party, attorney, or agent that to the best of his or her knowledge the items of cost are correct and were necessarily incurred in the case." (Cal. Rules of Court, rule 3.1700(a)(1).) An optional Judicial Council form and worksheet have been developed for this purpose. Rule completed both forms.

Rule 3.1700(b)(2) of the California Rules of Court prescribes the required format for a motion to strike or tax costs: "Unless objection is made to the entire cost memorandum, the motion to strike or tax costs must refer to each item objected to by the same number and appear in the same order as the corresponding cost item claimed on the memorandum of costs and must state why the item is objectionable."

Appellants did object to the entire cost memorandum on the same jurisdictional grounds they had been raising for several years. The format of appellants' motion was proper for that

purpose; as already discussed, the trial court appropriately rejected the jurisdictional arguments.

Alternatively, appellants attempted to object to specific items in the memorandum of costs. Appellants' motion, however, was procedurally defective and not in the requisite format for challenges to specific cost items. (Cal. Rules of Court, rule 3.1700(a)(2).) The procedural deficiencies provided sufficient justification for denial of the motion. Given the broad discretion enjoyed by trial courts, there was "no abuse of discretion [because] there exist[ed] a reasonable . . . justification under the law for the trial court's decision[, which fell] within the permissible range of options set by the applicable legal criteria." (*Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 957.)

## VII. Sanctions for a Frivolous Appeal (case no. B256763)

### *A.* Governing Principles and Background

Section 907 and rule 8.276(a)(1) of the California Rules of authorize sanctions for an appeal that is frivolous, i.e., one that "is prosecuted for an improper motive-to harass the respondent or delay the effect of an adverse

judgment-or when it indisputably has no merit-when any reasonable attorney would agree that the appeal is totally and completely without merit." (*Flaherty, supra,* 31 Cal.3d at p. 650.) A "total lack of merit of an appeal is viewed as evidence that appellant must have intended it only for delay." (*Id*. at p. 649.) "An unsuccessful appeal should not be penalized as frivolous if it presents a unique issue which is not indisputably without merit . . . involves facts which are not 'amenable to easy analysis in terms of existing law . . . or makes a reasoned argument for the extension, modification, or reversal of existing law. [Citation.]'" (*Workman v. Colichman* (2019) 33 Cal.App.5th 1039, 1062, internal quotation marks omitted (*Workman*).)

Our analysis requires that we apply "'both subjective and objective standards. The subjective standard looks to the motives of the appealing party and his or her attorney, while the objective standard looks at the merits of the appeal from a reasonable person's perspective. [Citation.] Whether the party or attorney acted in an honest belief there were grounds for appeal makes no difference if any reasonable person would agree the grounds for appeal were totally and completely devoid of merit.'" (*Workman,*

*supra,* 33 Cal.App.5th at p. 1062.) Sanctions for a frivolous appeal may be ordered against the litigants and/or the attorneys. (*Id.* at p. 1065.) "Sanctions are warranted against a lawyer 'who, because the appeal was so totally lacking in merit, had a professional obligation not to pursue it.'" (*Ibid.*)

Within this framework, Rule asserts the appeal from the judgment in its favor (case no. B256763) is frivolous and warrants sanctions. Rule asks this court to assess $21,366 in sanctions jointly and severally against appellants and their counsel, Nina Ringgold and Amy Lee. This sum represents the attorney fees it incurred to prepare the respondent's brief in this one appeal, the motion for attorney fees, and the request for judicial notice, as well as the attorney fees it anticipates incurring to file a reply and argue the motion.

We gave appellants written notice that we were considering the imposition of sanctions and the opportunity to submit written opposition. (Cal. Rules of Court, rule 8.276(c), (d).) Appellants have done so.

Appellants' opposition primarily consists of a reiteration of their jurisdictional claims. They argue (1) "Court users have a right to

receive disclosure that a person assigned to their case is a judge subject to mandatory constitutional resignation . . .”; (2) “Recusal was required in the trial court and is required in the appellate court under the due process clause of the United States [Constitution] and Decisions of the United States Supreme Court” (internal capitalization omitted); and (3) Rule’s motion for sanctions is frivolous because the federal district court never remanded the CTurner lawsuit, and this court should sanction Rule instead of appellants. Alternatively, appellants contend Rule is overreaching and its request for sanctions in the sum of $21,366 is too high.

At our invitation, Rule served and filed a reply. Although given the opportunity to do so (Cal. Rules of Court, rule 8.276(e)), counsel did not address the sanctions issue during oral argument.

### *B.* Analysis

We agree the appeal in case number B256763 is frivolous and warrants sanctions against counsel for appellants, payable to Rule in the sum of $21,366, and to the clerk of this court in the amount of $8,500. A decade ago, a cost analysis by the clerk’s office of the Second Appellate District estimated the cost to

taxpayers to process an appeal through opinion was "approximately $8,500." (*In re Marriage of Gong & Kwong* (2008) 163 Cal.App.4th 510, 520.) We find additional sanctions in the amount of $8,500 to be appropriate. (*Workman, supra,* 33 Cal.App.5th at pp. 1064-1065.)

Appellants chose to pursue legal remedies against Rule in the judicial system. So long as all three Turners were plaintiffs seeking damages under California law against Rule, a California corporation, this lawsuit could proceed only in a California state court. Although appellants were free to voluntarily dismiss this lawsuit against Rule at any time before trial, they did not. (§ 581, subd. (b)(1).) When appellants failed to respond to discovery, the trial court issued an order compelling appellants to respond to formal civil discovery and imposed monetary sanctions. Appellants disobeyed the discovery orders and never challenged the evidence in support of the finding that the disobedience was willful. The record is replete with instances where appellants not only evaded their discovery responsibilities, but actively sought to delay proceedings, divert attention from the issues

embraced by the pleadings, and dramatically increase the cost of the litigation.

Rule's motion for terminating sanctions was heard approximately eight months after it was filed. Appellants had no merits-based opposition. Instead they relied on the jurisdictional claims they have never supported with any applicable legal authority. When Rule's motion for terminating sanctions was granted and judgment was entered in its favor, appellants appealed, relying on the same meritless and unsupported jurisdictional claims. When this court advised it was considering the imposition of sanctions for a frivolous appeal, appellants' counsel still relied only on the frivolous jurisdictional claims.
Objectively, no reasonable attorney would pursue this appeal based solely on jurisdictional claims that are totally devoid of merit. (*Flaherty, supra,* 31 Cal.3d at p. 650.) Under these circumstances, the objective standard overrides any honest belief by counsel that grounds existed for this appeal. (*Workman, supra,* 33 Cal.App.5th at p. 1062.)

## DISPOSITION

The Turners' purported appeals from the orders compelling discovery and denying their request for a protective order are dismissed as having been taken from nonappealable orders. Hartford's notice of appeal from the order denying its request for joinder in Rule's motion for terminating sanctions is dismissed as nonappealable. In all other respects, the judgments and orders are affirmed.

Sanctions for a frivolous appeal in case no. B256763 are imposed upon appellants' counsel of record, the Law Offices of Nina R. Ringgold and Nina R. Ringgold, and the Law Office of Amy P. Lee and Amy P. Lee, jointly and severally, in the amount of $21,366, payable to Rule, and in the separate amount of $8,500, are payable to the clerk of this court. Appellants' counsel of record and the clerk of this court are each ordered to forward a copy of this opinion to the State Bar upon return of the remittitur. (Bus. & Prof. Code, §§ 6086.7, subd. (a)(3), 6068, subd. (o)(3).) All sanctions shall be paid no later than 15 days after the date the remittitur is filed.

In the interests of justice, as between appellants and Hartford, the parties are to bear

their own costs on appeal. Rule, Ponci, and Thornhill are awarded costs on appeal.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

DUNNING, J.*

WE CONCUR:

MANELLA, P. J.

CURREY, J.

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* Retired judge of the Orange Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

**APPENDIX B**

Court of Appeal, Second Appellate District,
Division Four - Nos. B248667, B250084, B256763,
B261032

**S257525**

**IN THE SUPREME COURT OF CALIFORNIA**

**En Banc**

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SUPREME COURT
FILED
AUGUST 28, 2019
Jorge Navarrete Clerk

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Deputy

LISA TURNER et al., Plaintiffs and Appellants,

v.

THE RULE COMPANY et al.,
Defendants and Respondents.

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LISA TURNER et al., Plaintiffs and Appellants,

v.

HARTFORD CASUALTY INSURANCE COMPANY;
Defendant and Appellant;

THE RULE COMPANY et al., Defendants and Respondents.

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The petition for review and application for stay are denied.

CANTIL-SAKAUYE
Chief Justice

**APPENDIX C**

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION 4

COURT OF APPEAL
SECOND DIST.
FILED
Aug 05, 2019
DANIEL P. POTTER, Clerk S
Veverka Deputy Clerk

LISA TURNER et al.
Plaintiffs and Appellants
v.
THE RULE COMPANY et al.
Defendants and Respondents.

B248667, B250084, B261032
Los Angeles County Super. Ct. No. BC463850

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LISA TURNER, et al.
Plaintiffs and Appellants,
v.
HARTFORD CASUALTY INSURANCE COMPANY,
et al. Defendant and Appellant;

THE RULE COMPANY et al.,
Defendants and Respondents.

B256763
Los Angeles County Super. Ct. No. BC463850

THE COURT:

Appellant Cornelius Turner's petition for rehearing and companion request for judicial notice are denied.

Appellant Cornelius Turners request to disqualify the appellate panel is denied. (*Kaufman v. Court of Appeal* (1992) 31 Cal. 3d 933, 939-940; *Lebbos v. State Bar* (1991) 53 Cal.3d 37, 41.)

| s/ Manella | s/ Currey | s/ Dunning |
|---|---|---|
| MANELLA, P.J. | CURREY, | DUNNING J. |

*Retired Judge of the Orange Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution

**APPENDIX D**

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**
**SECOND APPELLATE DISTRICT**

**DIVISION FOUR**

| | |
|---|---|
| **MARIAN TURNER, LISA TURNER CORNELIUS TURNER** | **Case No. B248667, B250084, B256763, B261032, B268792, B252461** |
| **Appellants,** | **LASC No. BC463850** |

**v.**

**HARTFORD CASUALTY INSURANCE COMPANY, THE RULE COMPANY INCORPORATED, NADJA SILLETTO SILLETTO, NORMA PIERSON, TONY GAITAN, ELAINE ALBRECHT, THORNHILL & ASSOCIATES**

**Respondents.**

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**PETITION FOR REHEARING**

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On Appeal from Orders of the Superior Court of the

State of California,
County of Los Angeles,
The Honorable Yvette Palazuelos

Nina R. Ringgold, Esq. (SBN 133735)
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Attorney for Nina Ringgold,
Law Offices of Nina Ringgold

## INTRODUCTION

Appellants Nina Ringgold and the Law Office of Nina Ringgold hereby file this Petition for Rehearing from the unpublished decision of the California Court of Appeal Second Appellate District Division Four dated July 10, 2019. A timely petition for rehearing must be granted if the decision is based on an issue not raised or briefed by any party and the court fails to give the parties an opportunity to present supplemental briefs on that issue. Govt. Code § 68081; People v. Alice (2007) 41 Cal.4th 668, 674-679. Also, a petition for rehearing may be granted on the ground that the court reached an improper decision because of a mistake of law or misstatement of a material fact in the case. In re Jessup's Estate (1989) 81 Cal. 408, 471.

The decision imposes sanctions against the Law Offices of Nina Ringgold and Nina Ringgold (attorney for Cornelius Turner) the Law Offices of Amy Lee and Amy Lee (attorney for Marian Turner and Lisa Turner) jointly and severally in the amount of $21,366 payable to Rule and an additional sum of $8,500 payable to the clerk of court. (Opn. 3). The focus of the sanction is based the jurisdiction and disqualification issues raised. (Opn p. 20-25). To

reach the conclusion that the legal issues in Appeal B256763 are frivolous require this court to disregard federal statutory and constitutional authority and decisions of the Supreme Court Committee on Judicial Ethics. All cited by appellants, but not mentioned in the decision. Additionally as to the issue of constitutional judicial resignation and the requirement of disclosure and consent -- these arguments are not frivolous and the panel has a general and financial interest that are disqualifying.[23] The decision also disregards (as if it was never filed), the request for recusal filed on May 9, 2019 before the death of Cornelius Turner. Appellants have independently requested recusal and move for disqualification in conjunction with this petition. The decision at page 23-25 does not relate to the arguments or reflected the legal arguments asserted by the appellants. Instead, this portion of the decision is not appellant's argument but rather

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[23] These matters are at issue in the related Voting Rights Case referenced in the appeal. There has already been an admission filed in the federal court concerning the admission of disqualifying interests. (See RJN 8.106-110). Herein appellants request that the proceedings be stayed pending review in the United States Supreme Court. Certainly there is an appearance the decision is being used as a platform as to matters under federal review.

issued as a platform to address judicial compensation. Appellants' arguments have *nothing* to do with judicial compensation.

Court users, including out of state court citizens, must be given disclosure that Section 5 of Senate Bill x211 ("Section 5 of SBX2 11") involuntarily forces a waiver of federal statutory and constitutional rights. They must be given an opportunity to withhold consent to proceedings where the involuntary waiver is made. There must be an official record (with a court reporter or audiotape) where the waiver is made or disclosures about acceptance of public employment and office by a judge of a court of record are made. The sanction imposed against the appellants is not reasonable or appropriate based on the legal issues raised. Because there was no response to the request for recusal the sanction appears to be an outcome of the general and financial disqualifying interests and more designed to force attorneys to betray the constitution and their client's interests discouraging them from informing clients of the existence, meaning, and forced waiver caused by uncodified Section 5 of SBX 211.

To continue to maintain federal financial assistance and to claim to be a viable form to hear federal claims California courts must comply with the applicable federal law and be straightforward about the waivers forced upon the public. It is also important to be straightforward and truthful about how Section 5 of SBX 211 is linked to past findings of intentional vote discrimination in judicial elections. It is that history that led to uncodified Section 5 of SBX 211--- not judicial compensation.

Sanctions are not appropriate under In re Marriage of Flaherty (1982) 31 Cal.3d 637, 651. The sanction imposed is intend to violate First Amendment rights as well as the claims made as to voting.[24] Professional speech is protected under the first amendment. The claims are subject to strict

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[24] Although CTurner was not a California voter he previously raised claims in the Voting Rights Case as to the procedures to be used to provide notice to court users (particularly out of state users of the California courts) and the retaliation encountered when he objected to state court jurisdiction and requested that his case be dismissed without prejudice and a tolling order. He did not have disclosure and did not consent. Although referred to generally in the appeal as the voting rights case the case is broader in that it seeks to implement certain administrative procedures and declaration of rights.

scrutiny. See NIFLA v. Becerra (2018) 138 S.Ct. 2361 (strict scrutiny standard applies to professional speech),

NAACP v. Button (1936) 371, U.S. 415, 430-438 (the power to regulate does not allow impairment of the First Amendment), NAACP v. Alabama ex rel. Flowers, 377 U.S. 288, 297 (1964), See also Vieth v. Jubelirer, 441 U.S. 267, 313-16 (Kennedy, J concurring in judgment). After removal only the federal court and restore jurisdiction to a state court or tribunal. National S.S. Co. v. Tugman (1882) 106 U.S. 118, 122, Ackerman v. Exxon Mobil Corp. (4th Cir. 2013) 734 F.3d237.

**INTRODUCTORY FACTS**

A personal injury action was filed on July 22, 2010 against Cornelius Turner (date of death 6/7/19) ("CTurner") in the United States District Court for the Central District of California. CTurner was a citizen of the State of Mississippi and the plaintiff Lisa Turner ("LTurner") was a citizen of the State of California.[25] Both the plaintiff and defendant are African American. The case was assigned to Judge Valerie Baker Fairbank and assigned the case

[25] LTurner is now a citizen of the State of Mississippi.

number CV10-5435-VBF. With the insurance broker and insurance company refusing to provide basic information CTurner made a blind tender of defense to Hartford. It was discovered that for over 20 years CTurner and his wife had been paying over 3 times the market rate for insurance for over 20 years. Before discovery of the basis for federal housing discrimination claims CTurner filed a third party complaint against Hartford. His wife Marian Turner ("MTurner") was later added to the personal injury complaint and when she filed her answer she also filed a third party complaint asserting federal discrimination claims.

Before the TPCs of the joined by the jointly insured spouses could be consolidated, based on Hartford's erroneous argument that the personal injury case was the same of the TPC of CTurner, Judge Fairbank entered a realignment order that destroyed diversity and required CTurner to refile his TPC in the state court. This left Judge Fairbank with the TPC of one insured in the district court with federal fair housing claims and the other insured (CTurner) in the state court asserting his federal fair housing claims. (See RJN 1.62-76). The decision improperly and erroneously indicates that "Two third party complaints were consolidated under one case

number and remained in the federal court. Appellants then voluntarily dismissed the federal claims")(Opn p. 6). Then the decision mischaracterizes the state court litigation including by inferring that CTurner had a pending federal TPC in the federal court. (Opn p. 6). The elderly out of state joint insureds *both* had federal claims and based on the erroneous claims of Rule, Hartford, and Thornhill, they could not proceed in one action together.

Despite the fact that Rule, Gaitan, and Albrecht (collectively "Rule") were aware that Judge Fairbank had entered orders that required the filing of a June 17, 2011 complaint by CTurner in the state court (RJN 1.6). After service of the complaint on or about September 8, 2011, on September 15, 2011 Rule removed the case back to the federal court. (RJN 1).

When CTurner filed the state court June 17,2011 complaint there was no disclosure at the filing window or available to general court users at the time that there was a requirement to involuntarily waive federal statutory and constitutional rights or that there was a requirement

to waive state constitutional rights under uncodified section 5 of Senate Bill x211 ("Section 5 of SBX211").

The Rule removal was initially assigned to Judge Otis Wright at case assignment. (RJN 1.2). Judge Fairbank unambiguously and properly took jurisdiction over the portion of the case that was re-filed by Rule under the guise of removal. And she continued to jurisdiction over the case that remained in the federal court. (RJN 2.87-88. 3.89-96, 5.99-100, 6.101-102, 7.103-105). Judge Percy Anderson, who had never been tentatively assigned the case at case assignment signed a transfer order over the signature line of Judge Fairbank. (RJN 4.97-98).

The decision specifies that the record does not demonstrate that the "entirely separate CTurner lawsuit was ever remanded back to the superior court, appellants insist that the trial court had no jurisdiction to proceed with this action. Appellants cite to no authority for the proposition that the federal court's failure to remand one lawsuit deprives a trial court of jurisdiction to proceed with a different action." (Opn 22). 28 U.S.C. § 1446 (d) prohibited the trial court from asserting jurisdiction over any aspect of a removed action. The decision then asserts that CTurner dismissed his state action on December 6,

2011. (Opn p. 22). This statement is entirely misplaced. Judge Dau continued to act in a case that had been removed and his actions or any action pertaining to the removed case were completely and utterly void as a matter of law. A local rule of court, a dismissal (attempting to prevent the perpetuate void proceedings initiated by Rule, Hartford, and Thornhill) could not restore jurisdiction to the state court.[26] Although the decision does not mention it is clear that any claimed dismissal in the federal case could not restore jurisdiction to Judge Dau to act in any manner in the removed case.[27] Therefore even if

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[26] It is improper to unilaterally take judicial notice of matters outside the record without allowing an opportunity to be hear particularly when the court is claiming that the jurisdictional arguments are a basis for sanction. (See Opn fn 13).

[27] (See also Allstate Ins. Co. v. Superior Court (1982) 132 Cal.App.3d 670, 676. ("There having been a dismissal without remand, there was no action in which respondent court could 'resume' jurisdiction….That court consequently erred and exceeded its jurisdiction, in permitting further proceedings in action No. P 37639 after the federal court had dismissed it as action No. C80 1627 AJZ"); Murray v. Ford Motor Co. (5th Cir. 1985) 770 F.2d 461, 463 (the court lacked jurisdiction to act or to set aside a default after removal had already taken place). Judge Dau, completely lacking any jurisdiction, could not continue to act as a an assigned case that had been removed to divest other judges of cases of jurisdiction. Moreover, MTurner and LTurner never had

it could be disregarded that Judge Fairbank never lawfully lost jurisdiction of the case as the assigned judge under the General Order of the District Court, Judge Palazuelos could not obtain jurisdiction over any case of the Turners because her assignment was entirely based on Judge Dau acting as if he had a case before him. Judge Dau could not designate a case that was not before him under 28 U.S.C. §1446 (d) and the Supremacy Clause as a "lead" case in order to make orders.

The decision specifies that a final judgment was entered on April 25, 2016. (Opn p. 3) However, the courted lack jurisdiction to enter judgment on multiple grounds. (lack of a remand order, appeal from a mandatory injunction, lack of disclosure and consent).

Rather than imposition of sanctions against appellants the court should have issued an order to show cause as to Rule for proceeding without a remand order causing undue expense and delay.

---

any case before this judge and he had never had any jurisdiction whatsoever over their cases.

## ARGUMENT

### I. There Is Error Of Law As To the Jurisdictional And Disqualification Issues.

#### A. There Is A Lack of Jurisdiction Due To The Lack of A Remand Order

The decision erroneously claims there were multiple cases in the federal court. There was one case assigned to one judge, Judge Fairbank. With that case there were various pleadings (i.e. complaint, answer, TPC). The third party complaints were not bifurcated. The decision completely relies upon the dismissal filed on December 6, 2011 in the state court. Judge Dau continued to exercise jurisdiction in violation of 28 U.S.C. § 1446 (d). There was nothing before him. The voluntary dismissal attempting to stop the judge from exercising jurisdiction where none exists has no relevance to the pertinent legal argument. The case had already been removed and assigned in the federal court. There was nothing to dismiss and nothing for Judge Dau to act upon. The argument concerning the lack of a remand order is not frivolous in any fashion.

**B. Sanctions Should Not Be Impose As To Good Faith And Well Founded Legal Arguments That Pertain To Judicial Resignation Particularly Since Attorneys Are Required To Uphold The State and Federal Constitution and To Not Betray The Interests Of Their Clients**

The California Commission on Judicial Performance had twice render decision that the acceptance of public employment by judges of the courts of record is unconstitutional. Therefore, to claim that arguments that the uncodified Section 5 of SBX 211 is unconstitutional is frivolous is not appropriate. Moreover, two justices (current and prior) have sought legal action to obtain declarations of rights concerning California Constitution Art VI § 17 and its application to them. Attorneys who have constitutional duties to advise clients about disclosures required and their clients have an equal right to raise the legal issues that pertain to their rights. This is not frivolous. Moreover the arguments are not indecipherable. Instead, they are undesirable to those who may have a general and financial interest.

### C. Recusal Is Required In This Case And The Panel Has Not Ruled on The May 9, 2019 Request For Recusal

Particularly given the admission of disqualifying interest filed in the federal court disqualification is required. The court should enter a rule on the May 9, 2019 request for recusal and grant the requested recusal/disqualification of appellants.

An appearance of impropriety, whether such impropriety is actually present or proven, weakens our system of justice. See In re Murchison (1955) 349 U.S. 133, 136. While claims of bias generally are resolved by common law, statute or professional standards of the bench and bar, the Due Process Clause of the Fourteenth Amendment "establishes a constitutional floor." Bracy v. Gramley (1997) 520 U.S. 899, 904. The Due Process Clause requires recusal not only where there is proof that a judge is actually bias, but also where an objective inquiry establishes a probability of bias. Caperton v. A. T. Massey Coal, Co., Inc. (2009) 129 S.Ct. 2252, 2259-2263, Tumey v. Ohio (1927) 273 U.S. 510, 532, Georgevich v. Strausz (3rd Cir. 1985) 772 F.2d 1078, 1087-1089. The potential financial interests and the fact that there was pending federal litigation "offer a possible temptation to the average ... judge to ... lead

him not to hold the balance nice, clear and true." Aetna Life Ins. Co. v. Lavoie (1986) 475 U.S. 813. Also, because disqualification is mandatory, there is not sufficient number of qualified justices to render a decision. The relief sought by appellants should be granted.

## II. There Was An Automatic Stay

The decision is in error because the appellants filed an appeal from a motion filed under CCP §526. Not only was a motion filed, an opposition was filed, and a reply filed. Finally, the trial court addressed the motion for injunctive relief and CCP § 526 in the resulting order. The appeal was not solely from a protective order and this is not an accurate reflection of the record.

## III. There Is Not A Reasonable Basis For Sanctions Against Appellants, But There is A Reasonable Basis for Sanctions Against Rule and It was Error Not To Issue the Requested Order To Show Cause.

As discussed above and incorporated by reference at this point, the arguments made on appeal are not frivolous there is no basis for sanctions. The

amount specified is not proper because CRC 8.276 (b) requires a declaration for sanctions and the only itemization specified in attachment to the declations was only in the amount of $7,230.00 and includes unexplained redacted items.

## IV. There Are Grounds To Transfer This Appeal To A Different Court Or To Stay The Appeal Pending Determination Of The Related Matters In The Federal Court

Appellants previously requested that the case be dismissed without prejudice with an equitable tolling order allowing the case to be filed in a different tribunal that did not require an involuntary waiver of federal and state rights. The members of the voting rights case are requesting that their cases be assigned to an out of state three-judge court for determination of disposition of the cases first raising the issue of constitutional judicial resignation and development of procedures for disposition of future cases pending election. Appellants do not waive these objections and request transfer to a district or panel of judges that do not have a general and financial interests in the legal issues raised. Unavoidably each panel member has a pecuniary interest and general personal interest in the pending cases. Gibson v. Berryhill, 411 U.S. 564, 579 (1973) (due process

violated when the decision makers had an indirect general interest of sufficient substance that was in competition with the parties), Aetna *supra*(due process violated by participation of a judge in a case where he had an indirect interest in the outcome).

## V. This Court Should Stay Issuance Of The Remittitur And Stay Further Proceedings In The Trial Court

Should this court deny this petition for rehearing, appellants request that this court stay of the issuance of a remittitur pending review in the California Supreme Court and any further review in the United States Supreme Court. This court has full jurisdiction to exercise its control over remittiturs in order to prevent wrong and injustice. Trumpler v. Trumpler (1899) 123 Cal. 248, People v. Fortman (1970) 4 Cal.App.3d 495; People v. Rodriguez (1969) 275 Cal.App.2d 946.

## CONCLUSION

For the foregoing reasons, this court should grant this petition for rehearing.

Date: July 25, 2019

Respectfully Submitted,

By: s/ Nina R. Ringgold
NINA RINGGOLD
Attorney for Appellants Nina Ringgold, Law Offices of Nina Ringgold

**CERTIFICATE OF WORD COUNT**

The text of this petition consist of 3,132 words as counted by the Word word-processing program used to generate the petition.

Date: July 25, 2019

By: s/ Nina R. Ringgold
NINA RINGGOLD
Attorney for Appellants

**PROOF OF SERVICE**

I hereby declare and state:

I am over the age of eighteen years, employed in the City of Los Angeles, County of Los Angeles, California, and not a party to the within action.

On July 25, 2019 I served a true and correct copy of the following as indicated below:

**PETITION FOR REHEARING**

By Electronic Service through Truefiling on the Following entities or persons:

Michael W. Ellison, Esq.
Smith - Ellison
18881 Von Karman, Suite 960
Irvine, CA 92612
Attorney for Craig Ponci, Hartford Casualty Insurance Company

Philip Black, Esq.
Soltman Levitt Flaherty and Wattles LLP
90 E. Thousand Oaks Blvd., #300
Thousand Oaks, CA 91360
Attorney for Thornhill & Associates

Frank Gooch III
Gilchrist & Rutter

1299 Ocean Avenue Suite 900
Santa Monica, CA 90401-1000
Attorney for Rule

Amy P. Lee, Esq.
428 South Atlantic Blvd, Suite 312
Attorney for Marian Turner, Lisa Turner

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at Los Angeles, California on July 25, 2019.

s/ Matthew Melaragno

**APPENDIX E**

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**
**SECOND APPELLATE DISTRICT**

**DIVISION FOUR**

| | |
|---|---|
| **MARIAN TURNER, LISA TURNER CORNELIUS TURNER** | **Case No. B248667, B250084, B256763, B261032, B268792, B252461** |
| **Appellants,** | **LASC No. BC463850** |

**v.**

**HARTFORD CASUALTY INSURANCE COMPANY, THE RULE COMPANY INCORPORATED, NADJA SILLETTO SILLETTO, NORMA PIERSON, TONY GAITAN, ELAINE ALBRECHT, THORNHILL & ASSOCIATES**

**Respondents.**

---

**MOTION TO DISQUALIFY/REQUEST FOR RECUSAL**

On Appeal from Orders of the Superior Court of the State of California,
County of Los Angeles,

The Honorable Yvette Palazuelos

Nina R. Ringgold, Esq. (SBN 133735)
LAW OFFICE OF NINA R. RINGGOLD
9420 Reseda Blvd. #361
Northridge, CA 91324
Telephone: (818) 773-2409
Facsimile: (866) 340-4312
Attorney for Nina Ringgold,
Law Offices of Nina Ringgold

NOTICE IS HEREBY GIVEN that appellants Nina Ringgold, Esq. and the Law Office of Nina Ringgold hereby adopt, and incorporate by reference, the request for recusal filed by appellants on behalf of their client Cornelius Turner when he was alive on May 9, 2019. The request for recusal is filed again and included in the accompanying request for judicial notice –item number 10. The request for recusal is hereby incorporated by reference in support of this motion.

Mr. Turner died on June 7, 2019. This case was fully briefed over three years ago and previously set for oral argument on August 11, 2016. (See request for judicial notice –item number 9).

Appellants independently and separately request recusal for the reasons specified in the request filed on behalf Mr. Turner and on the further grounds specified in the petition for rehearing.

Date: July 25, 2019.

By: s/ Nina R. Ringgold
NINA RINGGOLD
Attorney for Appellants

**PROOF OF SERVICE**

I hereby declare and state:

I am over the age of eighteen years, employed in the City of Los Angeles, County of Los Angeles, California, and not a party to the within action.

On July 25, 2019 I served a true and correct copy of the following as indicated below:

**MOTION TO DISQUALIFY/REQUEST FOR RECUSAL**

By Electronic Service through Truefiling on the Following entities or persons:

Michael W. Ellison, Esq.
Smith - Ellison
18881 Von Karman, Suite 960
Irvine, CA 92612
Attorney for Craig Ponci, Hartford Casualty Insurance Company

Philip Black, Esq.
Soltman Levitt Flaherty and Wattles LLP
90 E. Thousand Oaks Blvd., #300
Thousand Oaks, CA 91360
Attorney for Thornhill & Associates

Frank Gooch III
Gilchrist & Rutter
1299 Ocean Avenue Suite 900
Santa Monica, CA 90401-1000
Attorney for Rule

Amy P. Lee, Esq.
428 South Atlantic Blvd, Suite 312
Attorney for Marian Turner, Lisa Turner

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at Los Angeles, California on July 25, 2019.

s/ Matthew Melaragno

**APPENDIX F**

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**
**SECOND APPELLATE DISTRICT**

**DIVISION FOUR**

| | |
|---|---|
| **MARIAN TURNER, LISA TURNER CORNELIUS TURNER** | **Case No. B248667, B250084, B256763, B261032, B268792, B252461** |
| **Appellants,** | **LASC No. BC463850** |

**v.**

**HARTFORD CASUALTY INSURANCE COMPANY, THE RULE COMPANY INCORPORATED, NADJA SILLETTO SILLETTO, NORMA PIERSON, TONY GAITAN, ELAINE ALBRECHT, THORNHILL & ASSOCIATES**

**Respondents.**

---

**REQUEST FOR JUDICIAL NOTICE**
**(FILED IN CONJUNCTION WITH PETITION**

**FOR REHEARING)**

---

On Appeal from Orders of the Superior Court of the
State of California,
County of Los Angeles,
The Honorable Yvette Palazuelos

Nina R. Ringgold, Esq. (SBN 133735)
LAW OFFICE OF NINA R. RINGGOLD
9420 Reseda Blvd. #361
Northridge, CA 91324
Telephone: (818) 773-2409
Facsimile: (866) 340-4312
Attorney for Nina Ringgold,
Law Offices of Nina Ringgold

TO THE JUSTICES OF THE CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION FOUR

Appellants Nina Ringgold and the Law Office of Nina Ringgold file this request for judicial notice. They request judicial notice pursuant to California Evidence Code § 459 (§§ 451, 452, 453).

Appellants also request judicial notice of the following items:

1. Filed: 9.15.11. Notice of Removal of action under 28 U.S.C. § 1441 (b)(Federal Question) filed by The Rule Company Incorporated (CV11-7653-ODW, Judge Otis Wright)(BS 1-86).

2. Dated: 9.20.11. Order of Judge Valerie Baker Fairbank filed in proceedings already pending in the federal court. (CV10-5435-VBF, Judge Valerie Baker Fairbank) (BS 87-88).

3. Filed: 9.24.11. Notice of re-filing action and notice of related case. (CV11-7653-ODW, Judge Otis Wright). Giving notice of same action being returned by Rule immediately after ruling of Judge Valerie Baker Fairbank. (BS 89-96).

4. Filed: 9.27.11. Transfer order with signature line bearing the name of Judge Valerie Baker Fairbank with signature of different Judge, Judge Anderson. Entered on docket when only Judge Valerie Fairbank and Judge Otis Wright were involved in the Rule removal (the removal involved the same case that had been proceeding before Judge Fairbank) (CV11-7653-ODW, Judge Otis Wright)(BS 97-98)

5. Filed: 9.27.11. Minute Order of Judge Valerie Baker Fairbank asserting jurisdiction over removed case (Cornelius Turner v. Hartford et al.) and setting a scheduling conference and rendering other orders. (CV11-7653-VBF). (BS 99-100)

6. Filed: 10.5.11. Minute Order of Judge Valerie Baker Fairbank with exercising proper jurisdiction over the removed case filed by Rule (which was in in fact a return of the same case previously before her)(Cornelius Turner v. Hartford et al)(CV11-7653-VBF)(BS101-102).

7. Filed: 10.11.11. Minute Order of Judge Valerie Baker Fairbank continuing to exercise of jurisdiction over the remaining portions of the

original case filed in federal court and continuing in the federal court[28] (CV10-75435-VBF)(BS 103-105).

8. Filed: 2.20.14. Certificate of interested parties filed in the federal court admitting that judges of the Los Angeles Superior Court, justices of the California Court of Appeal for the Second Appellate District, the California Judicial Council, and others had general and financial interest in the legal issues raised by the Voting Rights Case and persons involved in the issues raised in that case. The case involved the one of the identified and lead plaintiffs in the Voting Rights Case. (CV13-04621-SI)(BS 106-110)

9. Dated: 7.19.16. Order consolidating appeals and vacating oral argument previously set for August 11, 2016 despite the fact that appellants Cornelius Turner and Marian Turner in their 80's/90's (BS 111-112)

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[28] The original case being Lisa Turner v. Cornelius Turner, Marian Turner et. al, and third party complaints of Cornelius Turner v. Hartford, Marian Turner et al v. Hartford et al. The third party complaints could not be filed at the same time because the joint insureds were sued at different times.

10. Filed: 5.9.19. Request for recusal filed prior to oral argument. The request was never been ruled upon and now filed independently by appellant. (BS 113-125).

11. Filed: 5.10.19. Official audio recording of oral argument at Minute 25:08 Justice Pro Tem Kim G. Dunning and Author of Decision indicating that Section 5 of Senate Bill x211 is uncodified. It is this exact point, that the provision is uncodified, that amplifies the involuntarily waiver of the Civil Rights Act of 1866, the Supremacy Clause and 14th Amendment of the United States Constitution, and Art VI §§ 17 & 21 of the California Constitution.

Date: July 25, 2019.

By: s/ Nina R. Ringgold
NINA RINGGOLD
Attorney for Appellants

**DECLARATION**

I, NINA RINGGOLD, hereby declare as follows:

1. If called as a witness I could and would competently testify hereto.

2. The attached exhibits numbers 1-10 are true and correct copies of the originals and I hereby authenticate these documents.

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

Dated: July 25, 2019

/s/ Nina R. Ringgold

**PROOF OF SERVICE**

I hereby declare and state:

I am over the age of eighteen years, employed in the City of Los Angeles, County of Los Angeles, California, and not a party to the within action.

On July 25, 2019 I served a true and correct copy of the following as indicated below:

**REQUEST FOR JUDICIAL NOTICE (FILED IN CONJUNCTION WITH PETITION FOR REHEARING)**

By Electronic Service through Truefiling on the Following entities or persons:

Michael W. Ellison, Esq.
Smith - Ellison
18881 Von Karman, Suite 960
Irvine, CA 92612
Attorney for Craig Ponci, Hartford Casualty Insurance Company

Philip Black, Esq.
Soltman Levitt Flaherty and Wattles LLP
90 E. Thousand Oaks Blvd., #300
Thousand Oaks, CA 91360
Attorney for Thornhill & Associates

Frank Gooch III
Gilchrist & Rutter
1299 Ocean Avenue Suite 900
Santa Monica, CA 90401-1000
Attorney for Rule

Amy P. Lee, Esq.
428 South Atlantic Blvd, Suite 312
Attorney for Marian Turner, Lisa Turner

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at Los Angeles, California on July 25, 2019.

s/ Matthew Melaragno

**APPENDIX F1**

FRANK GOOCH III (Bar No. 70996)
fgooch@gilchristrutter.com
KEVIN M. YOPP (Bar No. 218204)
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Telephone: (310) 393-4000
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Attorneys for Defendants The Rule Company, Inc., Nadja Silletto, Norma Pierson, Tony Gaitan, and Elaine Albrecht

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

| | |
|---|---|
| CORNELIUS TURNER,<br><br>Plaintiff,<br>v. | CASE NO. LACV11-76530DW(RAx) |
| HARTFORD CASUALTY INSURANCE COMPANY; THE RULE COMPANY, INCORPORATED; WESTERN SURETY COMPANY; CRAIG PONCI; NADJA SILLETTO; | NOTICE OF REMOVAL OF ACTION UNDER 28 U.S.C. 1441(b) (FEDERAL QUESTION) |

NORMA PIERSON; TONY GAITAN; ELAINE ALBRECHT; THORNHILL & ASSOCIATES, INC.; and DOES 1-10;

Defendants.

TO THE CLERK OF THE COURT:

PLEASE TAKE NOTICE that Defendants The Rule Company, Inc., Nadja Silletto, Norma Pierson, Tony Gaitan, and Elaine Albrecht (collectively, "Rule" or the "Rule Defendants") hereby remove the state court action described below to this Court.

1. On June 17, 2011, an action was commenced in the Superior Court of the State of California for the County of Los Angeles, entitled Cornelius Turner v. Hartford Casualty Insurance Co. et al, Los Angeles Superior Court Case No. BC463639. A copy of the Complaint is attached as Exhibit A. A copy of the Summons is attached as Exhibit B.

2. Rule believes that the first date that it would be legally deemed to have received a copy of the Complaint was on September 9, 2011, when Rule was served with the Summons and Complaint. On that date, Rule's counsel signed notices of acknowledgement for each of the Rule Defendants

and returned them to Plaintiff's counsel. [29]

3. This action is a civil action of which the Court has original jurisdiction under 28 U.S.C. § 1331 because it contains federal question claims arising under 42 U.S.C. § 1981-1982 (15th Cause of Action), 42 U.S.C. § 1985 (16th Cause of Action), and 42 U.S.C. § 3604-3605 (17th Cause of Action). The action may therefore be removed to this Court under the provisions of 42 U.S.C. § 1441(b).

4. Rule realizes that the Complaint also contains claims that were dismissed by this Court on May 19, 2011 because state-law issues predominated. Rule means no disrespect to the Court Now, Plaintiff Cornelius Turner's Complaint also contains federal discrimination claims that were not before the Court previously. For the sake of efficiency and judicial economy, Rule believes it is best to resolve these newly-added federal discrimination claims along with those in Central District Case No. CV 10-5435 VBF(Ex) because they pertain to the same conduct by the Defendants in this matter, involve the same parties, transactions, personal injury, and insurance claim handling, and therefore call for determination of the same or substantially related or similar questions of law and fact as the case already pending before the Court. By statute, Rule could not remove just the new federal claims; it had to remove the entire action.

---

[29] Cornelius Turner's counsel also attempted some kind of improper substantiated service on September 8, 2011, which was not valid or effective service.

5. Rule believes it would be appropriate for the Court to exercise its discretion to remand the previously-dismissed state law claims under 28 U.S.C. § 1441 (c).[30] Absent the newly-added federal claims, there would be no removal jurisdiction over the action because the Rule Defendants are citizens of the State of California. See 28 U.S.C. § 1441(b).

6. Counsel for Rule hereby certifies that all the other Defendants who have been served with the Summons and Complaint consent to the removal of this action.

DATED: September 15, 2011

GILCHRIST & RUTTER
Professional Corporation
KevimM. Topp
Attorneys for Defendants
The Rule Company, Inc., Nadja
Silletto, Norma Pierson, Tony Gaitan,
and Elaine Albrecht

---

[30] Plaintiff Cornelius Turner has improperly included in his state court Complaint claims that were dismissed with prejudice by this Court - his invasion of privacy claim (11th Cause of Action) and his intentional infliction of emotional distress claim (12th Cause of Action). Rather than remanding these two claims to state court, the Court should dismiss these claims with prejudice (again).

**APPENDIX F2**

FILED
LOS ANGELES SUPERIOR COURT
JUN 17 2011
John A, Clarke Clerk
By Darnetta Smith, Deputy

NINA R. RINGGOLD, ESQ. (SBN (CA) 133735)
LAW OFFICE OF NINA R. RINGGOLD
9420 Reseda Blvd. #361
Northridge, CA 91324
Tel: (818) 773-2409, Fax: (866) 340-4312
Email: nrringgold@aol.com
Attorney for Plaintiff Cornelius Turner

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

Case No.: BC463639

CORNELIUS TURNER,
Plaintiff
v.

HARTFORD CASUALTY INSURANCE COMPANY; THE RULE COMPANY, INCORPORATED; WESTERN SURETY COMPANY; CRAIG PONCI; NADJA SILLETTO, NORMA PIERSON; TONY GAITAN, ELAINE ALBRECHT;THORNHILL & ASSOCIATES, INC.; and DOES 1-10.
Defendants.

COMPLAINT OF CORNELIUS TURNER FOR:

1. Fraud
2. Misrepresentation
3. Fraud in the Inducement
4. Mistake
5. Reformation
6. Broker Negligence
7. Breach of Contract
8. Breach of the Covenant of Good Faith And Fair Dealing
9. Deceptive and Unfair Practices (Cal. Bus. & Prof. Code § 17200 et seq.)
10. Deceptive and Unfair Practices as to Seniors (Cal. Civ. Code § 1761, 3345, Cal. Ins. Code § 785)
11. Invasion of Privacy
12. Intentional Infliction of Emotional Distress
13. Negligent Infliction of Emotional Distress
14. Implied Contractual Indemnity and Equitable Indemnity
15. Violation of 42 U.S.C. 1981 & 1982
16. Violation of 42 U.S.C. 1985
17. Violation of 42 U.S.C 3604 & 3605

JURY TRIAL DEMANDED

Plaintiff Cornelius Turner ("CTurner") on this Complaint alleges as follows:

PARTIES

1. Plaintiff, CTurner, is an African American individual who resides in the State of Mississippi and is a citizen of this state. He is presently eighty three (83) years old.

2. CTurner is informed and believes and thereon alleges that Hartford Casualty Company ("Hartford") is a New Jersey Corporation with its principal place of business in the State of Indiana.

3. CTurner is informed and believes and thereon alleges that The Rule Company, Incorporated ("Rule") is a California Corporation with its principal place of business in the State of California and is an independent insurance broker, an insurance agent, and an agent of Hartford.

4. CTurner is informed and believes and thereon alleges that Western Surety Company is a South Dakota Corporation with its principal place of business in the State of Illinois, is the Surety Company for Rule, and has issued a bond (i.e. Bond # FX-R24084654) in favor of Rule. All references to Rule in this complaint include and shall be deemed to include Western in that Western is a surety for

Rule.

5. CTurner is informed and believes and thereon alleges that Craig Ponci ("Ponci") is an individual who resides in the State of Oregon and is a citizen of this state. Ponci is also a claims agent for Hartford.

6. CTurner is informed and believes and thereon alleges that Nadja Silletto is an individual residing in the State of California and a citizen of this state and is a broker, agent, agent of Hartford, and employee of Rule.

7. CTurner is informed and believes and thereon alleges that Norma Pierson is an individual residing in the State of California and a citizen of this state and is a broker, agent, agent of Hartford, and director of risk management for Rule.

8. CTurner is informed and believes and thereon alleges that Tony Gaitan ("Gaitan") is an individual residing in the State of California and a citizen of this state and is a broker, agent, agent of Hartford, and employee of Rule.

9. CTurner is informed and believes and thereon alleges that Elaine Albrecht ("Albrecht") is an individual residing in the State of California and a citizen of this state and is a broker, agent, agent of Hartford, and employee of Rule.

10. CTurner is informed and believes and thereon alleges that Thornhill & Associates, Inc. is a California Corporation with its principal place of business in the State of California and was retained by Rule.

11. CTurner is unaware of the true identity, nature and capacity of each of the defendants designated herein as a DOE. He is informed and believes and thereon alleges that each of the defendants designated herein as a DOE is in some manner responsible for the damages and injuries as are alleged herein. Upon learning the true identity, nature, and capacity of the ROE defendants, CTurner will amend this complaint to alleged their true names and capacities.

12. CTurner is informed and believes and thereon alleges that at all material times herein alleged that the defendants, and each of them, were the agents, servants and employees of the other defendants, and each of them.

13. CTurner is informed and believes and thereon alleges that at all times Hartford was vicariously liable for the tortuous acts committed by its employees and agents, for which it provided direct or ostensible authority, or for acts within the course and scope of their employment or agency, and even if

the conduct was not within the course of scope of such employment or agency, it is responsible for the acts which it ratified, justified, or continued.

14. CTurner is informed and believes and thereon alleges that at all times Rule was vicariously liable for the tortuous acts committed by its brokers, agents and employees for which it provided direct or ostensible authority, or for acts within the course and scope of their employment or agency, and even if the conduct was not within the course of scope of such employment or agency, it is responsible for the acts which it ratified, justified, or continued.

15. Lisa Turner ("LTurner"), is an individual who resides in the State of California and is a citizen of this state. LTurner has filed an action against CTurner and a separate action against the wife of CTurner for personal injuries. The community property estate would be liable for the claims and damages alleged by LTurner.

16. After Hartford did not respond to the tendered defense in October 2010, all insureds entered into binding agreements with LTurner. Dorian Turner ("DTurner") agreed to assign rights to LTurner in exchange for a dismissal with prejudice. MTurner agreed to assign certain claims and to an entry of judgment in the amount of $4,100,000. Plaintiff

believes this amount exceeds the applicable policy limit or the alleged policy limit of Hartford. CTurner agreed to a binding dispute resolution process.

REFUSAL TO PROVIDE POLICIES AND RECORDS PERTAINING TO INSURANCE AND CLAIMS [HARTFORD AND RULE]

17. CTurner diligently attempted to obtain complete and accurate copies of insurance policies in which he is designated as an insured from Hartford and from Rule and failed to provide him with the requested policies before filing a third party complaint in the action which had been filed by LTurner in the federal court.

18. CTurner has attempted to obtain a copy of the tape recording of the statement taken of CTurner and his wife Marion Turner on or about September 23, 2008 in order to review and make corrections. CTurner made multiple requests for the statement during the period September 24, 2008 to February 17, 2010. On or about February 17, 2010 CTurner made a made a written request and provided this request to Silletto at Rule. After LTurner filed a lawsuit against CTurner on or about July 22, 2010, on or about August 17, 2010 Gaitan of Rule provided two separate transcriptions of the recorded statement. The two separate transcriptions are not

identical and Hartford refuses to provide a duplicate of the tape recording. There were not two separate recorded statements taken of CTurner and his wife and they have not been afforded a reasonable opportunity to make any correction in compliance with California law. CTurner has also attempted to obtain information concerning files, records, and statements without success. See Cal. Ins. Code § 791.03, 791.08, 791.09.

19. In addition to policies and statements, CTurner has attempted to obtain documents and files relating to insurance and related matters and Hartford and Rule have failed to provide this information or have provided inadequate information. Rule provided a file but it does not include policies, applications for insurance, or even the information which CTurner provided to Rule.

20. Due to the substantial prejudice, CTurner requests that he be allowed leave to amend this complaint when the necessary information is provided.

## CHARACTERISTICS OF THE PROPERTY INSURED, THE INSUREDS, AND AREAS IN WHICH INSURANCE WAS PROVIDED

21. On or about December 21, 1989, MTurner, DTurner, and CTurner became owners of the

property located at located at 5615 Coliseum Street, Los Angeles, CA. The zip code for this area is 90016. LTurner continuously lived in the property as intended. LTurner is an adult child of MTurner and CTurner. DTurner is also an adult child of MTurner and CTurner.

22. All of the Turners are African American and members of a protected class.

23. The population in the general area where the property is located is approximately 78.5% African American. The median household income is approximately $29,079 which is significantly lower than the average income in the United States. The property is located in the Empowerment Congress West Area Neighborhood Council ("ECWANDC"). ECWANDC is one of 91 certified neighborhood councils in the City of Los Angeles.

24. According to 2000 United States Census data the general area of Jackson, Mississippi where MTurner, DTurner, and CTurner are located has an African American population of 70%. It is ranked number 1 for the metropolitan area with the highest percentage of African Americans.

25. Based on widely known demographic information and identifying information (i.e. zip codes, area codes, other) which could target the

location of the property, owners, prospective insureds, and/or insureds; the location of the mailings, telephone communications, fax transmissions, and other forms of interstate communications; personal contacts with the Turners, Grace Farrell or others; or linguistic profiling based on telephone contacts; the defendants knew and/or were able to determine that the Turners were African American or highly likely to be African American.

26. Availability of insurance is essential to property ownership in that lenders are unwilling to provide credit unless insurance can be obtained for property. Charging high premiums and failing to provide information and other services in areas where large numbers of African American persons reside frustrates the right to property ownership and rights and liberties obtained through property ownership. Discrimination as to insurance and the business of insurance and related services raises the cost of property ownership and housing for African Americans and their ability to achieve upward mobility. CTurner alleges that there was both disparate treatment and disparate impact in the discrimination of the defendants.

GENERAL ALLEGATIONS

27. On or about December 21, 1989 CTurner, his wife MTurner, and his daughter, DTurner became owners of property located at 5615 Coliseum St., Los Angeles, CA. Since the date of purchase LTurner has continuously lived in the property as intended at the time of purchase. LTurner is an adult child of CTurner and Marian Turner. CTurner communicated with Rule by telephone and explained that the owners of the property wanted an insurance policy which covered the property and their general liability exposure (including any injury to LTurner), but excluded personal contents and earthquake insurance. Rule was informed that CTurner did not reside in the property. Rule informed CTurner that the insurance it had selected provided the coverage specified by the owners. CTurner was informed by Rule that the insureds on the policy would be CTurner, Marian Turner, and Dorian Turner. All premiums for insurance policies selected by Rule from 1989 to October 8, 2009 were properly paid.

28. Commencing in or about October 8, 2004 Rule insured the property with a policy through Hartford. The insureds were not provided a copy of the policy. They were later provided with notice that they were being overcharged for the Hartford policy. However,

they were not provided with information of the reasons or calculation of the overcharge. The bills and information concerning the insurance was sent to the State of Mississippi from inception of the policy until its termination.

29. Continuously Hartford identified Rule as its agent and informed CTurner that there was insurance with Hartford through Rule.

30. Rule later indicated that it was going to change the insurance policy and the CTurner again informed Rule of their requirements for insurance and were again assured that changes would be made to meet the requirements consistently specified by the insureds.

31. On or about July 24, 2008 LTurner fell in the shower. Heavy glass fell on her causing severe life threatening injuries. Ultimately LTurner's arm, which had been lacerated to the bone, had to be amputated.

32. CTurner attempted to obtain a complete copy of the policy without success. He sent a written request to Silletto at Rule.

33. CTurner is informed and believes and thereon alleges that on or about August 13, 2008 Grace Farrell contacted Rule to report the accident of

LTurner. Authorization by LTurner for any presentation of a claim did not arise until on or about June 2009. Hartford and Rule failed to protect the interest of the insured including but not limited to failing to conduct a reasonable investigation with authorization of LTurner or the insureds, falsely claiming that the insureds had filed a claim in communications with LTurner, falsely claiming that LTurner had submitted and authorized a claim in communications with the insureds, failing to obtain proper designation from LTurner as a claimant, and even failing to inform the insureds when LTurner actually field a claim in June 2009. Hartford acted to protect its own interest and interest of Rule and others and failed to initiate or allow an opportunity for settlement. Under the pretext of processing a claim of LTurner, which did not yet exist, defendants began to build a case to deny coverage of the insureds while refusing to provide the insureds with information (including a complete copy of the policy or notification when an authorized claim had been submitted by LTurner). The conduct of defendants included but was not limited to:

a. Rule and Hartford collected information to deny coverage of the insureds before LTurner had submitted a claim. See Cal. Code of Regulations 2695.2 & 2695.5 (c). In this process Rule

used an independent adjustor Thornhill & Associates to obtain information without proper releases and authorization or claimant designation from LTurner and they refused to provide the insureds with a full copy of the policy.

b. Rule and Hartford refused to provide the insured seniors (CTurner and Marion Turner) with a copy of their recorded statement until after Rule and Hartford felt the statute of limitations had expired on the claims of LTurner. Rule and Hartford never took an independent recorded statement of Marian Turner or Dorian Turner. The recorded statement of CTurner had little to do with an investigation of any claim of LTurner, but rather was Hartford and Rule's effort to terminate coverage based on their own errors, concealment, and fraud. Hartford then sent a notice of nonrenewal of the policy of insurance and erroneously denied coverage under the policy.

c. Rule and Hartford refused to provide a complete copy of the policies. See Cal. Code of Regulations 2695.4.

d. In order to facilitate the pretext of investigating the claim of LTurner, and while refusing to provide the insureds with a copy of the policy, Pierson of Rule and Ponci of Hartford, and

others, devised and orchestrated an investigation to support termination of coverage and the policy when the insureds at this point had merely requested to see the full policy of insurance. See Cal. Code of Regulations 1695.4 (d) "Except where a time limit is specified in the policy, no insurer shall require a first party claimant under a policy to give notification of a claim or proof of claim within a specified time."

e. Hartford began the process of moving to terminate the policy and coverage of the property. CTurner is informed and believes and thereon alleges that the first time that Hartford attempted but inadequately provided notice of disclosure of its agent's compensation was during the period it was moving to terminate the policy of insurance.

f. Hartford notified Rule (as its agent) that it had not correctly written the Hartford insurance policy.

g. Without written authorization or permission from the insureds or proper disclosure to CTurner and the insureds, Hartford and Ponci began to independently contacting and directing employees in the business of CTurner to provide information regarding CTurner's business although the property has nothing to do with the business of CTurner.

Hartford and Rule then shared this information without authorization or permission.

h. Hartford and Rule established a reserve for the loss of $1,500,000 for the injuries to LTurner. Hartford then denied the claim actually presented by LTurner without allowing an opportunity for settlement discussions or review (including the review of medical records) provided by LTurner.

i. By the time Hartford received authorization and a valid claim from LTurner with her medical records, Hartford had already denied coverage under a pretext of a nonexistent claim of the insureds (who were still attempting to obtain a complete copy of the insurance policy to assess their rights and interests).

34. It was later discovered by CTurner after denial of the claim filed by LTurner that Rule never made changes to the policy as Rule had explained to the insureds. Instead, Rule and Hartford had benefited from the previous overcharging of premiums. To place the insureds in the policy they had requested would have resulted in a substantial reduction in the premium from approximately $1,951.00 to $ 678. There was an economic benefit to Hartford and Rule and a conflict of interest with

respect to the compensation of Rule. By maintaining the condition of the policy and refusing to provide complete copies of the policy and information, Hartford and Rule conspired and concealed their intent to maintain the high premium and to deny coverage when an actual liability exposure occurred.

35. Hartford notified CTurner in February 2009 that it had denied a claim that it had received from LTurner on August 13, 2008. However, Hartford had not received a claim from LTurner during this time. CTurner is informed and believes and thereon alleges that Hartford did not receive a claimant designation from LTurner until approximately June 2009. Therefore, Hartford was not acting in the interest of the insureds. After receiving the medical records of LTurner, and while issues concerning the claim of LTurner were pending, Hartford sent out a notice of nonrenewal of the insurance policy claiming that "the reason for nonrenewal is the named insured no longer occupies the dwelling at 5615 Coliseum." However, from 1989 Rule had always known of this fact and Hartford and its agents (including Rule) had always known of this fact from inception of the policy. Hartford and Rule were merely taking advantage of their own errors, concealment, and fraud.

36. CTurner is informed and believes and thereon alleges that the claim of LTurner was denied and that Hartford made no effort to settle, to initiate settlement discussions, or to allow any settlement discussions on the claim of LTurner thereby resulting in the lawsuit against CTurner. Hartford never provided the insureds with the copy of the June 2009 letter denying the actual claim of LTurner despite repeated requests. CTurner has only been able to obtain this letter after filing a third party complaint in federal court.

37. On or about July 22, 2010 LTurner filed a complaint for negligence, breach of the warranty of fitness and habitability, and negligent infliction of emotional distress and demanded damages in an amount exceeding $1,000,000. CTurner tendered his request for defense to Hartford and has requested independent cumis counsel due to the conflict of interest between CTurner, Hartford, Rule, and other defendants (who are related to Hartford and Rule). CTurner continued to request copies of the policies from 1989 to the date of termination of insurance.

**[…]**

**15th CAUSE OF ACTION**

**Discrimination In Violation of 42 U.S.C. 1981 & 1982**

**[All Defendants]**

192. Plaintiff refers to and incorporates, as though set forth herein in full, paragraphs 1 through 81 and paragraphs 116 through 191 above.

192. Plaintiff is entitled Equal Rights under the Law under 42 U.S.C. §1981 & 1982.

194. Defendants intentionally discriminated against plaintiff on the basis of race and engaged in disparate treatment of plaintiff and his family.

195. The policies, practices, and conduct has a disparate impact or discriminatory effect or disproportionately adverse impact on African Americans or other protected classes of person and is in violation of 42 U.S.C. §1981 & 1982 and other federal laws.

196. 42 U.S.C. 1981 states:

Sec. 1981. Equal rights under the law

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have

the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) ``Make and enforce contracts'' defined

For purposes of this section, the term ``make and enforce contracts'' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

197. 42 U.S.C. 1982 states:

Sec. 1982. Property rights of citizens

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and

personal property.

198. Defendants engaged in conduct which discriminated against plaintiff and his family in violation of 42 U.S.C. § 1981 & 1982 and other standards by conduct specified above and also including but not limited to the following:

a. Overcharging for the policy of insurance, renewing the policy of insurance knowing of the overcharges, and then terminating the policy of insurance during a pending claim or after a claim was filed.

b. By refusing to provide a copy of the policy of insurance and/or or only mailing the alleged policy of insurance to the agent or broker as a method to conceal discriminatory practices and conduct.

c. Through applying discriminatory and unfair practices, pricing, and services that have a disparate impact on a protected class of persons and those residing in predominately African American Communities as identified above.

d. Since lenders require owners to secure insurance for real property, the discriminatory and unfair practices unfairly applied to plaintiff and his family and to persons in the ECWANDC, the Zip

Code of 90016, or in Jackson, Mississippi have an adverse impact on housing, its availability, and cost.

e. Plaintiff is informed and believes and thereon alleges that during the period of 1989 to the date of termination of insurance that defendants had practices of redlining or reverse redlining as to writing insurance or charging high rates of insurance, or erroneously writing policies of insurance (which cost more) in areas where there are high African American populations.

f. Defendants intentionally targeted Africans-Americans with insurance policies with grossly unfavorable terms while offering homeowners' insurance policies with more favorable terms to others non- African-Americans. The insureds were overcharged for insurance premiums for approximately 20 years. To place the insureds in the policy they had requested and specified would have resulted in a substantial reduction in the premium from approximately $1,951.00 to $678.00.

g. By refusing to provide services and information comparable to persons who are not in a protected class such as the actual policy, recorded statements, information regarding overcharges, use of claimant designation as required by law, authorizations for obtaining private information,

notification of actual receipt of claims, notification of denial of actual claim received, timely response to tendered defense.

h. By failing to provide a fair and reasonable investigation of claims.

i. By Rule acting as a "claims office" to investigate and engage Thornhill, when it intentionally continued to write the policy of insurance to obtain higher commissions and perpetuate the discriminatory conduct.

j. By providing brokerage, agency, and services in a discriminatory manner to perpetuate extraordinary rates, fees, and charges, and to fairly deny claims.

k. By using interference, coercion and intimidation as a method to perpetuate discriminatory practices.

l. By Thornhill conducting an intrusive investigation without a claimant designation from LT.

m. By falsely claiming that the insureds had requested a coverage determination as a pretext to perpetuate discriminatory conduct.

n. By aiding or encouraging other persons

or co-defendants to engage in discriminatory conduct.

o. By conduct set forth in this complaint at paragraph 1 through 81 and paragraphs 116 through 191.

199. Defendants' actions interfered with plaintiff's rights to the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

200. Defendant's discrimination was designed to deprive the insureds and members of a protected class from benefits of insurance.

201. Defendants conduct intentionally targets or has a disparate impact by causing plaintiffs and members of the Africans-American Community to purchase and maintain insurance with grossly unfavorable terms when having such insurance is essential to the purchase, maintenance, and ownership of real property comparable to white citizens.

202. The insureds were overcharged for insurance premiums for approximately 20 years. To place the insureds in the policy they had requested and specified would have resulted in a substantial reduction in the premium from approximately $1,951.00 to $678.00. There was an economic benefit to defendants to perpetuating the discrimination and

conducting an intrusive and discriminatory investigation designed to terminate the insurance policy. By maintaining the condition of the policy and refusing to provide complete copies of the policy and information, defendants conspired and concealed their intent to maintain the high premium and to deny coverage when an actual liability exposure occurred.

203. Defendants' conduct was pervasive and had disproportionately adverse effects on African-Americans as compared with non- African-Americans.

204. Defendants' acts were willful and oppressive and justify an award of punitive damages according to proof.

205. Plaintiff seeks injunctive relief as to the discrimination and discriminatory practices of defendants.

206. Plaintiff seeks seek attorneys' fees and costs for all litigation arising from the issues referred to in this complaint, litigation as to this complaint, and as consequential damages for the period covered during incidents at issue in this complaint. Plaintiff has been injured and will continue to suffer injuries and damages and request injunctive relief. Plaintiff has or will incur attorney's fees, expert fees, and costs

and seek an award in an amount according to proof. The request for fees includes but is not limited to fees under the Civil Rights Attorney Fees Awards Act of 1976 (42 U.S.C § 1988).

207. As to Rule at all times it was acting on behalf of itself as an entity, purported "claims office" for itself, as a broker, or as an agent of Hartford.

208. As to Western, plaintiff requests that this surety make necessary contributions to compensate them for the damages associated with the conduct of Rule.

**16th CAUSE OF ACTION**

**Discrimination In Violation of 42 U.S.C. 1985**

**[All defendants]**

209. Plaintiff refers to and incorporates, as though set forth herein in full, paragraphs 1 through 81 and paragraphs 116 through 208 above.

210. Plaintiff is entitled Equal Rights under the Law under 42 U.S.C. §1985.

211. Defendants engaged in conduct which discriminated against plaintiff in violation of their Civil Rights under 42 U.S.C. §1982.

212. Plaintiff is informed and believes and thereon allege that homeowner's insurance including liability

insurance is inherent to property ownership, not only in the purchase of the property but also in the maintenance of the property.

213. 42 U.S.C. § 1985, in part, states:

Sec. 1985. Conspiracy to interfere with civil rights

(3) Depriving persons of rights or privileges

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged

therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

235. Defendants engaged in a conspiracy to directly or indirectly deprive plaintiff and other members of a protective class of the equal protection and equal benefits of the laws and to perpetuate discriminatory conduct in violation of 42 U.S.C. § 1985 and other standards by conduct specified above and also including but not limited to the following:

a. Overcharging for the policy of insurance, renewing the policy of insurance knowing of the overcharges, and then terminating the policy of insurance during a pending claim or after a claim was filed.

b. By refusing to provide a copy of the policy of insurance and/or or only mailing the alleged policy of insurance to the agent or broker as a method to conceal discriminatory practices and conduct.

c. Through applying discriminatory and unfair practices, pricing, and services that have a disparate impact on a protected class of persons and those residing in predominately African American Communities as identified above.

d. Since lenders require owners to secure insurance for real property, the discriminatory and unfair practices unfairly applied to plaintiff and to persons in the ECWANDC, the Zip Code of 90016, or in Jackson, Mississippi have an adverse impact on housing, its availability, and cost.

e. Plaintiff is informed and believe and thereon allege that during the period of 1989 to the date of termination of insurance that defendants had practices of redlining or reverse redlining as to writing insurance or charging high rates of insurance, or erroneously writing policies of insurance (which cost more) in areas where there are high African American populations.

f. Defendants intentionally targeted Africans-Americans with insurance policies with grossly unfavorable terms while offering homeowners' insurance policies with more favorable terms to others non- African-Americans. The insureds were overcharged for insurance premiums for approximately 20 years. To place the insureds in

the policy they had requested and specified would have resulted in a substantial reduction in the premium from approximately $1,951.00 to $678.00.

g. By refusing to provide services and information comparable to persons who are not in a protected class such as the actual policy, recorded statements, information regarding overcharges, use of claimant designation as required by law, authorizations for obtaining private information, notification of actual receipt of claims, notification of denial of actual claim received, timely response to tendered defense.

h. By failing to provide a fair and reasonable investigation of claims.

i. By Rule acting as a "claims office" to investigate and engage Thornhill, when it intentionally continued to write the policy of insurance to obtain higher commissions and perpetuate the discriminatory conduct.

j. By providing brokerage, agency, and services in a discriminatory manner to perpetuate extraordinary rates, fees, and charges, and to fairly deny claims.

k. By using interference, coercion and intimidation as a method to perpetuate

discriminatory practices.

l. By Thornhill conducting an intrusive investigation without a claimant designation from LT.

m. By falsely claiming that the insureds had requested a coverage determination as a pretext to perpetuate discriminatory conduct.

n. By aiding or encouraging other persons or co-defendants to engage in discriminatory conduct.

o. By conduct set forth in paragraph 1 through 100 and paragraphs 134 through 213.

214. Defendant's actions interfered with TPPs rights to the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

215. Defendant's discrimination was designed to deprive the insureds and members of a protected class from benefits of insurance.

216. Defendants conduct intentionally targets or has a disparate impact by causing plaintiff and members of the Africans-American Community to purchase and maintain insurance with grossly unfavorable terms when having such insurance is essential to the purchase, maintenance, and ownership of real property comparable to white

citizens.

217. The insureds were overcharged for insurance premiums for approximately 20 years. To place the insureds in the policy they had requested and specified would have resulted in a substantial reduction in the premium from approximately $1,951.00 to $678.00. There was an economic benefit to defendants to perpetuating the discrimination and conducting an intrusive and discriminatory investigation designed to terminate the insurance policy. By maintaining the condition of the policy and refusing to provide complete copies of the policy and information, defendants conspired and concealed their intent to maintain the high premium and to deny coverage when an actual liability exposure occurred.

218. Defendants' conduct was pervasive and had disproportionately adverse effects on African-Americans as compared with non- African-Americans.

219. Defendants' acts were willful and oppressive and justify an award of punitive damages according to proof.

220. Plaintiff seeks injunctive relief as to the discrimination and discriminatory practices of defendants.

221. Plaintiff seeks attorneys' fees and costs for all litigation arising from the issues referred to in this complaint, litigation as to this complaint, an as consequential damages for the period covered during incidents at issue in this complaint. Plaintiff has been injured and will continue to suffer injuries and damages and request injunctive relief. Plaintiffs have or will incur attorney's fees, expert fees, and costs and seek an award in an amount according to proof. The request for fees includes but is not limited to fees under the Civil Rights Attorney Fees Awards Act of 1976 (42 U.S.C § 1988).

222. As to Rule at all times it was acting on behalf of itself as an entity, purported "claims office" for itself, as a broker, or as an agent of Hartford.

223. As to Western, plaintiff requests that this surety make necessary contributions to compensate them for the damages associated with the conduct of Rule.

**17th CAUSE OF ACTION**

**FAIR HOUSING ACT In Violation of 42 U.S.C. §3604 & 3605**

**[All Defendants]**

224. Plaintiff refers to and incorporates, as though set forth herein in full, paragraphs 1 through 81 and

paragraphs 116 to 223 above.

225. Plaintiff is entitled to protection under 42 U.S.C. §3604 & 3605 and the Fair Housing Act. The Fair Housing Act covers property insurers. *Dunn v. Midwestern Indemnity Mid-American Fire & Casualty Co*., 472 F.Supp. 1106 (S.D. Ohio 1979), *McDiarmid v.Economy Fire & Casualty Company*, 604 F.Supp. 105 (1984). Prohibited activities under 24 C.F.R. Section 100.70 (d)(4) include, but are not limited to…refusing to provide…property or hazard insurance for dwellings or providing such…insurance differently because of race, color, religion, sex, handicap, familial status, or national origin..”). Also, discrimination in the renewal of an insurance policy is actionable under the *Fair Housing Act. Lindsey v. Allstate Insurance*, 34 F.Supp.2d (W.D. Tenn. 1999).

226. Defendants intentionally discriminated against plaintiff on the basis of race and engaged disparate treatment of plaintiff.

227. The policies and practices of defendants have a disparate impact or discriminatory effect or disproportionately adverse impact on African Americans or other protected classes of persons.

228. 42 U.S.C. §3604, in part, states:

Sec. 3604. Discrimination in the sale or rental of

housing and other prohibited practices

As made applicable by section 3603 of this title and except as exempted by sections 3603(b) and 3607 of this title, it shall be unlawful--

(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.

(b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.

229. 42 U.S.C. §3604, in part, states:

Sec. 3605. Discrimination in residential real estate-related transactions

(a) In general

It shall be unlawful for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap,

familial status, or national origin.

(b) "Residential real estate-related transaction" defined

As used in this section, the term ``residential real estate-related transaction" means any of the following:

(1) The making or purchasing of loans or providing other financial assistance--

(A) for purchasing, constructing, improving, repairing, or maintaining a dwelling; or

(B) secured by residential real estate.

(2) The selling, brokering, or appraising of residential real property.

230. Defendants engaged in conduct which discriminated against TPPs and which was in violation of 42 U.S.C. §3604 & 3605, the provisions and regulations under the Fair Housing Act, and other standards by conduct specified above and also including but not limited to the following:

a. Overcharging for the policy of insurance, renewing the policy of insurance knowing of the overcharges, and then terminating the policy of insurance during a pending claim or after a claim was filed.

b. By refusing to provide a copy of the policy of insurance and/or or only mailing the alleged policy of insurance to the agent or broker as a method to conceal discriminatory practices and conduct.

c. Through applying discriminatory and unfair practices, pricing, and services that have a disparate impact on a protected class of persons and those residing in predominately African American Communities as identified above.

d. Since lenders require owners to secure insurance for real property, the discriminatory and unfair practices unfairly applied to plaintiff and his family and to persons in the ECWANDC, the Zip Code of 90016, or in Jackson, Mississippi have an adverse impact on housing, its availability, and cost.

e. Plaintiff is informed and believes and thereon alleges that during the period of 1989 to the date of termination of insurance that defendants had practices of redlining or reverse redlining as to writing insurance or charging high rates of insurance, or erroneously writing policies of insurance (which cost more) in areas where there are high African American populations.

f. Defendants intentionally targeted Africans-Americans with insurance policies with

grossly unfavorable terms while offering homeowners' insurance policies with more favorable terms to others non- African-Americans. The insureds were overcharged for insurance premiums for approximately 20 years. To place the insureds in the policy they had requested and specified would have resulted in a substantial reduction in the premium from approximately $1,951.00 to $678.00.

g. By refusing to provide services and information comparable to persons who are not in a protected class such as the actual policy, recorded statements, information regarding overcharges, use of claimant designation as required by law, authorizations for obtaining private information, notification of actual receipt of claims, notification of denial of actual claim received, timely response to tendered defense.

h. By failing to provide a fair and reasonable investigation of claims.

i. By Rule acting as a "claims office" to investigate and engage Thornhill, when it intentionally continued to write the policy of insurance to obtain higher commissions and perpetuate the discriminatory conduct.

j. By providing brokerage, agency, and services in a discriminatory manner to perpetuate

extraordinary rates, fees, and charges, and to fairly deny claims.

k. By using interference, coercion and intimidation as a method to perpetuate discriminatory practices.

l. By Thornhill conducting an intrusive investigation without a claimant designation from LT.

m. By falsely claiming that the insureds had requested a coverage determination as a pretext to perpetuate discriminatory conduct.

n. By aiding or encouraging other persons or co-defendants to engage in discriminatory conduct.

o. By conduct set forth in paragraph 1 through 100 and paragraphs 134 through 213.

231. The acts complained of in this complaint are included in the broad scope of the Fair Housing Act and the "legislative design of the Act which seeks to eliminate discrimination within the housing field." Dunn supra at 1109.

232. Even if the policy of insurance had been written correctly, defendants renewed the policy with the excessive charges (knowing the policy was required to be modified), refused to provide a copy of

the alleged policy of insurance, and then terminated the policy based on a condition always known to have existed. (i.e. that the insured lived in Mississippi).

233. Defendant's actions interfered with plaintiff's rights to be free from discrimination.

234. Defendant's intentionally failed to provide the correct insurance policy as requested by the insureds for their own benefit and to perpetuate discrimination and discriminatory practices.

235. Defendants' discriminatory conduct was pervasive and had disproportionately adverse effect on African-Americans and persons residing in the ECWANDC, the Zip Code of 90016, or Jackson, Mississippi

236. As a direct and proximate result of defendant's conduct, plaintiff has suffered and will continue to suffer damages including economic and compensatory in an amount according to proof.

237. Defendants' acts were willful and oppressive and justify an award of punitive damages according to proof.

238. Plaintiff seeks injunctive relief as to the discrimination and discriminatory practices of defendants.

239. Plaintiff seeks attorneys' fees and costs for all litigation arising from the issues referred to in this complaint, litigation as to this complaint, and as consequential damages for the period covered during incidents at issue in this complaint. Plaintiff has been injured and will continue to suffer injuries and damages and request injunctive relief. Plaintiff has or will incur attorney's fees, expert fees, and costs and seek an award in an amount according to proof. The request for fees includes but is not limited to fees under the Civil Rights Attorney Fees Awards Act of 1976 (42 U.S.C § 1988).

240. As to Rule at all times it was acting on behalf of itself as an entity, purported "claims office" for itself, as a broker, or as an agent of Hartford.

241. As to Western, plaintiff requests that this surety make necessary contributions to compensate them for the damages associated with the conduct of Rule.

DEMAND FOR JURY TRIAL

CTurner demands a jury trial of all issues so triable.

WHEREFORE Plaintiff prays for a judgment in his favor against Hartford, Rule, Western, Ponci, Silletto, Pierson, Gaitan, Albrecht, Thornhill as provided in the causes of action set forth above and

as follows:

1. For actual, general, compensatory, and consequential damages in an amount to be proven at trial;

2. For costs of suit;

3. For punitive damages in a sum sufficient to punish and set an example of Defendants;

4. For treble damages as provided under Cal. Ins. Code § 785 and Cal. Civil Code § 3345.

5. For restitution of all money, property, profits and other benefits and anything of value that Defendants received preceding this lawsuit;

6. For reformation of the contract and for reimbursement of payments made prior to and after of termination of the policy;

7. For indemnity in favor of CTurner and apportionment between Hartford and Rule with respect to any damages or award made to LTurner;

8. For declaratory, injunctive relief, and other relief as provided under Cal. Business and Professions Code § 17200 et seq.;

9. For equitable relief;

10. For prejudgment interest at the rate of ten

percent (10%) per annum;

11. For reasonable attorney's fees and costs;

12. For such other and further relief as this Court deems just and proper.

Dated: June 17, 2011

LAW OFFICE OF NINA RINGGOLD
s/ Nina Ringgold
By:_____
Nina Ringgold, Esq.
Attorney Plaintiff

**APPENDIX F3**

Case 2:11-cv-07653-PA-E Document 19 Filed 09/27/11 Page ID #181

FILED
CLERK U.S. DISTRICT COURT
SEP 27 2011
Central District of California
By PB Deputy

**UNITED STATES DISITRICT COURT**
**CENTRAL DISTRICT OF CALIFORNIA**

Case Number CV 11-07653 ODW (PLAx)

**ORDER RE TRANSFER PURSUANT TO GENERAL ORDER 08-05 (Related Cases)**

Cornelius Turner Plaintiff(s),
v.
Hartford Casualty Insurance Company et al
Defendant(s).

**CONSENT**

I hereby consent to the transfer of the above-entitled case to my calendar, pursuant to General Order 14-03.

[SIGNATURE OF JUDGE
PERCY ANDERSON]

9/27/11 Valerie Baker Fairbank

_____ _____

**DECLINATION**

I hereby decline to transfer the above-entitled case to my calendar for the reasons set forth:

_____
_____
_____
_____
_____

_____ _____

Date United States District Judge

**REASON FOR TRANSFER INDICATED BY COUNSEL**

CASE CV 10-05435 VBF (Ex) and the present case:

__ A. Arise from the same or closely related transactions, happening or events; or

X B. Call for determination of the same or substantially related or similar questions of law and fact; or

__ C. For other reasons would entail substantial duplication of labor if heard by different judges; or

__ D. Involve the same patent, trademark or copyright, and one of the factors identified above in a, b or c also is present.

__ E. Involve one or more defendants from the criminal case in common, and would entail substantial duplication of labor if heard by different judges (applicable only on civil forfeiture action).

**NOTICE TO COUNSEL FROM CLERK**

Pursuant to the above transfer, any discovery matter that are or may be referred to a Magistrate Judge are hereby transferred from Magistrate Judge Abrams to Magistrate Judge Eick.

On all documents subsequently filed in this case, please substitute the initials VBF (Ex) after the case

number in place of the initials of the prior judge, so that the case number will read CV 11-07653 VBF (Ex). This is very important because the documents are routed to the assigned judges by means of these initials. The case file, under seal documents, exhibits, docket, transcripts or depositions may be viewed at the x Western __ Southern __ Eastern Division.

**Traditionally, filed subsequent documents must be filed at the x Western __ Southern __ Eastern Division. Failure to file at the proper location will result in your documents being returned to you.**

Cc: __ Previous Judge __Statistics Clerk

CV-34 (05/08) ORDER RE TRANSFER PURSUANT TO GENERAL ORDER 08-05 (RELATED CASES)

**APPENDIX F4**

Case 2:14-cv-03688-R-PLA Document 53 Filed
02/20/14 Page 1 of 4
Page ID #:2970

Kevin M. McCormick - CSBN 115973
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Attorney for Defendants, Superior Court of California, County of Los Angeles; Judge Barbara Scheper; Judge Douglas Sortino; Judge Carolyn Kuhl; John A. Clarke; William Mitchell; Sherri Carter; Nagi Ghobrial; Sylvie Bland; Ovsanna Chaparyan; Justice Roger Boren; Joseph Lane; Becky Fischer; Frank McGuire; Jennifer Casados; Nicole Benavides; and Linda McCulloh

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

| | |
|---|---|
| ASAP COPY AND PRINT, ET AL,<br>Plaintiffs,<br>v.<br>JERRY BROWN,<br>Defendants. | CASE NO. 13-cv-04621 SI<br>**DEFENDANTS, SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES, ET AL'S CERTIFICATION OF INTERESTED PARTIES**<br><br>[ND CA Local Rule 3-15]<br>Judge: Hon. Susan Illston |

COME NOW defendants, the Superior Court of California, County of Los Angeles ("LASC"): Barbara Scheper, Judge of the LASC; Douglas Sortino, Judge of the LASC; Carolyn Kuhl, Judge of the LASC; John A. Clarke, Former Executive Officer of the LASC; William Mitchell, Interim Executive Officer of the LASC; Sherri Carter, Executive Officer of the LASC; Sylvie Bland, Judicial Assistant, LASC; Nagi Ghobrial, Management Analyst of the LASC; Ovsanna Chaparyan, Court Services Assistant III, LASC; Roger Boren, Justice of the California Court of Appeal, Second Appellate District; Joseph Lane, Clerk and Executive Officer of the California Court of Appeal, Second Appellate District; Becky Fischer,

Supervising Deputy Clerk of the California Court of Appeal, Second Appellate District; Frank McGuire, Court Administrator and Clerk of the California Supreme Court; Jennifer Casados, Supervising Deputy Clerk of the California Supreme Court; Nicole Benavidez, Deputy Clerk of the California Supreme Court; and Linda McCulloh, Senior Attorney, Center for Judiciary Education and Research ("CJER"), Judicial and Court Operations Services Division, (hereinafter and collectively the "Judicial Branch Defendants" or "JBD"), and certify that the following persons, association of persons, firms, partnerships, corporations or other entities have a financial interest in the subject matter in controversy or in a party to the proceedings or have a non-financial interest in the subject matter in controversy or in a party to the proceedings or in a party that could be substantially affected by the outcome if the proceedings as follows:

• Superior Court of California, County of Los Angeles (LASC); Barbara Scheper, Judge of the LASC; Douglas Sortino, Judge of the LASC; Carolyn Kuhl, Judge of the LASC; John A. Clarke, Former Executive Officer of the LASC; William Mitchell, Interim Executive Officer of the LASC; Sherri Carter, Executive Officer of the LASC; Sylvie Bland,

Judicial Assistant, LASC; Nagi Ghobrial, Management Analyst of the LASC; Ovsanna Chaparyan, Court Services Assistant III, LASC;

• California Court of Appeal, Second Appellate District; Roger Boren, Justice of the California Court of Appeal, Second Appellate District; Joseph Lane, Clerk and Executive Officer of the California Court of Appeal, Second Appellate District; Becky Fischer, Supervising Deputy Clerk of the California Court of Appeal, Second Appellate District;

• California Supreme Court; Frank McGuire, Court Administrator and Clerk of the California Supreme Court; Jennifer Casados, Supervising Deputy Clerk of the California Supreme Court; Nicole Benavidez, Deputy Clerk of the California Supreme Court; and

• Judicial Council of California, Administrative Office of the Courts; Linda McCulloh, Senior Attorney, Center for Judiciary Education and Research ("CJER"), Judicial and Court Operations Services Division.

Dated: February 20, 2014

BENTON, ORR, DUVAL & BUCKINGHAM
By: /s/ Kevin M. McCormick Kevin M. McCormick
Attorney for Defendants, Superior Court of California, County of Los Angeles; Judge Barbara Scheper; Judge Douglas Sortino; Judge Carolyn Kuhl; John A. Clarke; William Mitchell; Sherri Carter; Nagi Ghobrial; Sylvie Bland; Ovsanna Chaparyan; Justice Roger Boren; Joseph Lane; Becky Fischer; Frank McGuire; Jennifer Casados; Nicole Benavides; and Linda McCulloh

PROOF OF SERVICE
ASAP Copy and Print, et al, v. Brown, et al
Case No. 13-cv-04621 SI
STATE OF CALIFORNIA, COUNTY OF VENTURA

I certify that I am employed in the County of Ventura, State of California. I am over the age of 18 and not a party to the within action. My business address is 39 N. California Street, Ventura, CA 93001.

On February 20, 2014, I served the foregoing document(s) described as:

DEFENDANTS, SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES, ET AL'S CERTIFICATION OF INTERESTED PARTIES

on the interested parties in this action as follows:

BY CM/ECF NOTICE OF ELECTRONIC FILING: I caused said document(s) to be served by means of this Court's electronic transmission of the Notice of Electronic Filing through the Court's transmission facilities, to the parties and/or counsel who are registered CM/ECF Users set forth in the service list obtained from this Court.

Executed on February 20, 2014, at Ventura, California.

/s/ Kevin M. McCormick
Kevin M. McCormick

**APPENDIX F5**

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FOUR

FILED
Jul 19, 2016
Joseph A. Lane, Clerk
S. Veverka, Deputy Clerk

| | |
|---|---|
| MARIAN TURNER, et al., | B248667, B250084, B256763, B261032 |
| Plaintiffs and Appellants | and B268792 |
| v. | (Super. Ct. No. BC463850) |
| HARTFORD CASUALTY INSURANCE COMPANY, et al., | ORDER CONSOLIDATING APPEAL |
| Defendants and Respondents. | |

THE COURT*:

On the court's own motion, it is hereby ordered that case numbers B248667 (notice of appeal filed May 3, 2013), B250084 (notice of appeal filed July 10, 2013), B256763 (notices of appeal filed May 30, 2014 and June 27, 2014), B261032 (notice of appeal filed

December 29, 2014), and B268792 (notice of appeal filed November 30, 2015) are consolidated for the purposes of oral argument and decision. Oral argument currently scheduled on August 11, 2016 in case number B261032 is ordered off calendar.

_____

*EPSTEIN, Presiding Justice

**APPENDIX F6**

Court of Appeal
Second Appellate District
Daniel P. Potter, Clerk
Electronically RECEIVED
on 5/9/2019 at 4.16.38 PM

Court of Appeal
Second Appellate District
Daniel P. Potter, Clerk
Electronically FILED
0n 5/9/2019 at by
Sandy Veverka
Deputy Clerk

LAW OFFICE OF NINA RINGGOLD
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Northridge, CA 91235
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(866) 340-4312 Facsimile
Email nrringgold@aol.com

May 9, 2019

Presiding Justice Nora M. Manella Associate Justice
Brian S. Currey Justice Pro Tem Kim G. Dunning
Assigned Panel In The Referenced Appeal
180 Howard St.
San Francisco, CA 94105

Re: *Marian Turner, Lisa Turner, Cornelius Turner v. Hartford Casualty Insurance Company et al.* (Appellate Case Nos. B248667, B250084, B256763, and B261032) Set for Oral Argument on May 10, 2019

Dear Justices:

This office has just received the assignment of the panel of justices for oral argument tomorrow. It is always a difficult decision to request recusal or to seek disqualification of a judge. This letter is in no way intended to attack the integrity or the character of any justice. As the United States stated in In re Murchison (1955) 349 U.S. 133, 136 it is recognized that the stringent requirement is applied even though "disqualification may sometimes bar judges who have no actual bias and do their very best to weigh the scales of justice equally between the parties." The critical factor is that a justice must satisfy the appearance of justice. I would be remiss in my duties if I did not request that each member of the assigned panel recuse themselves. I request this recusal on behalf of my client Cornelius Turner.

I request that the assigned panel consider the following authorities.

**Authorities:**

Aetna Life Insurance Company v. Lavoie
(1986) 475 U.S. 813

Caperton v. A.T. Massey Coal Co., Inc.
(2009) 556 U.S. 868

Gibson v. Berryhill
(1973) 411 U.S. 564

In re Murchison
(1955) 349 U.S. 133

Tumey v. Ohio
(1927) 273 U.S. 510

Ward v. Village of Monroeville
(1972) 409 U.S. 57

CJEO Oral Advice Summary No. 2016-015
Full Bench Disqualification (March 30, 2016)

CJEO Formal Opinion 2017-011
Judicial Service on a Nonprofit Charter School Board
(May 2, 2017)

CJEO Oral Advice Summary 2018-023
Disqualification Responsibilities of Appellate Court Justices

CJEO Oral Advice Summary 2018-025

Disqualification and Disclosure Duties of a Trial Judge Assigned as an Appellate Justice

Mr. Turner is over ninety (90) years old. He is a living legacy in the Civil Rights movement in the State of Mississippi. He shared and worked with Medgar Evers (a well known civil rights activist in the state). He is the co-founder of the Mississippi Free Press Newspaper that was the voice of the civil rights movement in Mississippi and an undisputed organizing centerpiece used by the NAACP and other civil rights organizations focused on eliminating former racist Jim Crow laws in the state. Mr. Turner is a part of the federal voting rights case referred to in this appeal. He never agreed to any proceeding in the state court and was involuntarily brought into the state when he was sued in the United States District Court for the Central District. He filed a counter claim against Hartford and others in the federal court. His case involves discrimination. He and his wife had been paying over three times the market rate for insurance for over 20 years. When his daughter fell through a glass enclosure –an insurable loss—the policy of insurance was cancelled even though Hartford admitted the policy had been written incorrectly by its agent.

Mr. Turner never received disclosure that the judge assigned to his case would be subject to constitutional resignation or that he had a right to withhold consent. Moreover, as the panel is aware he contends that he is being forced to make waivers of federal law and rights. These forced waivers are taking place when (1) there does not exist proper remand order from the federal court, and (2) the forced waiver is effectuated in proceedings where the state court does not provide an official record (via court reporter or audiotape). Mr. Turner requested dismissal with tolling to extricate himself from proceedings based on his view that his rights under federal law cannot be adequately protected in the state court forum. The issues on appeal challenge the fundamental jurisdiction of the court and the grounds for recusal under federal law that impacts both trial and appellate judges.

When the issue concerning the conflict between California Constitution Article VI Sections 17 & 21 and Section 5 of SBX 2 11 began to come to light Justice Candace Cooper's (ret.) who is African American and a former member of Division 8 of this court filed an appeal raising issues concerning the interpretation of California Constitution Art VI Section 17.

The federal voting rights case that is referred to in this appeal was filed on March 21, 2012. On March 28, 2012 Justice Cooper's petition for review was denied. See *Candace Cooper v. Controller of the State of California and Secretary of State of California, Cal. Sup. Ct.* (S200215). After Justice Cooper's effort to obtain review in the California Supreme Court failed there was a recognized conflict between members of the voting rights case that claimed a constitutional resignation had occurred and were seeking to implement a special judicial election and to implement disclosure and consent procedures (with an official record) on the one hand and the impacted judges on the other hand. In the appeal of a lead member of the voting rights case that was pending when Justice Cooper's petition for review was denied, the majority of the members of the assigned panel recused themselves. Certainly there appears to be disagreement (even among justices within the district) of whether members of whether recusal is required.

The federal voting rights case involving Mr. Turner does not raise judicial compensation in any fashion. The California Commission on Judicial Performance has twice provide written opinions that

the payment of compensation by the county to judges of the state courts of record is impermissible. Instead the case involving Mr. Turner claims that the public employment and office which is occurred and is occurring in Los Angeles County and other counties is constitutionally impermissible under California Constitution Art VI Section 17 and that out of state court users and California residents must receive disclosure and consent under California Constitution Art VI Section 21. It also claims that this obligation cannot be waived and the immunity provision under Section 5 of Senate Bill x211 violates federal law and enforces involuntary waiver of federal law and rights. Unlike the racial and language minorities in the voting rights case, who were actually using public court services, an acknowledged conservative group challenged judicial compensation. (i.e. Sturgeon cases). In these cases the entire Superior Court for the County of Los Angeles recused itself as well as the entire Second Appellate District. The grounds for disqualification which exist and raised in this appeal or greater than in the cases concerning judicial compensation because they challenge the nature of the judicial office itself, the disclosure obligation, and the involuntary waivers of federal law attempted through immunity allowed in an uncodified section of the law. Mr. Turner also claims

that any person who attempts to exit the system by dismissal without prejudice (and with tolling) or raise the issue is subject to retaliation.

The assigned panel has both financial and general interest in the pending appeal. Each justice of the panel has previously been either a former Municipal Court Judge or Superior Court judge. They could be potentially subject to the statutory fines and penalties at issue under the California Political Reform Act claims in the federal voting right case. There is an inference of bias in this appeal. These appeals were set for oral argument over 3 years ago. The matters were taken off calendar and were dormant for three years. Inquiries to the court provided no reason for the decision.

Respectfully, on behalf of Mr. Turner, the undersigned requests that this panel recuse itself. Persons involved in the federal voting rights case should be treated the same as persons involved in more conservative organizations where this court ordered the recusal of the entire court and the Chief Justice transferred the appeal to a different district. Alternatively, as requested in the briefing, this court should enter a stay pending disposition of the United States Supreme Court's determination of the request

for stay and injunction pending review or determination of the request of whether a three-judge court will be appointed.

Very truly yours,

NINA R. RINGGOLD, Esq.

Attachment: Judicial Profiles

# APPENDIX G

## 440 ATTORNEY GENERAL'S OPINIONS [VOLUME 66 NOVEMBER 1983]

### Opinion No. 83-607—November 23, 1983

**SUBJECT:** CALIFORNIA CONSTITUTION ART. VI, § 17--California Constitution, Art. VI, § 17 prohibits a superior court judge who resigns before the expiration of that term of office from accepting a public teaching position before the expiration of such term.

**Requested by:** MEMBER, CALIFORNIA STATE SENATE

**Opinion by:** JOHN K.VANDEKAMP, Attorney General Clayton P. Roche, Deputy

The Honorable H. L. Richardson, Member of the California Senate, has requested an opinion on the following question:

Does article VI, section 17, of the California Constitution prohibit a superior court judge who resigns that office before the expiration of that term of office from accepting a public teaching position before the expiration of such term?

## CONCLUSION

Article VI, section 17, of the California Constitution does prohibit a superior court Judge who resigns that office before the expiration of its term from accepting a public teaching position before the expiration of such term.

## ANALYSIS

Article VI, section 17, of the California Constitution, provides:

"A judge of a court of record may not practice law and during the term for which the judge was selected is ineligible for public employment or public office other than judicial employment or judicial office. A

judge of the superior or municipal court may, however, become eligible for election to other public office by taking a leave of absence without pay prior to filing a declaration of candidacy. Acceptance of the public office is a resignation from the office of judge."

"A judicial officer may not receive fines or- fees for personal use."

Our opinion is requested as to whether a superior court judge may resign before the end of his term and accept a public teaching position during such term. Such question requires a resolution of the question whether the ineligibility provided in article VI, section 17, as to accepting another public position was intended to continue during the entire term for which the judge was originally elected or appointed.

We conclude that such ineligibility provision of article VI, section 17, continues throughout the entire term for which a particular judge was elected or appointed. We so conclude based on (1) the plain meaning of the article; (2) the history of provision; and (3) case law and prior opinions of this office.

Accordingly, we also conclude that a superior court judge may not resign during his term and take a public teaching position.

## I. The Plain Meaning of Article VI, Section 17, Demonstrates That Its Disqualification Provisions Apply Throughout The Entire Term Or Period For Which The Judge Was Originally Selected.

With the exception of superior and municipal court judges, who are deemed eligible for *election* to another nonjudicial office, article VI, section 17, literally makes all judges of courts of record "ineligible" for other public office or other public employment "during the term for which the judge was selected." Since "eligible" means "capable of being chosen – the subject of selection or choice" (*Samuels v. Hite* (1950) 35 Cal. 2d 115, 116), the word "ineligible" in the context of article VI, section 17, means *in*capable of being chosen or been the subject of selection or choice.

Focusing on the period of such ineligibility, we see that it is for a prescribed period, that is, "during the term for which the judge was [originally] selected." Significantly, the disqualification provision does *not*

specify that the period shall be during the judge's "tenure," or words of similar import. As a general proposition, there is a clear distinction between the concepts of "term of office" and "tenure in office" with respect to public officers. As stated in the leading case, *Holbrook v. Board of Directors, Etc.* (1937) 8 Cal. 2d. 158, 161: "The term of an office relates to the office and not the incumbent." (*Harrold v. Barnum,* 8 al. App. 21, 25 [96 Pac. 104, 105].) It is, therefore, not to be confused with the tenure of office and it is not affected by the holding over of an incumbent beyond the expiration of the term. In a term of office there may be several tenures, but the term of office remains the same…." (See also, e.g., *Brown v. Hite (*1996) 64 Cal. 2d 120, 124; *Younger v. Board of Supervisors* (1979) 93 Cal. App. 3d 864, 872; 64 Ops. Cal. Atty. Gen. 1, 3 (1981); 33 Ops. Cal. Atty. Gen. 163, 164 (1959).)

Superior Court judges are elected for six-year terms. (Cal. Const., art. VI, § 16, subd. (c).)[31]

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[31] Where a vacancy occurs, the governor appoints a person to fill the vacancy until an election can be held to fill a full six-year term at the first general election after January 1 following accrual of the vacancy.

For other judicial offices, their prescribed term, and the manner of filling vacancies and the prescribed time an

Accordingly, a judge elected to such a six-year term would, under the literal provisions of article VI, section 17, of the California Constitution, be in eligible for *appointment* to any other nonjudicial public office or public employment, and would be eligible for *election* to another nonjudicial public office only by taking a leave of absence to run for that office.

That the disqualification provisions are to last for the entire period or term for which the judge was originally elected or appointed (i.e., "selected") is supported by the case which construed similar wording in the analogous provision of the state Constitution applicable to state legislators, that is, article IV, section 13, thereof.[32] Thus, in *Chenoweth v. Chambers* (1917) 33 Cal. App. 104, 107 the court said with respect to the similarly worded predecessor section [referred to therein as "the amendment"] in

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appointee may fill those vacancies, see Cal. Const. art. VI, §16 subds. (a) and (d). Supreme Court judges and Court of Appeal judges; Gov. Code, §§ 71145; 71180, Municipal Court judges.

[32] That provision states:

"A member of the Legislature may not, during the term for which the member is elected, hold any office or employment under the State other than an elective office."

holding resignation from the Legislature did not make a legislator eligible for appointment to another state office:

"The question here is: Was it [the constitutional provision] intended to apply to petitioner, whose term of office began before the adoption of the amendment and had not expired at the time it went to effect? And, if so intended, *could he evade its operation by resigning before the amendment took effect?*

"We may safely accept as rules of construction what was said in *Smith v. Union Oil Co.,* 166 Cal. 217, [135 Pac. 966], cited by petitioner: 'Where the words of a statute are not ambiguous and their effect is not absurd, the court will not give it other than its plain meaning, although it may appear probable that a different object was in the mind of the legislature.' No question arises here as to what the people desired to accomplish by adopting this amendment. Its object is plain enough and is manifest on its face.

"The word 'term' used in this section refers, we think, to the period for which the petitioner was elected and not merely to his

incumbency. (*Rice v. National City*, 132 Cal. 354 [64 Pac. 580].) *When we speak of the 'term' for which an officer has been elected we mean the period of time fixed by statute during which he may serve and not to the time he may happen to serve.* Said the court in *Ellis v. Lennon*, 86 Mich 468 [49 N.W. 308]: 'The term for which respondent was elected is clearly defined by the charter and the language, 'the term for which he was elected', has a clear and well-defined meaning. He was elected to serve for two years, whether he served that time or not. The language used in the statute fixes the period of his ineligibility which would have attached in the absence of that language.' In the instant case the statute fixed the term of petitioner's office, as assemblyman.

"We need not consider the effect of petitioner's resignation prior to the going into effect of the amendment. If this section applies to a senator or assemblyman whose term of office had not expired on December 21, 1916,[the effective date of the amendment] *we do not think that petitioner succeeded in evading its force by his resignation prior to December 21, for this section deals with a fixed*

*period of time, to wit, the 'term' of the officer and not to the period of his incumbency.*" [Emphasis added][33]

Insofar as a judge may be appointed to fill a vacancy, and accordingly may serve until such time as an election is prescribed by law to be held to fill the office for a new term, we believe such period also should be considered as 'the term for which the judge was selected.' Such periods, like the fixed term, are prescribed by statute, *determinable from the surrounding facts,* and thus, in the words of the court above, constitute "the period of time fixed by statute during which he may serve and not the time he may happen to serve."

Accordingly, the plain meaning of article VI, section 17, leads to the conclusion that the disqualification provision as to accepting another public position is to apply throughout the entire term or period for which a judge was originally selected, whether by election or appointment. Consequently, a judge may not, in the words of the court in

---

[33] For similar applications of the legislative disqualification provision, see 63 Ops. Cal. Atty. Gen. 428, 432-433 (1980); Ops. Cal. Atty. Gen. N.S. 2900 (1940) and N.S. 2399 (1940); Atty. Gen. Unpub. Opo. I.I. 66-37.

*Chenoweth v. Chambers, supra,* 33 Cal. App. at p. 107, "succeed in evading its force by his resignation."

## II. The History Of Article VI, Section 17, Further Demonstrates That Its Disqualification Provisions Apply Throughout The Entire Term Or Period For Which The Judge Was Originally Selected

Article VI, section 17, of the California Constitution had its genesis in article VI, section 16, of the Constitution of 1849. Its provisions were extremely similar to the main proviso of the present section 17, though limited to offices. It provided:

"The Justices of the Supreme Court and District Judges shall be ineligible to any other office during the term for which they shall have been elected."

An examination of the Constitutional Debates for the 1849 Constitution (at page 234) demonstrates that this provision was adopted without debate, thus providing no insight into its purpose.

When the 1879 Constitution was adopted, the provision was also numbered article VI, section 18, and stated in full:

"The Justices of the Supreme Court and Judges of the Superior Courts shall be ineligible to any other office or public employment than a judicial office or employment during the term for which they shall have been elected."

Again, the debates with respect to the adoption of the provision are not helpful for our purposes here in. There was some debate, but it was limited to whether a judge can serve as a member of the Constitutional Convention. (See Debates and Proceedings, 1878-1879 Constitutional Convention, p. 996.)

In 1904 judges of the District Courts of Appeal were added to the enumeration of judges in section, and in 1924 municipal court judges were added to such enumeration. Thus in 1930, when article VI, section 18, was next amended, it contained a complete enumeration of judges of the present courts of record as falling within its scope, and its impact was a disqualification for the entire term, *without qualification.*

In 1930, the provision was amended, providing for the first time an exception to its absolute disqualification "during the term for which they shall have been elected." Thus, in addition to a limitation on the practice of law by judges the following proviso with added:

"[P]rovided, however, that a judge of the superior court or of a municipal court shall be eligible to election or appointment to a public office during the term for which he may be elected, and the exception of any other office shall be deemed to be a resignation from the office held by said judge."

The addition of this proviso appears to have been intended to sanction *for the first time* resignation from the judicial office for the purpose of assuming another public office. Although the provision speaks in terms of an automatic resignation taking place upon assumption of the second office, we do not believe that this meant that previously a judge could have resigned and *then* have assumed another office. We believe it was couched in such terms so that a judge *need not resign* in order to run for elective office, thus obviating the need to place this judgeship in jeopardy.

This conclusion is confirmed from an examination of the arguments to the voters in the ballot pamphlet for the November 4, 1930, general election (at pages 24-25). The argument in favor of the amendments to article VI, section 18, state as material to our inquiry:

"A clause of the Amendment also permit the judge to be elected or appointed to other public office by resigning his judicial position – thus making available for wider public service to the people the best judicial minds in the state."

Such arguments to the voters may be used in ascertaining the intent of a constitutional amendment. (*Amador Valley Join Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal. 3d 208, 245-246.)

Accordingly, at this point in time, 1930, it is patent that only superior and municipal court judges could be elected or appointed to another public office[34] during the term for which they were selected. Other judges, that is supreme court judges and

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[34] The section at this time is surprisingly silent as to appointment of these judges to a more public employment.

district court of appeal judges, were not accorded such privilege and remain disqualified for other public office or other public employment ev*en if they resigned*. This was the clear import of article VI, section 18, at that time.

The next change in article VI, section 18, of the California Constitution came about as the result of the revision of article VI in 1966 as part of the work of the Constitutional Revision Commission. That commission proposed that the disqualification in the main proviso remain substantively the same, but that the exception proviso be changed as follows:

"[P]rovided, however, that a judge of the superior court or of a municipal court shall be eligible *to election* to a public office during the time for which he shall have been elected or appointed if you shall resign from his judicial office prior to his declaration of candidacy." (Emphasis added.)

The "Staff Notes" provided:

"STAFF NOTES: This draft takes the view that it is inimical to an independent judiciary for judges to serve in other capacities. The community can have the benefits of a judge's special

knowledge through other means such as his appearance at hearings or through the Conference of Judges but that service on boards and commissions is time-consuming and presents possible conflicts of interest.

"The provision that judges a municipal or superior courts are eligible for election *or appointment* is deleted because detrimental to the administration of justice; *the possibility of an appointment in return for a decision is thereby eliminated.* However, a judge resigns is made eligible for elective office." (Emphasis added.)[35] Thus we finally see an articulation, though brief, as to the purpose of the disqualification provision, that is, to *maintain objectivity in court decisions* without the possibility of decisions being rendered in return for appointments to public office or public employment.[36]

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[35] Article VI, Second Working Draft, Summary (4/26 /65); p. 51, California Constitution Revision Commission, Studies and Drafts. See also Article VI, Amended Third Working Draft Summary (9/10/65), pp. 51-52.

[36] It is to be noted that early in the case of *People v. Sanderson* (1866) 30 Cal. 160, 168, overruled on other grounds in *People v. Provines* (1868) 34 Cal. 520, 532, the court likened original article VI, section 16, to the provision of article III of the California Constitution; providing for the separation of powers between the three branches of government. Thus the Court stated:

In the 1966 report to the Legislature by the Constitutional Revision Commission, we find the following comment with respect to its proposed amendment to article VI, section 18.

"Comment: First paragraph in the section was transferred from existing Section 18. The new provision permits a judge of the trial court of record

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"This provision of the Constitution (article III) so far as it relates to the judicial department of the State, is, in our opinion, in imminently wise. One of its objects seems to have been to confine Judges to the performance of judicial duties; and another to secure them from entangling alliances with matters concerning which they may be called upon to sit in judgment; and *another still to save them from the temptation to use their vantage ground of position and influence to gain for themselves positions and places from which judicial propriety should of itself induce them to refrain. In the same spirit was conceived the sixteenth section of Article VI of the Constitution,* which declares that 'The Justices of Supreme Court, and the District Judges, and the County Judges shall be ineligible to any other office than a judicial office during the term for which they shall have been elected'." (Emphasis added.)

Thus, the danger pointed out by the Constitutional Revision Commission in 1965 of judicial decisions being rendered which would enhance a judge's chances for an appointment to a nonjudicial post was, in fact, articulated one hundred years previously by the California Supreme Court.

This purpose provides the reason or the existence of the disqualification *for the full term for which selected.*

to run for elective office but *prohibits appointment to a non-judicial public office during his term*. Rather than having the acceptance of another office operate as resignation from the one held, as in the existing provision, the proposed section requires a judge to resign upon declaration of his candidacy…." (Emphasis added.)[37]

Thus, the 1966 proposal to the Legislature by the California Constitutional Revision Commission demonstrates a clear understanding on its part that the *then* section 18 disqualification (now section 17) could not be avoided by resigning from office *on less a clear proviso to that effect was set forth in the section itself.*

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[37] See Proposed Revisions of the California Constitution (Cal. Const. Rev. Com. Feb. 1966), p. 96. The actual proposal read as follows, being substantively the same as set forth above in the staff report:

"Sec. 18. A judge of a court of record may not practice law and during the term for which he was selected is ineligible for public employment or public office other than judicial employment or judicial office. By resigning prior to his declaration of candidacy however, a judge of a superior or municipal court may become eligible for *election* to other public office.

"A judicial officer may not receive fines or fees for his own use." (Emphasis added.)

The Legislature, however, did not accept *in toto* the Constitutional Revision Commission's proposal, but in submitting the amendment to the People in 1966, liberalize the proviso somewhat so that, as presently provided, a superior or municipal court judge may run for *elective* office by taking a leave of absence from his judicial post. The Legislature did, however, leave intact the commission's recommendation that judges remain ineligible for *appointment* to another office during their entire term.

Accordingly, we believe that the foregoing examination of article VI, section 17, of the Constitution from its genesis in 1849 to the present demonstrates (1) that its main disqualification provision applies throughout the full term for which the judge was originally elected or appointed; (2) that resignation and acceptance of another "public office" or "public employment" during that period of time is to be permitted only as expressly provided in the section; and (3) that exception relates only to the judges actually specified. *Otherwise, over the years there would have been no need for the qualifying provisos and their limitation as to judges in particular courts.*

The California Supreme Court in 1866, and the Constitutional Revision Commission through its staff in 1965, and through its recommendation to the Legislature in 1966 recognized that the purpose of the disqualification was to keep judges objective in their decisions and to free them from the possibility of rendering decisions favorable to persons or agencies which could appoint them to another desired public office or public employment.

## III. The Purposes For The Enactment Of Article VI, Section 17, Are Also In Accord With Its Plain Meaning

The first case which interpreted article VI, section 17, this century is *Abbott v. McNutt* (1933) 218 Cal. 225. In that case the court held that a sitting judge was ineligible to serve on a qualifications Board established by a county charter to choose candidates for the position of county executive. Having found no prior case construing then article VI, section 18, the court borrowed from a New York case in setting forth the purpose of the provision. The essence of the court's holding is as follows at pages 230-to 31:

"[1] The phrase 'any other office or public employment' necessarily has application to any other *public* office or *public* employment, as distinguish or purely private office or private employment. The only constitutional inhibition against the private employment of judicial officers as to do with the practice of law. Research fails to disclose any case construing or applying that portion of the constitutional provision above quoted. However, the purpose and policy underlying such a provision is cogently stated by Justice Cardoza in *In re Richardson*, 247 N.Y. 401[160 N.E. 655, 661], wherein the following appears: 'The policy is to conserve the time of the judges for the performance of their work, and to save them from the entanglements, at times the partisan suspicions, so often the result of other and conflicting duties.' In other words, it is intended to exclude judicial officers from such extrajudicial activities as may tend to militate against the free, disinterested and impartial exercise of their judicial functions.

"In our opinion service upon the 'qualification board' by the respondent judges would be in contravention of the purpose and policy underlying the constitutional inhibition. As already stated, the charter provision requires that the

qualification board continue to solicit and select and submit to the board of supervisors lists of qualified candidates for the office of county executive until such time as the board of supervisors determines upon an appointee for that office.

"[2] It is conceivable that this duty may so consume the time of the respondent judge as to seriously embarrass, if not in fact impede, the orderly and proper discharge of their judicial functions. What may reasonably be done under a statute, is a test of its validity.

"Moreover, service upon said qualification board may tend to involve the respondent judges in those 'entanglements' and subject them to those 'partisan suspicions' of which the constitutional inhibition, in its wisdom, seeks to free them. To illustrate: If the respondent judges are permitted to serve upon the qualification board, it is not at all unlikely that at some time in the future they may be called upon, as judicial officers, to pass upon the propriety or validity of the official acts of the county executive whom they recommended and endorsed as qualified for appointment to that office. Or, in the event of misfeasance in the office of the county executive, the respondent as superior court judges

may, under section 758-769 of the Penal Code, be required to preside at a trial having for its purpose the removal from office of an incumbent theretofore recommended by them as qualified for the position. Either or both of these situations pointedly indicate the impropriety of service by the respondent judges on the qualification board.

"[3] Having definitely in mind the public policy underlying the constitutional inhibition, we are satisfied that membership on the 'qualification board' constitutes an 'office or public employment' within the purpose and intent of section 18 of article VI of the Constitution…" (Emphasis in original.)[38]

Based on the declared purpose for the proscriptions of article VI, section 17, set forth in *Abbott v. McNutt*, it can be argued that article VI, section 17, in no way prevents a judge from resigning

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[38] Interestingly, the purposes set forth in *Abbott v.* McNutt are essentially *the first two* articulated by the Supreme Court in 1866 in *People v. Sanderson supra,* 30 Cal. 160, 168 concerning original article VI, section 18. *Abbott v. McNutt* did not, since it did not have to, articulate the *additional purposes* set forth in *People v. Sanderson*, that is, to maintain objectivity of decision and prevent the possibility that judicial decisions would be made in a manner which would enhance a judge's chances for nonjudicial appointment. [ See n. 6, *ante.]*

during his term and then accepting another public office or public employment.

In response to this argument, we simply point out that *Abbott v. McNutt* involved a *sitting* judge. Accordingly, the courts' attention was not directed to the issue of the duration of the article's proscription, that is, the meaning of the words "during the term for which the judge was selected." "'…case, of course, are not authority for propositions not there considered'." (*People v. Belleci* (1979) 24 Cal. 3d 879, 888.) *Abbott v. McNutt* is helpful in deciding cases with respect to sitting judges. However, as to judges who resign from office and *then* assume another public office or employment, it is, in our view, inapposite and not too helpful.

The next and only other case interpreting the provisions of article VI, section 17, although also involving a sitting judge, is more helpful for purposes herein. That case, *Alex v. County of Los Angeles* (1973) 35 Cal. App. 3d 994, involved in municipal court judge who sought back pay for the period he was required to take a leave of absence to run (unsuccessfully) for Congress. The judge raise numerous constitutional objections to such requirements as presently contained in article VI,

section 17. The court, however, upheld the provision of article VI, section 17, imposing that requirement.

In upholding the leave of absence requirement the court did draw upon *Abbott v. McNutt* as well as the federal cases upholding the Federal Hatch Act's prohibition against engaging in partisan politics by federal employees.[39] However, because of the factual difference between *Abbott v. McNutt* and *Alex v. County of Los Angeles*, we see in Alex and emphasis on the purpose of article VI, section 17, which we believe underlies the requirement that a judge be disqualified for other public office or employment for the entire period for which he was selected. Such purpose is that the *integrity* of the office as well as its efficiency be protected. Stated, otherwise, in *Alex v. County of Los Angeles* we see an emphasis on (1) ensuring that judicial decisions are not affected by extrajudicial influence and (2) ensuring that any appearance of conflict with respect to judicial decisions is avoided as well. Finally, in *Alex*(at page 1008, see a tangential allusion to the separation of powers purpose which underlies article VI, section 17, first

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[39] See *United States Civil Service Commission v. National Association of Letter Carriers, AFL-CIO* (1973) 413 U.S. 548 and *United Public Workers v. Mitchell* (1947) 330 U.S. 75.

expounded by our Supreme Court over 100 years ago. (See fn. 6, *ante.)*

Thus, in *Alex v. County of Los Angeles*, the court stated with respect to article VI, section 17:

"Thus, the compelling, legitimate state purpose and policy underlying the provision and the necessary distinctions drawn because of the natural, intrinsic and constitutional requirements of the judge's office are (1) *to save the judges from the 'entanglements, at times the partisan suspicions' which may result when a judge engages in the extrajudicial activity* of *campaigning for public office*; and (2) 'to conserve the time of the judges for the performance of their work' so as not to 'embarrass, if not in fact impede, the orderly and proper discharge of their judicial functions.' (See *Abbott v. McNutt,* 218 Cal. 225 [22 P.2d 510, 89 A.L.R. 1009].)

"The requirements of section 17 are not empty. They are essential to maintain in the trial court an atmosphere in which justice can be done." (fn. Omitted.)(35 Cal. App 3d at pp. 1001-1002; emphasis added.)

And as its conclusion the court stated:

"CONCLUSION"

"We are living through a period of massive distrust and loss of confidence in all major institution of government, including the judiciary.

"*The approximately 20 million citizens of California*, speaking through the initiative process at the ballot box, the approximately 40,000 attorneys in California, speaking through the committees of the California State Bar; and the approximately 1000 judges in California, speaking through the Judicial Council and the California Conference of Judges, *want their trial judges to be free of the 'suspicion' of being warped by political bias.* They want their trial judges to 'tend the store' *and not be divergent from the impartial performance of their work by extrajudicial activities such as running for public office.* These desires are reflected in section 17 and thus tend to foster confidence in our courts which is indispensable." [35 Cal. App. 3d at pp. 1008-1009; emphasis added.)

The language emphasized above contains an essence the reason articulated over 100 years ago by the court in *People v. Sanderson, supra*, 30 Cal. 160,

168 and by the Constitutional Revision Commission in its materials in 1965 in 1966, discussed *ante,* as to why a judge should be disqualified from other public officer or public employment during the full period for which he was selected. That reason is to ensure that judicial decisions are not influenced by the possibility that they will in some manner enhance the judge's chances for appointment to another public position.

## CONCLUSION

The plain meaning of article VI, section 17, of the California Constitution requires that its disqualification provisions apply throughout the entire term or period for which a judge was originally selected. Accordingly, under the plain meaning of the section a superior court judge may not resign from office before the expiration of his term and accept a public teaching position. This conclusion is supported by an examination of the history of article VI, section 17, from its genesis as article VI, section 16, of the Constitution of 1849 to the present.

Should the courts, however, look beyond the plain wording of article VI, section 17, to its purposes, it will be seen that both case law and

materials of the California Constitutional Revision Commission articulate among its purposes (1) the ensurance that judicial decisions are rendered impartially and (2) the avoidance of the appearance of any conflict or bias with respect to those decisions. A judge's impartiality will be enhanced and so too will be the public's perception of impartiality by the knowledge that the judge cannot have any other public office or public employment for the full term of office. Thus judicial decisions will not be influenced by the hope for immediate appointment to another public position. If a judge is permitted to resign and immediately accept another public position, such could raise suspicions as to the impartiality of our court system.

Accordingly, we conclude that a Superior Court judge may not resign from office before the expiration of his term and accept a public teaching position based on the fact that the disqualification provision of article VI, section 17, continues during the entire term for which the judge was originally selected.[40]

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[40] It is to be noted that several opinions of this office had already indicated that article VI, section 17, prevents resignation from office and the immediate assumption of another public position. (See 39 Ops. Cal. Atty. Gen. 191, 197 (1962); Atty. Gen. Unpb. Opn. I.I 63-119.)

# APPENDIX H
## Excerpt From California Ballot Pamphlet
## General Election November 8, 1988
## Legislative Constitutional Amendment
## Proposition 94

**94 Judges**

### Official Title and Summary Prepared by the Attorney General

**JUDGES, LEGISLATIVE CONSTITUTIONAL AMENDMENT**. Permits Judges of courts of record to accept part-time teaching positions that are outside the normal hours of their judicial position and do not interfere with the regular performance of their judicial duties. Prohibits judicial officer from earning retirement service credit from a public teaching position while holding judicial office. Summary of Legislative Analyst's estimate of net state and local government fiscal impact will have little, if any, fiscal impact on the state and local governments.

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Final Vote Cast by the Legislature on ACA 17 (Proposition 94)

| | | | | | |
|---|---|---|---|---|---|
| Assembly: | Ayes | 63 | Senate: | Ayes | 37 |
| | Noes | 2 | | Noes | 0 |

## Analysis by the Legislative Analyst

### Background

The California Constitution prohibits judges of the Supreme Court, the court of appeal, superior courts, and municipal courts from accepting other public office or employment, including teaching at *public* institutions, during their judicial terms. These Judges may, however, teach at *private* institutions. The California Code of Judicial Conduct sets standards regarding the compensation judges may receive from participating in outside activities.

Under existing law, the state provides retirement benefits for these judges based on their age and the length of their judicial service.

### Proposal

This constitutional amendment permits judges of the Supreme Court, the courts of appeal, superior courts, and municipal courts to teach part-time at public institutions, provided that the activity is outside the normal hours of their judicial positions and does not interfere with the performance of their duties. The measure prohibits judicial officers from gaining additional retirement credit from a public teaching position.

**Fiscal Effect**

This measure would have little, if any, fiscal impact on the state and local governments.

**Text of Proposed Law**

This amendment proposed by Assembly Constitutional Amendment 17 (Statutes of 1988, Resolution Chapter 70) expressly amends the Constitution by amending a section thereof: therefore, existing provisions proposed to be deleted are printed in ~~strikeout type~~ and new provisions proposed to be added or printed in *italic type* to indicate that they are new.

**PROPOSED AMENDMENT TO ARTICLE VI. SECTION 17**

SEC. 17. A judge of a court of record may not practice law and during the term for which the judge was selected is ineligible for public employment or public office other than judicial employment or judicial office, *except a judge of a court of record may accept a part-time teaching position that is outside the normal hours of his or her judicial position and that does not interfere with the regular, performance of his or her judicial duties while holding office*. A judge of ~~the superior or municipal court~~ *a trial court of record* may, however, become eligible for election, to other public office by taking a leave of absence without pay prior to filing a declaration of candidacy.

Acceptance of the public office is a resignation from the office of judge.

A judicial officer may not receive fines or fees for personal use.

*A judicial officer may not earn retirement service credit from a public teaching position while holding judicial office.*

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**Argument in Favor of Proposition 94**

The primary purpose of Proposition 94 is to amend the State Constitution to allow a judge of a court of record to accept a part-time teaching position which does not interfere with his or her judicial duties. This measure also makes two technical changes which would: (1) prohibit any judge from earning retirement service credit from a public teaching position while holding judicial office, and (2) clarify the law requiring all judges of trial courts of record to take a leave of absence without pay in order to run for election to other public office.

The Constitution prohibits judges of courts of record from accepting public employment or public office outside their judicial position during their term of office. This prohibition has been interpreted to mean that a judge cannot accept a teaching position at a public school, but may accept one at a private School. The prohibition applies during the time the judge is actually in office and during the entire term

for which the judge was selected, even if the judge has resigned part way through the term.

The practical effect of this provision has been to allow students at private universities and colleges to benefit from the knowledge and experience of judges, but to deny to the students at public educational institutions the contact and exposure to this valuable source of knowledge and expertise. Private institutions have been attracting judges as lecturers and professors for many years and the experience has been overwhelmingly positive for these schools and their students.

In order to remedy this inequity, Proposition 94 would allow judges, to accept part-time teaching positions at public institutions provided that the work does not interfere with the regular duties of the judge's position and the work is undertaken outside the normal hours for that position.

Judges are regulated by the Canons of Judicial Conduct which require that the judge place primary emphasis upon his or her judicial position. A failure to adequately and competently discharge judicial duties can lead to removal from office. Californians, thus, can be assured that utilizing judges as teachers in public schools will be beneficial to the public and pose minimal potential for abuse.

We respectfully ask you to vote yes on Proposition 94.

PETER R. CHACON
Member of the Assembly, 79th District

V. GENE McDONALD
Judge
President, California Judges Association

P. TERRY ANDERLINI
President, State Bar of California

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**Rebuttal to Argument in Favor of Proposition 94**

The provision in Proposition 94 which permits judges to teach part time for pay at public institutions only as long as the job "does not interfere with the regular performance of his or her judicial duties …" is practically unenforceable.

Under existing law, a judge who allows any activities to prevent him or her from performing the duties of the judicial office could be removed by the California Supreme Court on recommendation of a Commission on Judicial Performance. This almost never happens.

Technically, judges of trial courts in California are elected by local voters. In reality, though, a trial court judge is ordinarily appointed by the Governor

and stands election only if a local attorney runs against the Governor's choice.

Under Proposition 94, it might be possible to sue a judge whose part-time teaching position at a public institution is interfering with his or her full-time position on the bench. But what attorney would take the case? What questioning of the judge would be allowed in the lawsuit? What other judge would want to decide the case?

Given the staggering backlog of criminal and civil cases pending in California's courts, we should not authorize judges to take part-time jobs in public schools or colleges.

On November 8, please exercise your best judgment concerning the measures and candidates on the ballot. VOTE and encourage everyone you know to vote (preferably your way!).

GARY B. WESLEY
Attorney at Law

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**Argument Against Proposition 94**

Proposition 94 is a proposal by the Legislature to amend our State Constitution, to permit a judge to teach part time for pay at public institutions as long as the job "*is outside the normal hours of his or her judicial position and … does not interfere with the regular performance of his or her judicial duties. …*"

The proposed amendment reflects a concern that judges not permit part-time teaching positions to interfere with their full-time jobs on the bench. However, neither existing law nor the proposed amendment restricts judges who teach part time in private institutions, such as the law schools at the University of Santa Clara, the University of San Francisco and the University of San Diego.

Why should we amend our State Constitution to create one rule for judges who wish to teach at public institutions and maintain another rule for judges who wish to teach at private institutions?

Allowing judges to teach part time is either a good idea or a bad idea.

Given the enormous volume of criminal and civil cases tiled in California's courts, it is probably, on balance a bad idea to allow judges to teach part time.

Judges have an immense stack of homework every day. And, while attorneys sometimes wonder whether some judges have done their homework, allowing judges to teach part time at public institutions can only make matters worse. Teaching requires many hours of preparation and judges just do not have the time.

A "no" vote on Proposition 94 will retain the prohibition against judges teaching for pay at public institutions. The Legislature should offer voters at

the next election a measure that would prohibit judges from, teaching at private institutions as well

Certainly, many judges are marvelous people and teachers who bring precious insight to the classroom; however, unless and until the number of judges across the state is increased dramatically, judges will not be able to find the time to both teach and handle their heavy caseloads.

With regard to my remark about attorneys sometimes wondering whether some judges have done their homework, I can only hope that the remark is taken in kindly spirit in which it was offered!

GARY B. WESLEY
Attorney at Law

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**Rebuttal to Argument Against Proposition 94**

The arguments against Proposition 94 are misguided.

First, this measure WILL NOT create one set of rules for those judges who teach at public schools and another set for those who teach at private schools. Instead, judges will be subjected to the same rules on part-time teaching regardless of where they may choose to teach. This is because all judges must follow the rules of judicial conduct. These rules require judges to place primary emphasis upon their judicial duties. Judges can be removed from office for

poor performance. This threat will serve as an effective safeguard from potential abuses that might otherwise occur.

Second, the opposition asserts that on balance it is a bad idea to let judges teach part time because it will worsen the already enormous number of court cases filed. Yes, there is an enormous number of cases filed in our courts. Continuing a prohibition on after-work contact between judges and law students in public schools, however, WILL NOT reduce or eliminate the number of cases filed. Instead, it will hurt our students by depriving them of the practical experience judges can bring to the classroom.

Many private schools employ judges to teach on a part-time basis. These schools recognize the importance of having judges interact with students in the classroom. Judges are "specialists" in the law and the rules and procedures of the court.

Improve our public school system. Permit students in public law schools to benefit from the experience judges can offer them.

Vote "yes."

PETER R. CHACON
Member of the Assembly, 79th District
P. TERRY ANDERLINI
President, State Bar of California
V. GENE McDONALD
Judge
President, California Judges Association

## APPENDIX I

[County Seal
De Witt W.
Clinton
County
Counsel]

**COUNTY OF LOS ANGELES**
**Office of the County Counsel**
648 Hall of Administration
500 West Temple Street
Los Angeles, CA 90012

November 10, 1988

Mr. Frank S. Zolin
County Clerk/Executive Officer
Superior Court
111 North Hill Street
Los Angeles, California 90012

Attention: Eric D. Webber, Chief Deputy

Re: Judicial Compensation

Dear Mr. Zolin:

You have asked our opinion concerning the legality of providing judges with County employee benefits such as the Flexible Benefit and Savings Plans.

It is our opinion that judges' salaries must be set by the Legislature, but other benefits may (and in some cases must) be provided by the County.

## ANALYSIS

Article VI, Section 19 of the California Constitution provides:

> "The Legislature shall prescribe compensation for judges of courts of record. A judge of a court of record may not receive the salary for the official office held by the judge while any cause before the judge remains pending and undetermined for 90 days after it has been submitted for decision."



As a general proposition, the word "compensation" originally meant "wages" or "salary," but as other benefits have evolved, it has come to have a broader meaning, and is now commonly used to include both salary and fringe benefits. The question of which meaning was intended in Section 19 is critical, since the courts have held that where the Constitution requires the Legislature to "prescribe" something, the Legislature must do so itself, and may not leave or delegate the function to another body or person. County of Madera v. Superior Court (1974) 39 C.A.3d 665.

For reasons which will become apparent below, we believe that "compensation" as used in Sections 19 refers only to the salary which is the

emolument of the judicial office. The Attorney General does not agree. See, e.g., 59 Ops. Cal. Atty. Gen. 496; 61 Ops. Cal. Atty. Gen. 338. We note initially that judges, like other elected officers, are paid under the common law rule that the salary is an incident of the office. Consequently, they do not technically have such benefits as vacation, sick leave or overtime, which otherwise might be considered a part of compensation.

Reading Section 19 as a whole, it appears that the words "compensation" and "salary" are used interchangeably; that is, "salary" in the second sentence appears to refer to the "compensation" prescribed pursuant to the first sentence.

This reading of Section 19 is supported by the fact that Article VI, Section 20 provides:

> "The Legislature shall provide for retirement, with reasonable allowance, of judges of courts of record for age or disability."

If "compensation" as used in Section 19 was intended to include fringe benefits such as retirement benefits, there would be no need for Section 20.



Prior to Article VI, Section 19 (which was added as 1966), judicial compensation was provided under Article IV, Section 11, which read in part:

> "The compensation of the justices or judges of all courts of record shall be fixed, and the payment thereof prescribed by the Legislature."

This language again suggests the payment of a salary, rather than other benefits.

The predecessor to Article VI, Section 11 was Article VI, Section 17, which provided:

> "The justices of the Supreme Court and of the District Courts of Appeal, and the judges of the superior courts, shall severally, at stated times during their continuance in office, receive for their service such compensation as is or shall be provided by law. The salaries of the judges of the superior court, in all counties having but one judge, and in all counties in which the terms of the judges of the superior court expire at the same time, shall not hereafter be increased or diminished after their election, nor during the term for which they shall have been elected. Upon the adoption of this amendment the salaries then established by law shall be paid uniformly to the justices and judges then in office. The salaries of the justices of the Supreme Court and of the District Courts of Appeal shall be paid by the State. One half of the salary of each superior court judge shall be paid

> by the State and the other half therefor shall be paid by the county for which he is elected. On and after the first day of January, A.D. 1907, the justices of the Supreme Court shall each receive an annual salary of $8,000, and the justices of the several District Courts of Appeal shall each receive an annual salary of $7,000; the said salaries to be payable monthly."

Former Section 17 also appears to use the terms "compensation" and "salary" interchangeably.



The language of former Section 17 is directly traceable to the Constitution of 1879, and thence to the Constitution of 1849.

Article VI, Section 15 of the Constitution of 1849 provided:

> "The Justices of the Supreme Court, and Judges of the District Court, shall severally, at stated times during their continuance of office, receive for their services a compensation, to be paid out of the treasury, which shall not be increased or diminished during the term for which they shall have been elected. The County Judges shall also severally,

> at stated times, receive for their services a compensation to be paid out of the county treasury of their respective counties, which shall not be increased or diminished during the term for which they shall have been elected."

It is clear that "compensation" as used in Section 15 meant "salary." For that matter, we doubt that public officials in either 1849 or 1879 received much in the way of fringe benefits in any event.

Thus, historically "compensation" for judges has been used and understood to mean "salary," and this has carried over to the present day.

The Legislature has interpreted the constitutional language in the same way. Chapter 1.5 of Title 8 of the Government Code Sections 68200, et seq.) is entitled "Compensation of Justices and Judges of Courts of Record." It deals exclusively with salary and not with fringe benefits or any other form of remuneration. Similarly, Government Code Section 75003, which is a part of the Judges' Retirement Law, defines "salary" as follows:

> "'Salary' means the compensation received by a judge as the emolument of the office of judge…."

Consequently, we conclude that while the Legislature must prescribe the salary of a superior court judge and may not delegate that responsibility to any other person or body, Article VI, Section 19 of the California Constitution does not prohibit the board of supervisors of a particular county from providing additional benefits for judges in that county. In fact, the Legislature has authorized or required such additional benefits in some instances.

For example, Government Code Section 53200.3 provides that judges are deemed to be county employees for the limited purposes of the application of that article (dealing with group insurance) and provides that judges are entitled to the same or similar health and welfare benefits as are granted to employees of the county in which the court is located. Thus, judges are clearly entitled to medical, dental and life insurance benefits such as those provided in the Flexible Benefit Plan.

Similarly, Government Code Section 53214.5 authorizes judges to participate in deferred compensation plans established by counties. While Section 53214.5 was probably inspired by the existence of deferred compensation plans established pursuant to Section 457 of the Internal Revenue Code, 401(k) plans such as our Savings Plan are also deferred compensation plans, and health care and dependent care reimbursement accounts as well as salary reduction agreements provided under the Flexible Benefit Plan are deferred compensation arrangements, and consequently we believe that

judges' participation therein is authorized by Section 53214.5.

It is true that participants in the Flexible Benefits Plan may elect to take part or all of the County's contribution as taxable cash, and that the County provides matching contributions to the 401(k) plan. We believe that these benefits are similarly authorized by Sections 53200.3 and 53214.5, since they are part of the plans authorized by those sections. In addition, Government Code Section 68206.6, which provides for payment of superior court judges solely



from a county payroll, was added for the specific purpose of permitting judges to participate fully in county cafeteria and 401(k) plans.

However, even assuming that such benefits are not specifically authorized by statute, we believe that the County may still provide them to judges, so long as the Board of Supervisors finds that there is a benefit to the County in doing so. This would also be true of other benefits for judges, such as a professional development allowance or bonus.

Superior court judges are technically State constitutional officers, but they are in many respects quasi-county officers. They serve the population of a particular county, their salaries are paid in part by

the county in which they sit, and as noted above, they are deemed to be county employees for purposes of participation in health and life insurance programs as well as in deferred compensation plans.

The salary of a superior court judge is the same statewide. Thus, a judge in a small, rural county may be well compensated based upon the cost of living there and in comparison to what he could earn in private practice. On the other hand, judges in Los Angeles County are moderately compensated based upon the cost of living here and in comparison to what they could earn in private practice. The Board of Supervisors has evidently found that in order to attract and retain qualified judges to serve in this County, it is necessary and appropriate to provide them with benefits such as the Flexible Benefit Plan contribution and the 401(k) match, which are available to many employees in the private sector, as well as to County employees and court officers and employees other than judges.

Mr. Frank S. Zolin

November 10, 1988
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It may be necessary for the Board of Supervisors to provide additional benefits for judges in the future in order to maintain a high level of judicial competence and performance in this County.

If we can be of further assistance to you in this matter, please let us know.

Very truly yours,

DE WITT W. CLINTON
County Counsel

By: s/ Roger M. Whitey
ROGER M. WHITEY
Senior Assistant
County Counsel

APPROVED AND RELEASED:

s/ De Witt W. Clinton
DE WITT W. CLINTON
County Counsel

RHW:jk
Nov10W (Schedule A, Which Does Not Include Real Property)

**APPENDIX J**

[SEAL]
State of California
Commission on Judicial Performance
455 Golden Gate Avenue, Suite 14400
San Francisco, CA 94102-3660
(415) 557-1200
FAX (415) 557-1266
Web Site: http://cjp.ca.gov

April 3, 2009

*Hand delivered*

Edmund G. Brown, Jr.
Attorney General
Attorney General's Office
California Department of Justice
455 Golden Gate Avenue, Suite 1100
San Francisco, CA 94102

Dear Attorney General Brown:

At its March 18, 2009 meeting, the Commission on Judicial Performance by a vote of ten

members and none opposed resolved to request a legal opinion from your office pursuant to Government Code section 12519 as to the three issues set out below arising from the Legislature's enactment of SB 11 (also known as SBX2 11)(attached). Deputy Attorney General Peter E. Flores, Jr., is a member of the commission. Mr. Flores is recused from this matter, and did not participate in the commission's decision to request a legal opinion from your office. Because we understand that the effective date of SB 11 is to be May 21, 2009, the commission respectfully requests a legal opinion at the earliest possible time.

SB 11 was enacted in response to *Sturgeon v. County of Los Angeles* (2008) 167 Cal. App. 4th 630; review den., December 23, 2008 (attached). (See, e.g., Senate Bill Analysis, February 14, 2009, attached.) *Sturgeon* held that supplemental compensation provided by Los Angeles County to the judges in that County, in addition to the compensation already prescribed for the judges by the Legislature, was not authorized by law and was unconstitutional. The commission was not involved in the *Sturgeon* case.

SB 11 is applicable to all state court judges. Section 2 of SB 11 states in part that "Judges of a court whose

judges received supplemental judicial benefits provided by the county or court, or both, as of July 1, 2008, shall continue to receive supplemental benefits from the county or court then paying the benefits on the same terms and conditions as were in effect on that date." The commission understands that judges in a number of courts receive supplemental compensation, and that the value of the supplemental compensation varies between courts. In Los Angeles County, the county contributes 19 percent of the judges' salaries to a MegaFlex



California Benefit Plan. The judges either spend it on medical, dental or vision coverage, or life and disability insurance (all in addition to the salary and benefits provided to them by the state). Any portion of the county's contribution that is not used to purchase such benefits is paid to the judges as taxable income. The county also matches the judges' 401K contribution to up four percent of salary. In fiscal year 2007, each judge was eligible to receive $46,436 in supplemental compensation from the

county, representing 27 percent of his or her salary prescribed by the Legislature, at a cost for the county of $21 million. *Sturgeon*, 167 Cal. App. 4th at 635-636. Judges in other courts receive different amounts and types of supplemental compensation, some paid in cash, some in the form of benefits that the judges are free to "cash out" at their sole discretion, some in the form of professional development allowances paid in cash for the judges to use at their sole discretion, some in the form of car allowances and some in the form of life and disability insurance policies. Judges in some counties receive nothing.

Section 5 of the SB 11 purports to retroactively immunize all state court judges from authorizing or receiving such compensation. It provides that "(n)otwithstanding any other law, no governmental entity or officer or employee of a governmental entity shall incur any liability or be subject to prosecution or disciplinary action because of benefits provided to a judge under the official action of a government entity prior to the effective date of the act on the ground that those benefits were not authorized under law.

There were no public hearings on SB 11. It was inserted into the Budget Act of 2008 at the last

minute on February 14, 2008, and passed the same day.

**Issues Presented**

**1. Does the Legislature have the authority to enact legislation that purports to preclude the commission from disciplining California superior court judges for authorizing supplemental compensation to be paid to themselves from public funds, and/or receiving that supplemental compensation on the ground that such benefits were or are not authorized by law?**

The commission concludes that the Legislature does not have this authority, and that section 5 of SB 11 is invalid and unconstitutional as a violation of the separation of powers principle. Cal. Const. art. III §3. Under article IV, section 18 of the Constitution, the commission and the California Supreme Court have exclusive authority over judicial authority.

**Analysis**

The commission is the independent state agency charged with investigating complaints of judicial misconduct and judicial incapacity and for disciplining judges. The commission's jurisdiction

includes all judges of California's superior courts and the justices of the Court of Confidential letter to

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Appeal and Supreme Court. Cal. Const. art. VI § 18, subd. (d).[41] The Supreme Court may in its discretion

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[41] Article VI, section 18 subd., (d) states in its entirety: "Except as provided in subdivision (f), the Commission on Judicial Performance may (1) retire a judge for disability that seriously interferes with the performance of the judge's duties and is or is likely to become permanent, or (2) censure a judge or former judge or remove a judge for action occurring not more than 6 years prior to the commencement of the judge's current term or of the former judge's last term that constitutes willful misconduct in office, persistent failure or inability to perform the judge's duties, habitual intemperance in the use of intoxicants or drugs, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute, or (3) publicly or privately admonish a judge or former judge found to have engaged in an improper action or dereliction of duty. The commission may also bar a former judge who has been censured from receiving an assignment, appointment, or reference of work from any California state court. Upon petition by the judge or former judge, the Supreme Court may, in its discretion, grant review of a determination by the commission to retire, remove, censure, admonish, or disqualify pursuant to subdivision (b) a judge or former judge. When the Supreme Court reviews a determination of the commission, it may make an independent review of the record. If the Supreme Court has not acted within 120 days after granting the petition, the decision of the commission shall be final. The referenced exception in subdivision (f) does no limit

grant review of a disciplinary determination by the commission. *Id.* "No court, except the Supreme Court, shall have jurisdiction in a civil action or other legal proceeding of any sort brought against the commission by a judge." Cal. Const. art. VI, § 18 subd. (g). Further, "The Supreme Court shall makes rules for the conduct of judges, both on and off the bench … referred to as the Code of Judicial Ethics." Cal. Const. art. VI § 18 subd. (m).

There is a conflict between the grant of immunity in section 5 of SB 11 and the commission's constitutional authority to discipline judges. In addition to the situation in Los Angeles County Superior Court, judges in other state courts have authorized payment of supplemental compensation to themselves from court funds since 1997, even without benefit of any enactment by their respective counties. Based on the rule announced in *Sturgeon* and unmodified by the Supreme Court, such supplemental compensation was not authorized by law and was unconstitutional. Depending on the

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the commission's jurisdiction. It states "A determination by the Commission on Judicial Performance to admonish or censure a judge or former judge of the Supreme Court or remove or retire a judge of the Supreme Court shall be reviewed by a tribunal of 7 court of appeal judges selected by lot."

facts, judges' authorization and receipt of such supplemental compensation may violate canons 1 and 2A of the California Code of Judicial Ethics (failing to respect and comply with the law, failing to promote public confidence in the integrity of the judiciary, failing personally to observe the high standards of conduct required to preserve the integrity of the judiciary and/or raising an appearance of impropriety.) If violative of the canons, the judges' conduct may constitute willful misconduct or conduct prejudicial to the administration of justice that brings the judiciary into disrepute and warrants discipline by the commission under Article VI, section 18, subd. (d). See note 1, *supra*.

Because the authority to determine and administer discipline for misconduct is expressly and exclusively in the commission under article VI, section 18, the Legislature cannot directly or indirectly remove that authority or authorize it to be performed by any other authority. *State Board of Education v. Levitt* (1959) 52 Cal. 2d 441, 461-62; *Carmel Valley Fire Protection District v. State of California* (2001) 25 Cal. 4th 287, 304. "Powers, obligations, and rights bestowed or declared by the Constitution may not be amended, modified, or

derogated by statute." *Fair Political Practices Com. v. State Personnel Bd.* (1978) 77 Cal. App. 3d 52, 56



disapproved on another ground in *Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168, 192.

There is nothing in the Constitution that permits the Legislature to restrict the constitutional scope of the commission's authority over judicial discipline. Consistent with the separation of powers principle of article III, section 3, where the judicial branch is to share power with the Legislature, the Constitution so states. See e.g. California Court Reporters Assn. v. Judicial Council of California (1995) 39 Cal. App. 4th 15, 18 (roles of court promulgated by the Judicial Council held invalid under article VI section 6 of the Constitution, which authorizes the Judicial Council to make such rules, but only to the extent they are "not inconsistent with statute"). There is no such provision in the Constitution for the judicial branch to share power with the Legislature for making rules of judicial

conduct, or for determining and administering discipline.

This issue was raised by the commission in response to past legislative efforts to circumscribe the commission's jurisdiction and was one of the bases for Governor Pete Wilson's veto of legislation in 1998. At that time, AB 1110 (Escutia) sought to prohibit the commission from investigating or imposing discipline on a judge "solely on the basis of a judicial decision or an administrative act found to be incorrect legally" or on the basis of "[a] dissenting opinion in an appellate case which does not adhere to precedent set by a higher court." The Governor's veto letter (attached) stated that, "Under the California Constitution, the Legislature is not authorized to restrict (or expand) the types of judicial conduct which constitutes a basis for discipline. The letter further states:

Under the Constitution, it is the Supreme Court that is to make rules for the conduct of judges, and it is the Commission that may discipline a judge for misconduct, subject to review by the California Supreme Court. Where the judicial branch is to share power with the Legislature in promulgating rules, the Constitution has so stated, as in the case of

the Judicial Council's right to adopt rules for court administration, practice and procedure. In that case, the Constitution provides that these rules shall "not be inconsistent with statute." See Cal. Const. Art. VI, section 6. The Constitution does not provide a similar sharing of power here.

The standard for assessing whether the Legislature has overstepped its authority and violated the separation of powers principle has been summarized as follows: "The legislature may put reasonable restrictions upon constitutional functions of the courts provided they do not defeat or materially impair the exercise of those functions." *Santa Clara County Counsel Attorneys Assoc. v. Woodside* (1994) 7 Cal. 4th 525, 543 (citation omitted). Even in instances where there is no express and exclusive grant of authority in the Constitution, the separation of powers doctrine prevents the Legislature from usurping "core" functions of another branch of government, in contrast to actions properly within the sphere of one branch of government that have the "incidental" effect of duplicating a function or procedure, delegated to another branch.

*Younger v. Superior Court* (1978) 21 Cal.3d 102, 115-17; *Hustedt v. Workers' Comp. Appeals Bd.*(1981) 30 Cal. 3d 329, 338 ("[L]egislature may put reasonable restrictions upon constitutional functions of the courts provided they do not defeat or materially impair the exercise of those functions"); Ops. Cal. Atty.Gen. 146 (2003) ("exercise of such overlapping functions must be incidental and ancillary to the core powers of the branch in question, rather than a usurpation of a power delegated to another branch"). Determining whether judges are subject to discipline under the Code of Judicial Ethics is a core function of the commission. Judicial discipline decisions can in no way be characterized as "incidental" or "ancillary" to the commission's functions as set out in article VI, section 18.

The Supreme Court has not hesitated to strike down laws that defeat or materially impair the exercise of core functions of the judicial branch. The issue has been addressed in the context of the judicial branch's power to regulate the practice of

law including attorney discipline, which has been recognized as an inherent power of the state courts. Sec. e.g. *Hustedt,* 30 Cal. 3d at 336-342 (Legislature overreached its authority when it permitted the Workers' Compensation Appeals Board to discipline an attorney, undermining the Supreme Court's unlimited original jurisdiction over disciplinary proceedings); *Merco Constr. Engineers, Inc. v. Municipal Court* (1978) 21 Cal. 3d 724, 27-33 (Legislature violated separation of powers principle when it enacted legislature that encroached on Supreme Court's authority over standards for engaging in the practice of law).

On these bases, we conclude that the Legislature exceeded its authority in enacting section 5 of SB 11, purporting to preclude the commission and from disciplining judges who authorize or receive supplemental compensation that is not authorized by law.

In reaching our conclusion, we are mindful that the California Constitution is a restriction on the Legislature's powers and that the Legislature may exercise any and all legislative powers which are not expressly, or by necessary implication, denied to it by the Constitution. We are also mindful that

doubts about the Legislature's power to act must be resolved in the Legislature's favor. *Methodist Hosp. of Sacramento v. Snyder* (1971) 5 Cal. 3d 685, 691 (citations omitted); *Levit* 52 Cal. 2d at 452 ("[a]ll presumptions and intendments are in favor of constitutionality," and "[t]he general rule is that the invalidity of a legislative act must be clear before it can be declared unconstitutional.").

But there appears to be cause to temper this deference here. As the Supreme Court has stated, this presumption in favor of the Legislature is particularly appropriate when the Legislature has enacted the statute with the relevant constitutional prescription clearly in mind, and the statute represents a "considered legislative judgment" as to the appropriate reach of the constitution provision. *Pacific Legal Foundation*, 29 Cal.3d at 180 (citations omitted). SB 11 reflects no such "considered legislative judgment." There is nothing in the bill analyses of SB 11 indicative of any considerations of the commission's or the Supreme Court's jurisdiction. As noted, there were no public hearings. The bill was inserted into the Budget Act of 2008 at the last minute on February 14, 2008, and passed the same day.

**2. Does section 2 of SB 11 (a) simply identify which judges are permitted as of the effective date of SB 11 to continue receiving supplemental compensation from the effective date forward, on the terms and conditions in effect on July 1, 2008, or (b) Retroactively authorize all or some portion of supplemental compensation provided by counties to judges or to judges by the judges themselves so long as it was being provided as of July 1, 2008?**

We believe that section 2 of SB 11 simply identifies which judges are permitted as of the effective date of SB 11 to continue receiving supplemental compensation from that date forward on the terms and conditions in effect on July 1, 2008, and that it is not a retroactive authorization of past supplemental compensation.

**Analysis**

Section 2 of SB 11, adding Section 6822(a) the Government Code states:

Judges of a court whose judges received supplemental judicial benefits provided by the county or court, or both, as of July 1, 2008, shall continue to receive supplemental benefits from the county or court then paying the benefits on the same terms and conditions as were in effect on that date.

Section 2 does not state from what date the supplemental compensation "shall continue." Nor does it state that supplemental compensation received prior to the effective date of the statute is authorized (except possibly supplemental compensation received on or after July 1, 2008). Section 2 may mean that the subset of state court judges receiving supplemental compensation on July 1, 2008 are permitted, as of the effective date of SB 11, to continue to receive the compensation on the same terms and conditions in effect on July 1, 2008. In that case, there is still no legislative enactment authorizing receipt of such compensation before the effective date of SB 11, and assuming the immunity provision in section 5 is invalid, judges who authorized or received it may be subject to discipline by the commission if their conduct is found to constitute misconduct.

Alternatively, it might be contended that because of the Legislature's stated intention in section 1(a) of SB 11 was to "address" *Sturgeon* and the central finding in *Sturgeon* was that there was no legislative enactment from 1997 to date permitting the supplemental compensation at issue in the case (paid from 1997 to date in at least some cases), the Legislature must necessarily have intended SB 11 to be the missing legislative enactment authorizing the supplemental compensation for this entire period.



Retroactive legislation is not impermissible within limits.[42] Nevertheless, based on the following

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[42] Where it is clear that the Legislature intended a statute to have retroactive application, separation of powers principles do not preclude the application of the legislature to both pending and future cases through any such law cannot "readjudicate" or otherwise "disregard" judgments already final. *People v. Bunn* (2003) 27 Cal.4th 1, 17 (citations omitted)(new criminal statute applicable because it was in effect when judicial review became final); *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1207 (citations omitted)(statute held not retroactive); *Mandel v. Myers* (1981) 29 Cal.3d 531, 547 (rejecting legislative attempt,

principles, it appears that section 2 of SB 11 does not constitute retroactive authorization of supplemental compensation, but operates only prospectively.

First, statues are presumed to be prospective.

The principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every laws student. [Citations]. This court has often pointed out: "[T]he first rule of construction is that legislation must be considered as addressed to the future not to the past…The rule has been expressed in varying degrees of strength but always of one import, that a retrospective operation will not be given to a statute which interferes with antecedent rights…unless such be "the unequivocal and inflexible import of the terms, and manifest intention of the legislature."

*Evangelatos*, 44 Cal.3d at 1207, quoting *United States Security Industrial Bank* (1982) 459 U.S. 70, 79-80; see also *Aetna Cas. & Surety Co. v.*

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as part of state budget process, to review the merits of an attorney fee award previously entered and affirmed on appeal); *Hunt v. Superior Court* (1999) 21 Cal.4th 984, 1008 (judgments are not final for separation of powers purposes until both the trial and appellate process is complete and the case no longer pending in the courts).

*Ind. Acc. Com.* (1947) 30 Cal.2d 388, 393: "[I]t is an established canon of interpretation that statutes are not to be given a retrospective operation unless it is clearly made to appear that such was the legislative intent"). The lack of an express statement of retroactivity in a statute has been held to mean that the presumption of prospective application should apply. *Bolen v. Woo* (1979) 96 Cal.App.3d 944, 958-959 . (Observing that if the Legislature had intended the statute to be retroactive, "it could very easily have inserted such language in the statute itself. It chose not to so."); *Robins v. Pediatric Affiliates Medical Group, Inc.* (1979) 98 Cal. App. 3d 907, 911-912; see also *Evangelatos,* 44 Cal.3d at 1211-1212.

Second, "In the absence of an express retroactivity provision, a statute will not be applied retroactively unless it is very clear from extrinsic sources that the Legislature …must have intended a retroactive application." *Evangelatos* 44. Cal. 3d at 1209: The California Supreme Court has repeatedly given retroactive application to statutes "even when a statute did not contain an express provision mandating retroactive application, where the legislative history of the context of the enactment provided a sufficiently clear indication that the

Legislature intended the statute to operate retrospectively." *Id.* at 1210 (citations omitted).

Applying these principles here, SB 11 appears to have only prospective application. First there is no express statement of retroactivity in SB 11. Section 2 of SB 11 does not state that it is retroactive. Nor is there an express statement of retroactivity in the findings and



declaration of purpose in section 1(a). Section 1(a) states only that the legislation was intended "to address" Sturgeon. Consistent with *Bolen, Robins* and *Evangelatos*, the absence of an express statement of retroactivity should mean that the presumption of prospective application applies. As in *Bolen*, had the Legislature intended to retroactively authorize judges to receive supplemental compensation, it could've said so. For example, section 2 might have stated, "This provision is intended to be retroactive and to authorize such supplemental compensation as provided in this

section beginning in 1997." But, it does not. Instead, it states that judges "shall continue to receive" such supplemental compensation as was in place on July 1, 2008. This phrase has a prospective meaning.

Nor is there an express statement of retroactivity in any other section of SB 11. Although sections 1(b) and (c) of the findings and declarations referred to events in the past tense (the "benefits were considered by the Legislature in enacting the Lockyer-Isenberg Trial Court Funding Act of 1997", counties and courts "established" the supplemental compensation and judges "relied upon the existence of these long-standing supplemental benefits"). These statements appear to reflect only an awareness of the history of the supplemental compensation, and it seems unreasonable to construe them as retroactive authorization. Similarly, while section 4 acknowledges the existence of past supplemental compensation by stating that neither the Judicial Council nor the state are obliged "to pay for benefits previously provided by the county, city and County, or the court," this does not state that such past supplemental compensation is now retroactively authorize, it simply immunizes the state from any claims for repayment. Nor does the retroactive immunity provision in section 5 expressly

authorizes supplemental compensation retroactively. To the contrary, the fact that the Legislature felt it was necessary to immunize judges from liability and discipline on the ground that such supplemental compensation was not authorized by law suggests that the Legislature recognized that such benefits were *not* authorized, thus requiring an immunity provision.

Second, we have located nothing in the legislative history of SB 11 that meets the standard in *Evangelatos*, 44 Cal.3d at 1209 (in the absence of an express retroactivity provision and must be "very clear from extrinsic sources that the Legislature… must have intended a retroactive application"). Regarding the legislative history, Bill analyses obtained from the Legislative Counsel's Office(attached) echo the "continue to receive" language of section 2 of the bill, and support a prospective interpretation. The Assembly floor analysis states that the bill makes statutory changes "to address" *Sturgeon*, and provides that "counties and courts through subsequent to the Lockyer-Isenberg Trial Court Funding Act of 1997, established supplemental benefits to retain qualified applicants for judicial office and where [sic] paying such benefits as of July 1, 2008 … *shall continue to*

*provide* supplemental benefits to judges on the same terms and conditions as were in effect of July 1, 2008." [Emphasis added]. The digest section of the Senate floor analysis similarly states that, "This bill now responds to a recent state court of appeal decision by authorizing counties and courts *to continue providing* existing local benefits to trial court judges." [Emphasis added]. The analysis section of the same document states,

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"This bill addresses the Court's holding in *Sturgeon* by expressly authorizing counties and courts *to continue* providing existing local benefits to trial court judges." [Emphasis added][43]

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[43] The statement in the Senate Floor analysis that after the Lockyer-Isenberg Trial Court Funding Act of 1997 was enacted, "counties and courts *were permitted* to continue providing supplemental benefits to trial court judges, as had been the practice prior to 1997" appears questionable in view of *Sturgeon's* extensive analysis of whether such benefits were "permitted", and conclusion that there was no law "permitting" it.

On the foregoing basis, we conclude that section 2 of SB 11 is not a retroactive authorization of past supplemental compensation.

**3. Has the Legislature adequately prescribed the supplemental compensation purportedly authorized by SB 11?**

We conclude that SB 11 contains no discernible standards or safeguards, hence it appears to be an improper delegation by the Legislature of its duty to prescribe compensation for judges.

**Analysis**

The Legislature is charged with the nondelegable duty to "prescribe compensation" for state judges. Cal. Const. art. VI § 19; *Sturgeon*, 167 Cal. App. 4th at 642 (citation omitted). When the Constitution has "prescribed" a duty, it is non-delegable; the named authority must itself exercise the functions described. *Sturgeon*, 167 Cal. App. 4th at 652-653 (citations omitted). Article VI, section 19 "makes manifest as clearly and tersely as words could do the intent of the framers thereof that the entire matter of the compensation of justices and judges … both as to the amount thereof and as to the time and manner of payment thereof should be

transferred from the constitution and reposed in the legislature." *Sturgeon*, 167 Cal. 4th at 642, quoting *Sevier v. Riley* (1926) 198 Cal. 170, 174-175 (interpreting precursor to this portion of article VI, section 19).

Even when the legislature bears a nondelegable duty, however, it may still permit other bodies "to take action based on a general principle established by the legislative body so long as the Legislature provides either standards or safeguards which are sure that the Legislature's fundamental policy is effectively carried out." *Kugler v. Yocum* (1968), 69 Cal. 2d 371, 376-377. The purpose of the doctrine that legislative power cannot be delegated is to assure that "truly fundamental issues will be resolved by the legislature", and that a grant of authority is accompanied by "safeguards adequate to prevent its abuse." Id. (citations omitted).

There are two Attorney General opinions on the Legislature's nondelegable duty to prescribe judges' compensation that appear relevant to whether the Legislature has adequately prescribed the supplemental compensation purportedly authorized by SB 11. 59 Ops.Cal.Atty.Gen. 496 (1976); 61 Gps.Cal.Atty.Gen. 388 (1978). The statute

in question in the first opinion authorize local governments to provide health and welfare benefits to their officers and employees, and provided that judges whose salaries were paid in whole or in part from County funds were county employees, hence they also receive the benefits. The Attorney



General found this to be an impermissible delegation of the Legislature's nondelegable duty to prescribe judges' compensation. 59 Ops.Cal.Atty.Gen at 500 (the power channeled to the counties by the statute was "totally without standards, and thus would not satisfy the requirements set forth in *Kugler*). The Legislature then amended the statute to provide that the benefits "shall be subject to the same or similar obligations and be granted the same or similar employee benefits as are now required or granted to employees of the county in which the court of said judge, officer or attaché is located." But, the Attorney General found the amended statute in valid for the same reason. "[A]s was the case prior to the amendment, the Legislature authorizes the

individual County legislative bodies to determine if, in one what form, and to what extent judges shall be compensated with county-sponsored health insurance benefits. There is a complete absence of effective legislatively established standards to guide county authorities in the making of this determination. The Legislature has thus failed to address itself to those omissions that cause the original statue to be constitutionally defective." 61 Ops.Cal.Atty.Gen at 390.

SB 11 appears to suffer from the same infirmity. The legislature has reported to approve whatever supplemental compensation County authorities or the judges themselves approved as of July 1, 2008. But, there were no standards or safeguards in any legislations on or before July 1, 2008. *Sturgeon*, 167 Cal.App.4th at 654-657. Nor does SB 11 contain any standards or safeguards going forward.

It appears that the Legislature has attempted to define around this problem of missing standards or safeguards by defining "compensation" in article VI section 19 to mean only "salary" and not "benefits." This would mean that the Legislature does not have nondelegable duty to prescribe

"benefits," or to set standards or safeguards regarding "benefits," leaving in place the wide variety of supplemental compensation authorized by courts and judges themselves as of July 1, 2008. This is purportedly accomplished via section 3 of SB 11. Section 3 add section 68221(b) the Government Code. Section 68221 (b) is to state that Salary" and Benefits" shall have the meanings given those terms in Government Code section 1241. Government Code section 1241 in turn states that, "Whenever a section of the California Constitution uses both the terms 'salary' and 'compensation', with respect to public officer or employee, the terms shall apply only to salary." Since article VI, section 19 contains both the words "salary" and "compensation", application of section 1241 would mean that "benefits" are no longer encompassed by article VI, section 19, thus there is no requirement that the Legislature prescribe them, or provide standards or safeguards for them. Section 3 also add section 6822(a) to the Government Code, which would now define professional development allowances as a "benefit."

We believe there is some doubt as to the validity of this mechanism for avoiding the import of Article 6, section 19. Both the Attorney General in the prior to opinions and the Court of Appeal in

Sturgeon have rejected this "salary" and "benefits" dichotomy. The Attorney General opinions conclude that benefits are part of compensation and must be prescribed by the Legislature. The Court of Appeal reach the same conclusion. "Our consideration of the express language of section 19, article VI, its origins and purposes and the potential consequences of adopting a narrow interpretation of its scope, convince us that notwithstanding section 1241, the employment benefits provided by the county are part of each judge's



compensation and therefore must be prescribed by the Legislature." *Sturgeon*, 167 Cal.App.4th at 645.

Most clearly with respect to the unrestricted cash payments judges are receiving, it does not appear that simply attaching the label "benefit unquote to the payment could legitimately convert it into something other than an impermissible payment of enhanced judicial salary. Judges are entitled to these cash and "cash-in-lieu" payment simply by

virtue of holding the office of judge, and receive the money regardless of the quantity or quality of work performed. These types of cash benefits us appear to be "salary," as commonly defined.[44] as stated in *People ex. Rel. Lockyer v. Pacific Gaming Technologies* (2000) 82 Cal. App.4th 699, 701 & fn. 1, "if it looks like a duck, and sounds like a duck, it is a duck." See also Civ. Code §3528 (the law of respects form less than substance). Other courts have applied these principles to find that compensation termed "benefits" were actually salary. See e.g. *Estes v. City of Richmond* (1957) 249 Cal.App.2d 546 (monthly "hazardous duty pay unquote to police officers and firefighters was "a blanket increase … in the 'payroll' of the police and fire departments and of the 'salaries' of the personnel affected and …the city

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[44] Neither section 1241 nor article VI, section 19 define "salary." It is essentially a right to payment that "is incident to an office or employment." *Conover v. Board of Equalization* (1941) 44 Cal.App.2d 283, 288; Government Code § 75003 (defining "salary" under the Judges Retirement Law as "the compensation received by a judge as the emolument of the office of judge"). See also *Kahn v. Superior Chicken and Ribs, Inc.* (E.D.N.Y. 2004) 331 F.Supp.2d 115, 117 (a salaried employee received a fixed compensation in period payments, "which amount is not subject to reduction because of variations in the quality or quantity of the work performed"); *United States v. Grant* (7th Cir. 1956) 237 F.2d 522, 514 (to the same effect); *United States v. Gorman* (1948) 76 F.Supp. 218, 219 ("salary" implies the receipt of a fixed stipend).

Council could not obviate this fact merely by designating such payments as 'hazardous duty pay' and enacting an ordinance purporting to remove such pay from the scope of [the pension provision] of the city charter").[45]

On these bases, we conclude that to the extent that the supplemental "benefits" are salary and thus "compensation" under article VI, section 19, the Legislature has failed to provide standards are safeguards as required by *Kugler*. Instead, SB 11 purports to authorize counties in individual judges to continue receiving a wide spectrum of supplemental compensation designed either by the counties or the judges themselves, including unrestricted cash payments and cash-in-lieu of benefits. This appears entirely inconsistent with the meaning of article VI,

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[45] See also *City of Fort Wayne v. Ramsey* (Ind.App. 1991) 578 N.E.2d 723, 737 (designating a payment as something other than "salary" does not mean it is not salary, and prior cases involving longevity pay properly found such pay was part of salary for purposes of computing pension benefits); *Hemphill v. City of Bogalusa* (La.App. 1982) 417 So.2d 462, 464 (supplemental payments paid to city firefighters by the state were part of "salary" for purposes of computing pay differentials between ranks under state statute; *Joseph Radtke v. United States* (E.D. Wis. 1989) 712 F.Supp. 143 (the sole shareholder of a corporation could not evade Social Security and unemployment taxes by characterizing his remuneration as "dividends" instead of "wages").

section 19, as set forth out, *Sevier*, 198 Cal. at 174-175, and *Sturgeon*, 167 Cal.App.4th at 654. As stated by the Court of Appeal, "in the context of judicial compensation, we must carefully observe the limits of legislative delegation… in considering compensation judges receive we must be careful that in fact the Legislature has exercised its prescriptive role. In particular, unlike the concern employees might receive excessive pay … we must in addition be sensitive to the potential that,



in the absence of proper direction from the Legislature, judges might be subject to substantial variations in compensation determined solely by local authorities." *Id.* SB 11 perpetuates the same lack of rationality and uniformity in judicial compensation found problematic in *Sturgeon*, and defeats the principle purpose of article VI, section 19 that the Legislature prescribe judges' compensation.

The commission appreciate your attention to this matter. To the extent that the Attorney General's

office will entertain input from other parties on this issue, we ask that the commission be given an opportunity to respond to that input prior to your final opinion.

Please not hesitate to contact me if you would like to discuss this further.

Very truly yours,

s/Victoria B. Henley
Director, Chief Counsel

VBH:MB:cj/040309Brown
Enclosures

**APPENDIX K**

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FILED
LOS ANGELES
SUPERIOR COURT
DECEMBER 10, 2010
John A. Clarke, Clerk
By s/ Raul Sanchez, Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

BY FAX

Case No. BC425491

CANDACE COOPER,
Plaintiff,
v.
CONTROLLER OF THE STATE OF CALIFORNIA

and SECRETARY OF THE STATE OF CALIFORNIA
Defendants.

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NOTICE OF ENTRY OF JUDGMENT

Dept: 33
Judge: The Honorable Charles F. Palmer
Action Filed: November 6, 2009

PLEASE TAKE NOTICE that on November 22, 2010, the Court entered the attached Judgment.

Dated: December 10, 2010

Respectfully Submitted,

EDMUND G. BROWN, JR.
Attorney General of California
STEPHEN P. ACQUISTO
Supervising Deputy Attorney General
s/ Anthony R. Hakl
ANTHONY R. HAKL
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EXEMPT FROM FILING FEES PURSUANT TO GOVERNMENT CODE § 6103
ORIGINAL FILED NOV 22 2010
LOS ANGELES SUPERIOR COURT
SUPERIOR COURT OF THE STATE OF CALIFORNIA COUNTY OF LOS ANGELES

Case No.BC425491
~~[PROPOSED]~~ JUDGMENT

CANDACE COOPER,
Plaintiff,
v.
CONTROLLER OF
THE STATE OF CALIFORNIA
and SECRETARY OF THE STATE OF
CALIFORNIA
Defendants

Date: None
Time: None
Dept: 33
Judge: The Honorable
Charles F. Palmer
Trial Date November 8, 2010
Action Filed: November 6, 2009

The motion for summary judgment of Plaintiff Candace Cooper and the motion for summary judgment, or in the alternative summary adjudication, of Defendant Controller of the State of California came on regularly for hearing upon notice on September 9, 2010, before the Honorable Charles F. Palmer, in Department 33 of the court identified above, located at the Stanley Mosk Courthouse, 111 North Hill Street, Los

Angeles, California. Further hearing on the motions occurred on September 30. Elwood Lui and Erica L. Reilley appeared on behalf of Cooper. Anthony R. Hakl, Deputy Attorney General, appeared on behalf of the Controller. Following oral argument, the Court took the matter under submission.

Having reviewed and considered all papers in support of and in opposition to the motions, and after hearing oral argument, the Court issued its Order Re Motions for Summary Judgment and Summary Adjudication, consisting of twenty-seven pages, on October 20. For the reasons and to the extent set forth in that Order, which is attached hereto and incorporated by reference, and there being no disputed material facts, the Court finds, adjudges and orders that the Controller is entitled to judgment in his favor as follows:

1. Cooper's motion for summary judgment is denied;

2. The Controller's motion for summary judgment is denied;

3. The Controller's motion for summary adjudication as set to the first cause of action granted in part and denied in part; and

4. The Controller's motion for summary adjudication as to the second cause of action is granted.

IT IS SO ORDERED.

Dated: NOV 22 2010

s/ CHARLES F. PALMER
The Honorable Charles F. Judge of the Superior Court

Approved as to form:

s/Erica L. Reilley
Attorney for Plaintiff Candace Cooper

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FILED
LOS ANGELES SUPERIOR COURT
OCT 20 2010

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

Case No. BC425491

CANDACE COOPER,
Plaintiff,
vs.
CONTROLLER OF THE STATE OF CALIFORNIA, ET.AL.
Adjudication Defendants

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Order Re: Motions for Summary Judgment and Summary Adjudication

Background

Plaintiff Candace Cooper ("Justice Cooper") was appointed to the Court of Appeal in 1999.

In 2006, Justice Cooper was elected to a twelve year term, pursuant to Article VI, Section 16 of the California Constitution ("Section 16"). Justice Cooper's (Ret.)Separate Statement of Undisputed Material Facts, etc. ("Justice Cooper's UMF") at 1 and 2.

Justice Cooper resigned and retired from the Court of Appeal, effective December 31, 2008. Justice Cooper's UMF 3. At the time of her retirement, their remained approximately 10 years of the term to which she had been elected. *Ibid.* Justice Cooper has had a long- standing interest in teaching at the university level and would like to "seize upon a teaching opportunity at a public institution during her retirement...but is reluctant to do so because she is concerned that a few non-judicial interpretations of Article VI, Section 17 of the California Constitution ("Section 17") have construed the provision so as to preclude her from any public employment during the remainder of the term for which she was elected – that is, until the year 2018." Verified Complaint for Declaratory Relief, filed herein November 6, 2009 (the "Complaint") at para. 18. She is further concerned that "acceptance of such public employment could result in her forfeiting all her State retirement benefits or

other vested benefits (health, dental, etc.) to which she is entitled." *Ibid.*

The Complaint seeks the following judicial declarations: (1) that a proper construction of Section 17 requires that its bar against public employment applies only to sitting judges or justices and not to judges or justices who have resigned or retired from the bench and (2) if Section 17 is construed as a bar to post-retirement public employment, Section 17 violates equal protection insofar as it treats similarly situated judges or justices differently and such differential treatment bears no rational relationship to any legitimate state purpose. Complaint, p.8. The Complaint names as defendants the Controller of the State of California (the "Controller") and the Secretary of State of the State of California (the "Secretary of State"). The Secretary of State was dismissed without prejudice on March 23, 2010.

Justice Cooper has moved for summary judgment; the Controller has moved for summary judgment or, in the alternative, summary adjudication. There are no disputed material facts. See Defendant's Separate Statement of Undisputed Material Facts in Opposition to Plaintiff's Motion for Summary Judgment, filed herein August 12, 2010

and Justice Cooper's (Ret.) Response to Separate Statement of Undisputed Material Facts in Support of Defendant's Motion for Summary Judgment, or in the Alternative Summary Adjudication, filed herein August 12, 2010. In that there are no disputed material facts, the issues presented by the pending motions are purely legal and the case is ripe for resolution by summary judgment.

Pertinent Provisions of the California Constitution

The pertinent provisions of the California Constitution for purposes of these motions are Article VI, section 16 ("Section 16") and Article VI, section 17 ("Section 17").

Section 16 provides, in pertinent part:

"(a) Judges of the Supreme Court shall be elected at large and judges of courts of appeal shall be elected in their districts at general elections at the same time and place as the Governor. Their terms are 12 years beginning the Monday after January 1 following their election, except that a judge elected to an unexpired term serves the remainder of the term. In creating a new Court of appeal district or division the Legislature shall provide that the first elective terms are 4, 8, and 12 years.

"...

"(c) Terms of judges of superior courts are six years beginning the Monday after January 1 following their election. A vacancy shall be filled by election to a full term at the next general election after the January 1 following the vacancy, but the Governor shall appoint a person to fill the vacancy temporarily until the elected judge's term begins.

"(d) (1) Within 30 days before August 16 preceding expiration of the judge's term, a judge of the Supreme Court or a Court of appeal may file a declaration of candidacy to succeed to the office presently held by the judge. If the declaration is not filed, the Governor before September 16 shall nominate a candidate. At the next general election, only the candidate so declared or nominated may appear on the ballot, which shall present the question whether the candidate shall be elected...

(2) The Governor shall fill vacancies in those courts by appointment. An appointee holds office until the Monday after January 1 following the first general election at which the appointee had the right to become a candidate or until an elected judge qualifies...

Section 17 provides, in pertinent part:

"A judge of a court of record may not practice law and during the term for which the judge was selected is ineligible for public employment or public office other than judicial employment of judicial office, except a judge of a court of record may accept a part-time teaching position that is outside the normal hours of his or her judicial position and does not interfere with the regular performance of his or her judicial duties while holding off A judge of a trial court of record may, however, become eligible for election to other public office by taking a leave of absence without pay prior to filing a declaration of candidacy. Acceptance of the public office is a resignation from the office of judge...A judicial officer may not earn retirement service credit from a public teaching position while holding judicial office."

It is undisputed that "judges of a court of record" encompasses Superior Court judges and justices of the Supreme Court and Courts of Appeal.

Textual Analysis of Sections 16 and 17

The first declaration sought by Justice Cooper – that Section 17's ineligibility

provision applies only to sitting judges and not to resigned or retired judges – requires a determination of the meaning of the word "term" as it is used in Section 17 ("A judge of a court of record...during the term for which the judge was selected is ineligible for public employment...") Justice Cooper asserts, as she must, that the term to which a justice is elected ends upon the justice's resignation or retirement. If the term does not end upon resignation or retirement, under Section 17, the term necessarily continues and the retired justice remains ineligible for public employment.

Since 1849, Article VI of the California Constitution has provided for the judicial branch of government *Lungren v. Davis* (1991) 234 Cal.App.3d 806, 810 and fin.3. The present Section 16 addresses the election and appointment of judges of the Supreme Court, the Court of Appeal, and the superior court, defines their terms, and provides for filling vacancies in those courts. *Ibid.* The present Section 17 addresses restrictions on employment by judges of courts of record, including justices of the Court of Appeal. Section 17 does not define the word "term." The only definition of "term" in Article VI is found in Section 16, the section that immediately precedes Section 17.

"It is a cardinal rule to be applied to the interpretation of particular words, phrases, or clauses in a statute or a constitution that the entire substance of the instrument or of that portion thereof which has relation to the subject under review should be looked to in order to determine the scope and purpose of the particular provision therein of which such words, phrases, or clauses form a part; and in order also to determine the particular intent of the framers of the instrument in that portion thereof wherein such words, phrases, or clauses appear." *Wallace v. Payne* (1925) 197 Cal.539, 544. This applies even where the particular part of the constitution at issue was added or amended subsequently. *Lungren v. Davis, supra,* 234 Cal.App.3d at 823. "There can be no question then that words and phrases within article VI of the Constitution must be interpreted in the light of other provisions of that article [Citations] ... [T]here is nothing in the history of these two sections [Sections 16 and 17] which indicates or even suggests that the word "term" was meant to have one meaning in section 16 and another in 17." *Ibid.*

Section 16(a) defines the term of justices of the Supreme Court and the Court of Appeal. It provides: "Their terms are 12 years beginning the Monday after January 1 following their election, except that a judge

elected to an unexpired term serves the remainder of the term." Thus, "term" is defined as 12 years and the exception ("except that a judge elected to an unexpired term serves the remainder of the term") on its face contemplates that when a justice elected to a term ceases to hold that position, the successor justice will be elected to *an unexpired term* and serves *the remainder of the term*. If a term ended upon retirement, resignation, or other vacation of judicial office, there would be neither an unexpired term nor a remainder of the term. To sum up, Section 16(a) defines "term" for justices of the Supreme Court and Court of Appeal as 12 years commencing the Monday following January 1 following a justice's election, unless there is an "unexpired term" which could only occur because the prior occupant failed to serve the full term to which she was elected, in which case, the successor justice serves he remainder of the term.

It should be noted that Section 16's definition of "term" for superior court judges is markedly different from that provided for justices. Section 16(c), set forth above, provides that the terms of superior court judges are 6 years beginning the Monday after January 1 following their election and that a vacancy shall be filled by election to a full term at the next general election after the

January 1 following the vacancy. Thus, not only is the term half that of a justice, but section 16(c) expressly provides that an election following a vacancy is to a "full term." There is no reference to an "unexpired term" or "remainder of their term."

Applying Section 16(a)'s definition of "term" for Supreme Court and Court of Appeal justices to the ineligibility provision of Section 17 ("...during the term for which the judge was elected is ineligible for public employment of public office..."), the language of Section17does not tie ineligibility for public employment to the justice's service in office or the time the justice holds office, but to the "term for which the judge was selected." Section 16 defines that term as 12 years, unless the justice was elected to an unexpired term, in which case it is the unexpired term.

Moreover, Section 17 by itself distinguishes between a prohibition tied to a justice's service in office and a prohibition tied to the term to which the justice was elected. The prohibition on the practice of law by its terms only applies to sitting judges and justices ("A judge of a court of record may not practice law"). This prohibition is immediately followed by the language rendering judges and justices ineligible for public employment or public office ("and

during the term for which the judge was selected is ineligible for public employment or public office..." Presumably, had the drafters and voters intended the ineligibility provision to apply only to sitting justices, they need only to have deleted the phrase" during the term for which the judge was selected" and the operative language would have read "A judge of a court of record may not practice law and is ineligible for public employment of public office..." The fact that Section 17makes this distinction in the same sentence which creates the ineligibility provision further evidences an intent to tie the ineligibility provision not to the justice's service in office, but to the term to which the justice was elected. Thus, absent some contrary intent reflected in the legislative history of Article VI or judicial precedent, it appears a justice who resigns, retires, or leaves office for any other reason, remains ineligible for public employment or public office until the expiration of the most recent term to which she was elected.

The History of Constitutional Revisions and Judicial Authorities

The parties have not identified, and the court has been unable to find, any case in which an appellate court has considered whether the ineligibility provision of Section 17 or its predecessors applied to justices of the

Court of Appeal or Supreme Court who have retired or resigned. However, the Supreme Court and the Court of Appeal have addressed related issues which may be of assistance in determining the meaning of those provisions. Similarly, the history of the ineligibility provision in its various forms throughout the State's history may be pertinent to a determination of the issues before the court.

In divining the "legislative history" of the ineligibility provision, the court relies upon the submissions of the parties as well as the comprehensive summary of that history contained in *Lungren v. Davis, supra*, 234 Cal.App.3d at 811-819. *Lungren* cautions that it focuses on constitutional provisions and decisional authorities concerned with the office of superior judge and that

"while there are many similarities between the office of superior court judge and justice of the Supreme Court or Court of Appeal, there are also many differences. For example, appellate justices must stand for election, but they always run unopposed (Section 16(d)). Upon their initial election they succeed in the unexpired term of their predecessor, and thereafter their terms are 12 years. (Section 16(a)). Due to these and other differences, authorities concerned with

appellate justices are not strictly analogous to superior court judges." Lungren v. Davis, *supra*, 234 Cal.App.3d at 818-819.

With this admonition in mind, the court has endeavored to avoid analogizing authorities concerned with superior court judges to appellate justices where the differences between the offices render them inapplicable or suspect.

California's initial 1849 Constitution had a provision in Article VI, section 16 that "The Justices of the Supreme Court and District Judges shall be ineligible to any other office during the term for which they shall have been elected." *Lungren v. Davis, supra,* 234 Cal.App.3d at 811. The position of district judge was analogous, but not identical, to the position of superior court judge today. *Ibid.* For convenience of reference, the court will refer to the constitutional provision making justice or judges ineligible for public office or public employment, as that provision was amended from time to time, as the "ineligibility provision."

In 1858 and 1859, the California Supreme Court considered two cases concerning the term to which a district judge was elected. *People v. Weller* (1858) 11 Cal.77 and *People v. Burbank* (1859) 12

Cal.378. In *Burbank*, in considering the issue presented, the court discussed the purpose of, among other constitutional provisions, the above- described provision in the 1849 Constitution making Supreme Court justices and district judges ineligible for other office, and explained these provisions were intended to secure the impartiality and independence of the judiciary:

"The Constitution of California shows a wise and peculiar solicitude to secure the independence of the Judiciary. For that purpose, it provides that the Supreme and District Judges shall not be eligible to any other office during the terms for which they shall have been elected; and further, that their compensation shall not be increased or diminished during that term." *People v. Burbank, supra*, 12 Cal at 391-392.

In 1866, the California Supreme Court considered whether the Legislature could make the Chief Justice a trustee of the State Library, a position which the Court found to be "within the sphere of the executive department of the Government." *People v. Sanderson* (1866) 30 Cal. 160, 168. In holding that the Legislature could not do so, the Court relied primarily upon the separation of powers provisions then in the Constitution,

but also referenced the ineligibility provision and emphasized that the same policies underlie both:

"This provision of the Constitution [the separation of powers provisions], so far as it relates to the judicial department of the State, is, in our judgment, eminently wise. One of its objects seems to have been to confine Judges to the performance of judicial duties; and another to secure them from entangling alliances with matters concerning which they may be called up to sit in judgment; and another still to save them from the temptation to use their vantage ground of position and influence to gain for themselves positions and places from which judicial propriety should of itself induce them to refrain. *In the same spirit was conceived the sixteenth section of Article VI. of the Constitution, which declares that "The Justices of the Supreme Court, and the District Judges, and the County Judges shall be ineligible to any other office than a judicial office during the term for which they shall have been elected." Ibid.* (Emphasis added).

This appears to be the only instance in which an appellate court considered the application of the ineligibility provision to justices of the Supreme Court or Court of Appeal.

In 1879, the Constitution was revised to create the present superior court system and the ineligibility provision was moved to Article VI, section 18 and revised to provide, in pertinent part, that justices of the Supreme Court and superior court judges "shall be ineligible to any other office or public employment than a judicial office or employment during the term for which they shall have been elected."

In 1904, Article VI, section 18 was amended to make the ineligibility provision applicable to justices of the Court of Appeal. In 1924, Article VI, section 18 was amended to add municipal court judges to the prohibition on holding public office and to revise the language of the provision:

"The justices of the supreme court, and the district courts of appeal, and the judges of the superior courts and of the municipal courts shall be ineligible to any other office or public employment than a judicial office or appointment during the term for which they shall have been elected or appointed, and no justice or judge of a court of record shall practice law in any court of the state during his continuance in office." *Lungren v. Davis, supra*, 234 Cal.App.3d at 812.

This provision very clearly distinguished between the time of applicability of the ineligibility provision ("during the term for which they shall have been elected or appointed") and the practice of law ("during his continuance in office"). As previously noted, this distinction, in somewhat modified language continues in Section 17 today.

In 1930, Article VI, section 18 was again amended to add the following exception to the ineligibility provisions:

"provided, however, that a judge of the superior court or of a municipal court shall be eligible to election or appointment to a public office during the time for which he may be elected, and the acceptance of any other office shall be deemed to be a resignation from the office held by said judge." (Italics in original). *Lungren v. Davis, supra*, 234 Cal.App.3d at 813.

Thus, superior and municipal court justices – but not justices of the Supreme Court or Court of Appeal – were affirmatively made eligible for election or appointment to public office. The court is aware of no authority or legislative history addressing the basis for the distinction in the 1930 amendment between trial court judges and justices of the Supreme Court and the Court

of Appeal. Regarding the purpose of this change, the members of the Assembly who authored the ballot argument in favor of the amendment asserted that the provision "permits a judge to be elected or appointed to other public office by resigning his judicial position thus making available for wider public service to the people the bet judicial minds in the state." Defendants' Request for Judicial Notice ("RJN"), Exh. 7. Ballot summary, arguments and analysis "may be helpful in determining the probably meaning of uncertain language." *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 2008, 245-246. In light of the distinction between trial court judges and justices, the ballot argument's stated rationale is puzzling in that one would hope the justices of the Supreme Court and Court of Appeal would be among the "best judicial minds in the state." Nonetheless, the ballot argument does carry with it the inference that in the absence of the amendment, superior court and municipal court judges could not be elected to public office by resigning their judicial position.

In 1963 the Legislature created a Constitutional Revision Commission to recommend desirable constitutional changes to the Legislature. *Alex v. County of Los Angeles* (1973) 35 Cal.App.3d 994, 948, fn.1.

The Commission established a subcommittee on the general revision of Article VI, the judicial article. From the outset of the re-drafting of Article VI, the staff notes of the subcommittee recommended that the ineligibility provision be revised to delete the 1930 exception making a trial court judge eligible for election or appointment to public office, and provide that a trial court judge could be elected to public office upon resignation from judicial office prior to declaration of candidacy. Staff notes accompanying subsequent drafts reflect that the recommendation continued and stated the rationale for the change:"the provision that judges of municipal or superior courts are eligible for election or appointment is deleted because detrimental to the administration of justice; *the possibility of an appointment in return for a decision is thereby eliminated*." Defendant's Request for Judicial Notice ("Defendant's RJN"), Exh. 12, p. 51.

Successive drafts of a pending bill may be helpful to interpret a statute if its meaning is unclear; official reports and comments of the Constitution Revision Commission may also be considered. *Carter v. California Dept. of Veteran's Affairs (2006) 38 Cal.4th 927-928; Katzberg v. Regents of the University of California* (2002) 29 Cal.4th 300, 319, fn. 18.

The Constitutional Revision Commission's recommendation that the 130 exception providing that a judge of the superior court or municipal court was eligible for election or appointment to any other office or public employment be deleted was approved by the Legislature and submitted to the voters; the recommendation that the ineligibility provision be revised to provide that a trial court judge could seek public office only by resigning was changed by the Legislature prior to submission to the voters to provide that trial court judges may become eligible for election to other public office by taking a leave of absence without pay prior to filing a declaration of candidacy and that acceptance of the public office is a resignation of the office of judge. The voters adopted the resulting amendments to the ineligibility provision in 1966.

The 1966 amendments to the Constitution made another change pertinent to the present inquiry – "elected" in the ineligibility provision was changed to "selected." ("and during the term for which the judge was selected"). As explained in *Lungren Davis, supra*, 234 Cal.App.3d at 821-822, this change was necessitated by the expansion of the ineligibility provision's coverage to all judge of a court of record:

"Until 1924, the [ineligibility provision] applied only to justices of Supreme Court and Courts of Appeal and to superior court judges. Throughout the period preceding 1924 the [ineligibility provisions] applied during the term for which the judge was 'elected.' In 1924 the [ineligibility provisions] were enlarged to include judges of the municipal courts. As we have previously noted, judges of the municipal courts do serve fixed and definite terms and an appointee to the municipal court is appointed to finish the unexpired term of the previous judge. [Citations]. Accordingly, if the [ineligibility provisions] of the Constitution were to be enlarged to include judges of the municipal court, then it was necessary to use a word or phrase of greater breadth than the word 'elected.' Indeed, in conjunction with the inclusion of municipal court judges in the [ineligibility provisions] of the Constitution, the reference to the term of [ineligibility] was changed from 'elected' to 'elected or appointed.' In the 1966 constitutional revision, the [ineligibility provisions] were expanded to include all judges of a court of record and the use of the word 'selected' was necessary in order to include all such judges serving a term of office."

In 1988, the voters approved Proposition 94, a legislatively-referred constitutional

amendment which, with respect to Section 17, (1) added a part-time teaching exception to the ineligibility provision ("...except a judge of a court of record may accept a part-time teaching position that is outside the normal hours of his or her judicial position and that does not interfere with the regular performance of his or her judicial duties while holding office..."); (2) changed the phrase "the superior court or municipal court" to "a trial court," and (3) prohibited a judge from earning retirement service credit from a public teaching position while holding judicial office. Defendant's RJN, Exh.20, p. 63. With these changes, Proposition 94 brought Section 17 to its current language.

Significantly, the authors of the argument in favor of Proposition 94 in the ballot pamphlet included a member of the Assembly, the President of the California Judges Association, and the President of the State Bar. In explaining the need for Proposition 94, the authors stated their understanding of the scope of Section 17's ineligibility provision:

"The Constitution prohibits judges of courts of record from accepting public employment or public office outside their judicial position during their term of office. This prohibition has been interpreted to mean

that a judge cannot accept a teaching position at a public school, but may accept one at a private school. *The prohibition applies during the time the judge is actually in office and during the entire term for which the judge was selected, even if the judge has resigned part way through the term*." Controllers RJN, Exh.20, p.64. (Emphasis added).

Thus, the ballot argument authors apparently understood and acknowledged that a judge's resignation did not render Section 17's ineligibility provision inapplicable, but continued during the entire term to which the judge was elected.

Conclusions As To The Applicability of the Ineligibility Provision to Resigned or Retired Justices of the Court of Appeal

As discussed above, the textual analysis of Sections 16 and 17 indicates, with little ambiguity, that a resigned or retired justice of the Court of Appeal is ineligible for public employment or public office during the balance of the most recent term to which they were elected. In sum, this analysis is as follows:

1) Section 16 (a) defines the "term" of a justice of the Court of Appeal as "twelve years beginning the Monday after

January 1 following their election, except that a judge elected to an unexpired term serves the remainder of the term;"

2) On its face, Section 16 (a) contemplates that upon resignation or other vacation of office, the term to which a justice was most recently elected will continue until completed ("...except that a judge elected to an unexpired term serves the remainder of the term")

3) Section 16 (a)'s definition of the "term" of a justice applies to section 17. See *Lungren v. Davis, supra,* 234 Cal.App.3d at 823.

4) Section 17's utilization of the word "term" ("...during the term for which the judge was selected is ineligible for public employment...") is consistent with the above-described definition of "term" in Section 16;

5) Section 17 itself distinguishes between a prohibition that continues only during service in office ("A judge of a court of record may not practice law...") and a prohibition that continues for the balance of the term to which the judge was elected ("...and during the term for

which the judge was selected is ineligible for public employment...")

6) Section 16 (c)'s definition of the "term" of a superior court judge differs substantially from Section 16 (a)'s definition of the "term" of a justice in that Section 16 (c) provides that an election following a vacancy is to a "full term," while Section 16 (a) provides that "a judge elected to an unexpired term serves the remainder of the term." This is further indication that the term of a justice continues until it has expired.

There is nothing inconsistent with this analysis or its resulting conclusion in the "legislative history" of the ineligibility provision. Commencing with at least the 1924 amendment and continuing to the present, there has been a distinction between the duration of the prohibition on the practice of law (..."no justice or judge of a court of record shall practice law...during his continuance in office") and the ineligibility provision (..."during the term for which they shall have been elected or appointed..."). Indeed, as noted above, the language of the 1924 amendment made the distinction even more unavoidable ("the justices of ...the district courts if appeal...shall be ineligible to any other office or public employment than a judicial office or

appointment during the term for which they shall have been elected or appointed, and no justice...shall practice law in any court of the state during his continuance in office."). *Lungren v. Davis, supra*, 234 Cal.App.3d at 812.

As discussed above, the ballot argument in favor of the 1930 amendment, which removed superior and municipal court judges from the effect of the ineligibility provision, argued that the amendment permitted "a judge to be elected or appointed to other public office by resigning his judicial position..." This argument carries with it the inference that in the absence of the amendment, a trial judge could not be eligible for appointment or election to public office and that justices of the Court of Appeal, who were not subject to the 1930 amendment, similarly could not simply resign and accept appointment to public office.

Moreover, as discussed above, the ballot argument in favor of Proposition 94 in 1988, authored by a legislator and the Presidents of the California Judges Association and the State Bar essentially adopted the same interpretation of the duration of the effectiveness of the ineligibility provision – that "it applies during the time the judge is

actually in office and during the entire term for which the judge was selected, even if the judge has resigned part way through the term."

Regarding the purposes of the ineligibility provision, as discussed above, since as early as 1859, in *People v. Burbank, supra*, 12 Cal.378 and 1866 in *People v. Sanderson, supra,* 30 Cal. 160, our Supreme Court has emphasized its importance in securing the independence and impartiality of the judiciary. As *Sanderson* made clear, the ineligibility provision was "[i]n the same spirit conceived" as the doctrine of the separation of powers. To be sure, the ineligibility provision also serves the purpose of avoiding a non-judicial employment of office unduly interfering with a judge's judicial duties. See *Abbott v. McNutt* (1933) 318 Cal.225, 229. However, even in Abbott v. McNutt, after quoting the language of Justice Cardozo relative to a similar provision in New York, our Supreme Court immediately summed up:

"In other words, it [the ineligibility provision] is intended to exclude judicial officers from such extrajudicial activities as may tend to militate against the free, disinterested and impartial exercise of their judicial functions." 218 Cal. at 229.

In perhaps the most direct statement of the purpose of the ineligibility provision, the staff notes of the Constitutional Revision Commission's committee on the revision of Article VI,

"the provision that judges of municipal or superior courts are eligible for election or appointment is deleted because detrimental to the administration of justice; the possibility of an appointment in return for a decision is thereby eliminated." Defendants RJN, Exh. 12, p.51. Judicial independence, the separation of powers, and judicial impartiality are critical to our system of justice. The State is a frequent litigant in our courts. The executive branch and, to a more limited extent, the legislative branch, have a multitude of appointments and positions to which a justice or judge could aspire.

The ineligibility provision serves to substantially reduce, if not eliminate, the possibility that a justice in considering cases could be influenced by aspiration to public office or public employment. Limiting the effect of the ineligibility provision to sitting justices would serve to substantially erode its protections in that any justice aspiring to non-judicial office or employment would know that by simply resigning, she would be eligible for the position aspired to. In its grossest forms, a

justice contemplating, in the words of the Constitutional Revision Commission staff notes, "an appointment in return for a decision," would not be deterred at all, since by simply resigning, the justice would become eligible for the appointment traded for.

Having determined (1) that the text of Sections 16 and 17 contemplates that the effectiveness of the ineligibility provision shall continue following a justice's resignation or retirement until expiration of the last term to which the justice was elected and (2) that the purposes of the ineligibility provision are substantial and would not be served if its effectiveness was limited sitting justices, there remains the issue of the harshness of its application in the present case. As Justice Cooper points out, while a shorter period of effectiveness, such as the two years of ineligibility imposed following vacation of judicial office in Michigan, may be justified to accomplish the ineligibility purposes, ten years seems excessive. The court find itself in a difficult quandary in that Legislatures and voters since the state's founding in 1849 have, as to justices of the Supreme Court and the Court of Appeal, maintained the ineligibility provision in the Constitution and the appellate courts have consistently found it to serve an important purpose in preserving the independence of the judiciary. Having found

that its effectiveness continues following resignation, the court does not find it appropriate for it to "second-guess" the Constitution as to the proper length of the period of effectiveness because the court finds a shorter period to be better public policy. That responsibility is appropriately placed by our Constitution with the legislative branch or the initiative process and, ultimately with the voters. Thus, while sharing the view that the result in the present and similar circumstances is harsh, if not unfair, the cour finds that remedying the degree of harshness is beyond the proper scope of its authority.

Justice Cooper further questions the application of the ineligibility provision to retired or resigned justices because it produces "unreasonable" or "absurd" results. See, e.g., *Pollack v. Hamm* (1970) 3 Cal.3d 264, 273 ("because the language of [a constitutional provision] does not compel the result suggested by petitioner, we are governed by the well-established rules that constitutional and statutory provisions be construed consistently with the intent of the adopting body and in such manner as not to produce unreasonable results."); *Barber v. Blue, supra*, at 188 ("we indulge in a presumption that constitutional and legislative provisions were not intended to produce unreasonable results").

First, the text, purposes, and legislative history of the ineligibility provision reflects an intent that it apply to justices who have vacated their judicial office. This distinguishes it from the cases cited by Justice Cooper, where the result of applying the rejected interpretation of a statutory or constitutional provision would have resulted in a determination that was at odds with the intent or purposes of the provision under consideration or some other important public policy. See *Barber v. Blue, supra*, 65 Cal.2d at 188 (general rule in pertinent section allowing time for an orderly and complete elective process overcomes interpretation which would have resulted in "hit-or-miss" election); *Pollack v. Hamm* (1970) 3 Cal.3d 264, 273 (constitutional provision that contemplates that an opportunity to pass on the qualifications of superior court judges no less than every six years overcomes interpretation that a new vacancy is created each time an appointee vacates the office of judge, thereby making it possible for carefully timed resignations to avoid an election indefinitely.)

Second, while the result in this particular case is harsh, it is consistent with the purposes of Section 17. The public policies served by the ineligibility provision are

substantial and important: judicial independence, separation of powers and judicial impartiality. Because of the importance of keeping them independent and impartial, justices have a term of 12 year unless elected to an unexpired term. Having an election to the unexpired term furthers the policy of subjecting the judiciary to election; however, justices, unlike superior court judges, run unopposed in confirmation elections, further insulating them from the political sphere. During the term to which they are elected, the compensation of justices may not be reduced. As discussed above, the language of the ineligibility provision as well as its legislative history reflect an intent that its provisions apply after vacation of the office, precisely to avoid justices being affected in their deliberations by aspirations for non-judicial public employment or public office – to avoid the possibility of trading an appointment for a decision, but also to avoid the more subtle influence of a generalized interest in future government employment. It appears to the court that this can be accomplished in one of three ways (although there may be others): (1) by specifying a specific time period following vacation of office during which a justice would be ineligible for public employment or public office; or, (2) by making it concurrent with the term to which the justice was most recently elected; or, (3) by

making it applicable for the lifetime of the justice. California has chosen the second option. Any unfairness of the result is, at least to some extent ameliorated by the fact that justices are at least constructively on notice at the time they stand for election that they will be ineligible for public employment or public office for the duration of that term.

Moreover, with the one exception discussed below, the court does not find the potential results cited by Justice Cooper to be absurd or unreasonable. Section 17 treats all justices the same – they are subject to the ineligibility provision for the duration of the term to which they are elected. Justice Cooper's assertion that it is unreasonable that a justice could practice law privately, but not be a county bus driver ignores one of the critical purposes of the ineligibility provision which is to remover or minimize the possibility that contemplation of future appointment to public non-judicial position in any capacity could influence a justice's decisions. With respect to one of Justice Cooper's examples of positions foreclosed to her by the ineligibility provision, the position of court clerk, the court feels constrained to point out that Section 17 specifically by its terms excludes from the ineligibility provision judicial employment ("other than judicial employment or judicial office"); thus, a retired

judge would be eligible for employment as a court clerk or elsewhere in the judicial branch.

The one exception referred to above, relates to the part-time teaching exception to the ineligibility provision ("except a judge of a court of record may accept a part-time teaching position that is outside the normal hours of his or her judicial duties while holding office."). The court finds that it would be an unreasonable result and contrary to the purposes for which Proposition 94 was adopted in 1988, to permit part-time teaching at a public institution by a sitting justice, but prohibit it when the justice, for whatever reason, vacates her office. Such a result, in light of the part-time teaching exception for sitting justices, in no way advances any purposes of the ineligibility provision or any other significant public policy, while it is contrary to the purposes for which Proposition 94 was adopted in 1988 – making judges and justices available to teach at public institutions. Similarly, it would be unreasonable to limit a judicial officer who has vacated her judicial position to part-time teaching, in that a former justice who vacates her position has no judicial duties with which her teaching activities can interfere. The Controller concedes that applying the ineligibility provision to bar retired justices

from teaching at a public institution, part-time or full-time would be an unreasonable result.

In view of the above, the court finds that a justice of the Court of Appeal who has vacated her judicial position may accept a part-time or full-time teaching position at a public institution during the term to which she was elected. While Justice Cooper did not move for summary adjudication, at the hearing on this matter, Justice Cooper and the Controller stipulated and agreed that to the extent the court were to conclude that a retired justice may accept a part-time or full-time teaching position, the court may to that extent grant her motion for summary judgment. Accordingly, the court concludes that Justice Cooper is entitled to a judicial declaration that a retired or resigned justice of the Court of Appeal may accept a part-time or full-time teaching position at a public institution during the term to which the justice was most recently elected consistent with the provisions of Section 17. In all other aspects, a retired or resigned Justice of the Court of Appeal is ineligible for public employment or public office during the term to which she was most recently elected.

Conclusions As To Whether The Applicability of the Ineligibility Provision to Resigned or Retired Judges Violates Equal Protection

In her second cause of action, Justice Cooper seeks a judicial declaration that if Section 17 is construed as a bar to post-retirement public employment, it violates the equal protection of the laws guaranteed by the Fourteenth Amendment of the United States Constitution, as well as by various provisions of the California Constitution. In her moving papers, she asserts that Section 17 violates equal protection "insofar as its provisions will treat similarly situated judges or justices differently," and describes two examples: (1) a justice who retires at the end of her elected term will face no bar to post-retirement public employment, while a justice who retires at some point during her elected term could face up to a near-twelve-year bar to post- retirement public employment; and, (2) a trial judge could take a leave of absence to run for public office (and could return to her judicial office if unsuccessful), but an appellate justice could not even resign from the bench to run for office for potentially upwards of twelve years following her resignation.

The United States and California Supreme Court have adopted the same general description of equal protection:

"The Equal Protection Clause...denies to States the power to legislate that different treatment be accorded to persons placed by a statue into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.'" *Reed v. Reed* (1971) 404 U.S. 71, 75-76, quoting *Royster Guano Co. v. Virginia* (1920) 253 U.S. 412, 415. See also *Brown v. Merlo* (1973) 8 Cal.3d 855.

As an initial matter, "[t]he first perquisite to a meritorious claim under an equal protection analysis is a showing that the state has imposed a classification which affects two or more similarly situated groups in an unequal manner." *In re Eric J.* (1979) 25 Cal.3d 522, 530 (Emphasis in original). See also, *Reed v. Reed, supra*, 404 U.S. at 75-76 and *Royster Guano Company v. Virginia, supra*, 253 U.S. at 415. This is an insurmountable obstacle to Justice Cooper's assertion that the differential effect of the

ineligibility provision on different justices of the Court of Appeal is a violation of equal protection. Section 17 does not impose a classification which affects two or more similarly situated groups of justices of the Court of Appeal. As between justices of the Court of Appeal, the ineligibility provision by its terms imposes but one classification: justices of the Court of Appeal. They are all ineligible for public employment or public office during the term to which they were elected. There are not two or more classes of justices imposed by Section 17. Accordingly, there can be no violation of equal protection.

As between justices of the Court of Appeal and superior court judges, section 17 does impose two classifications: justices of the Court of Appeal and superior court judges. Justice Cooper asserts as the differential treatment of these two classifications that "[a] trial judge could take a leave of absence to run for public office (and could return to his judicial office if unsuccessful), but an appellate justice could not even resign from the bench to run for office for potentially upwards of twelve years following her resignation." Justice Cooper's (Ret.) Memorandum of Points and Authorities in Support of Her Motion For Summary Judgment, p. 14; Justice Cooper's (Ret.) Opposition, etc., p. 11. However, Justice Cooper lacks standing to assert her inability

to seek political office in that she is a retired justice of the Court of Appeal and a retired judge of the superior court, like Justice Cooper, is ineligible for public office during the term to which she was elected. Section 17 authorizes superior court judges to "become" eligible for election to public office only if they have taken a leave of absence without pay prior to filing a declaration of candidacy. ("A judge of a trial court of record may, however, become eligible for election to other public office by taking a leave of absence without pay prior to filing a declaration of candidacy.") A superior court judge who has not first taken a leave of absence without pay remains ineligible for public office pursuant to Section 17 during the term to which the judge was elected. Put another way, in that a retired superior court judge is not capable of taking a leave of absence without pay, a retired superior court judge, like Justice Cooper, is ineligible for public office during the term to which the judge was elected. There is no differential treatment of Justice Cooper as compared with a similarly situated superior court judge and Justice Cooper lacks standing to challenge any differential treatment of sitting justices and judges because she is not a sitting justice.

For the reasons discussed above, the Controller's motion for summary adjudication of the second cause of action is GRANTED and the motion for summary judgment of Justice Cooper is DENIED.

Summary of Court's Order

For the reasons set forth above, the motions for summary judgment of Justice Cooper and of the Controller are DENIED. The Controller's motion for summary adjudication as to the first cause of action is GRANTED in part and DENIED in part as follows: the court finds that (1) Justice Cooper is not entitled to a judicial declaration that Section 17 requires that its bar against public employment applies only to sitting judges or justices and not to judges or justices who have resigned or resigned from the bench, but the court finds that (2) Justice Cooper is entitled to a judicial declaration that a justice of the Court of Appeal who has vacated her judicial position may, consistent with Section 17, accept a part-time or full-time teaching position at a public institution during the term to which she was elected. The Controller's motion for summary adjudication as to the second cause of action is GRANTED. The Controller shall submit a proposed form of judgment within 15 days.

DATED: October 20, 2010

s/Charles F. Palmer
Judge of the Superior Court

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: Candace Cooper v. Controller of the State of California, et al.
No.: BC425491

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney general for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On November 4, 2010, I served the attached [PROPOSED] JUDGMENT by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system

at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 94425, Sacramento, CA 94244-2550, addressed as follows:

Elwood Lui Jones Day
555 South Flower Street, Fiftieth Floor Los Angeles, CA 90071-2300 Telephone: (213) 489-3939
E-Mail: elui@jonesday.com Attorney for Plaintiff

I declare under penalty of perjury under the laws of the State of California the foregoing in true and correct and that this declaration was executed on November 4, 2010, at Sacramento, California.

Brooke C. Carothers s/Brooke C. Carothers
Declarant Signature

SA2009103156 1051281.doc

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: Candace Cooper v. Controller of the State of California, et al.
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On December 10, 2010, I served the attached NOTICE OF ENTRY OF JUDGMENT by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney

General at 1300 I Street, Suite 125, P.O. Box 94425, Sacramento, CA 94244-2550, addressed as follows:

Elwood Lui Jones Day
555 South Flower Street, Fiftieth Floor Los Angeles, CA 90071-2300 Telephone: (213) 489-3939
E-Mail: elui@jonesday.com Attorney for Plaintiff

I declare under penalty of perjury under the laws of the State of California the foregoing in true and correct and that this declaration was executed on December 10, 2010, at Sacramento, California.

Brooke C. Carothers s/Brooke C. Carothers
Declarant Signature

SA2009103156 1051281.doc

**APPENDIX L**

[SEAL]

State of California
Commission on Judicial Performance
455 Golden Gate Avenue, Suite 14400
San Francisco, CA 94102-3660
(415) 557-1200
FAX (415) 557-1266
Web Site: http://cjp.ca.gov

May 23, 2011

PERSONAL AND CONFIDENTIAL

Hand Delivered

Attorney General Kamala Harris
Attorney General's Office
California Department of Justice
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102

Dear Attorney General Harris:

At its May 18, 2011 meeting, the Commission on Judicial Performance by a vote of nine members and one opposed resolved to request a legal opinion from your office pursuant to Government Code Section 12519 as to the two issues set out below arising from the Legislature's enactment of Senate

Bill X 2 11 (SBX2 11) (enclosed). One commission member was absent and did not vote.

SBX2 11 was enacted in response to *Sturgeon v. County of Los Angeles* (2008) 167 Cal.App.4th 630; review den., December 23, 2008 (Sturgeon I) (enclosed). (See, e.g., Senate Bill Analysis, February 14, 2009, enclosed.) The commission took no part in the legislative process. There were no public hearings on SBX2 11. It was inserted into the Budget Act of 2008 at the last minute on February 14, 2008, and passed the same day. *Sturgeon I* had held that supplemental compensation provided by Los Angeles County to the superior court judges in that county, in addition to the compensation already prescribed for the judges by the Legislature, was not authorized by law and was unconstitutional. The dispute was subject to further litigation after the enactment of SBX2 11, which authorized the compensation. *Sturgeon* was recently resolved in favor of the defendants, based on SBX2 11. *Sturgeon v. County of Los Angeles* (2010) 191 Cal.App.4th 344; review den., March 16, 2011 (*Sturgeon II*) (copy enclosed). The commission was not involved in the *Sturgeon* case. Although the supplement compensation in Los Angeles was authorized by the county, judges in other counties have authorized supplemental compensation for themselves from court funds without any action by a legislative body.

*Sturgeon II* did not address the two issues raised in this letter, which arise from the following tow provisions in the bill:

- Section 2 of SBX2 ll states in part that "Judges of a court whose judges received supplemental judicial benefits provided by the county or court, or both, as of July 1, 2008, shall continue to receive supplemental benefits from the county or court then paying the benefits on the same terms and conditions as were in effect on that date."

- Section 5 of SBX2 11 purports to retroactively immunize all state court judges as to their authorizing or receiving such compensation. It provides that, "[n]otwithstanding any other law, no government entity, or officer or employee of a governmental entity, shall incur any liability or be subject to prosecution or disciplinary action because of benefits provided to a judge under the official action of a governmental entity prior to the effective date of the act on the ground that those benefits were not authorized under law."

**Issues Presented**

**1. Does the Legislature have the authority to enact legislation that purports to preclude the commission from disciplining California superior court judges for authorizing supplemental compensation to be paid to themselves from public funds, and/or receiving that supplemental compensation, on the ground that such benefits were or are not authorized by law?**

The commission concludes that the Legislature does not have this authority, and that section 5 of SBX2 11 is invalid and unconstitutional as a violation of the separation of powers principal. Cal Const., art. III, § 3. Under article VI, section 18 of the Constitution, the commission and the California Supreme Court have exclusive authority over judicial discipline.

**Analysis**

The commission is the independent state agency charged with investigating complaints of judicial misconduct and judicial incapacity and for disciplining judges. The commission's jurisdiction includes all judges of California's superior courts and the justices of the Court of

Appeal and Supreme Court. Cal. Const art. VI, § 18, subd. (d).[46] The Supreme Court may in its discretion grant review of a disciplinary determination by the

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[46] Article VI, section 18 subd., (d) states in its entirety: "Except as provided in subdivision (f), the Commission on Judicial Performance may (1) retire a judge for disability that seriously interferes with the performance of the judge's duties and is or is likely to become permanent, or (2) censure a judge or former judge or remove a judge for action occurring not more than 6 years prior to the commencement of the judge's current term or of the former judge's last term that constitutes willful misconduct in office, persistent failure or inability to perform the judge's duties, habitual intemperance in the use of intoxicants or drugs, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute, or (3) publicly or privately admonish a judge or former judge found to have engaged in an improper action or dereliction of duty. The commission may also bar a former judge who has been censured from receiving an assignment, appointment, or reference of work from any California state court. Upon petition by the judge or former judge, the Supreme Court may, in its discretion, grant review of a determination by the commission to retire, remove, censure, admonish, or disqualify pursuant to subdivision (b) a judge or former judge. When the Supreme Court reviews a determination of the commission, it may make an independent review of the record. If the Supreme Court has not acted within 120 days after granting the petition, the decision of the commission shall be final. The referenced exception in subdivision (f) does no limit the commission's jurisdiction. It states "A determination by the Commission on Judicial Performance to admonish or censure a judge or former judge of the Supreme Court or remove or retire a judge of the Supreme Court shall be reviewed by a tribunal of 7 court of appeal judges selected by lot."

commission. *Ibid.* "No court, except the Supreme Court, shall have jurisdiction in a civil action or other legal proceeding of any sort brought against the commission by a judge." Cal. Const. Art. VI, § 18, subd. (g). Further, "The Supreme Court shall make rules for the conduct of judges, both on and off the bench...referred to as the Code of Judicial Ethics." Cal. Const. art. VI, § 18, subd. (m).

There is a conflict between the grant of immunity in section 5of SBX2 11 and the commission's constitutional authority to discipline judges. Because the authority to determine and administer discipline for misconduct is expressly and exclusively in the commission under article VI section 18, the Legislature cannot directly or indirectly remove that authority, or authorize it to be performed by any other authority. *State Board of Education v. Levit* (1959) 52 Ca1.2d 441, 461-62; *Carmel Valley Fire Protection District v. State of California* (200l) 25 Cal.4th 287, 304. "Powers, obligations, and rights bestowed or declared by the Constitution may not be amended, modified, or derogated by statute." *Fair Political Practices Com. v. State Personnel Bd.* (1978) 77 Cal.App.3d 52 56, disapproved on another ground in *Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168, 192.

There is nothing in the Constitution that permits the Legislature to restrict the constitutional scope of the commission's authority over judicial discipline. Consistent with the separation of powers

principle of article III, section 3, where the judicial branch is to share power with the Legislature, the Constitution so states. See e.g., *California Court Reporters Assn. v. Judicial Council of California* (1995) 39 Cal.App.4th 15, 18 (rules of court promulgated by the Judicial Council held invalid under article VI section 6 of the Constitution, which authorizes the Judicial Council to make such rules, but only to the extent they are "not inconsistent with statute"). There is no such provision in the Constitution for the judicial branch to share power with the Legislature for making rules of judicial conduct, or for determining and administering discipline.



This issue was raised by the commission in response to past legislative efforts to circumscribe the commission's jurisdiction, and was one of the bases for Governor Pete Wilson's veto of legislation in 1998. At that time, AB 1110 (Escutia) sought to prohibit the commission from investigating or imposing discipline on a judge "solely on the basis of a judicial decision or an administrative act found to be "incorrect legally" or on the basis of "[a) dissenting opinion in an appellate case which does not adhere to precedent set by a higher court." The Governor's veto letter (enclosed) stated that, "Under the California

Constitution, the Legislature is not authorized to restrict (or expand) the types of judicial conduct which constitute a basis for discipline." The letter further stated:'

Under the Constitution, it is the Supreme Court that is to make rules for the conduct of judges, and it is the Commission that may discipline a judge for misconduct, subject to review by the California Supreme Court. Where the judicial branch is to share power with the Legislature in promulgating rules, the Constitution has so stated, as in the case of the Judicial Council's right to adopt rules for court administration, practice and procedure. In that case, the Constitution provides that these rules shall "not be inconsistent with statute." See Cal. Const. Art. VI, section 6. The Constitution does not provide a similar sharing of power here.

The standard for assessing whether the Legislature has overstepped its authority and violated the separation of powers principle has been summarized as follows: "The legislature may put reasonable restrictions upon constitutional functions of the courts provided they do not defeat or materially impair the exercise of those functions." *Santa Clara County Counsel Attorneys Assoc. v. Woodside* (1994) 7 Cal.4th 525, 543 (citation omitted). Even in instances where there is no express and exclusive grant of authority in the Constitution, the separation of powers doctrine prevents the Legislature from usurping "core" functions of another

branch of government, in contrast to actions properly within the sphere of one branch of government that have the "incidental" effect of duplicating a function or procedure delegated to another branch. *Younger v. Superior Court* (1978) 21 Cal.3d 102, 115-17; *Hustedt v. Workers' Comp. Appeals Bd.* (1981) 30 Cal.3d 329, 338 ("[L]egislature may put reasonable restrictions upon constitutional functions of the courts provided they do not defeat or materially impair the exercise of those functions"); Ops.Cal.Atty.Gen. 146 (2003) ("exercise of such overlapping functions must be incidental and ancillary to the core powers of the branch in question, rather than a usurpation of a power delegated to another branch"). Determining whether judges are subject to discipline under the Code of Judicial Ethics is a core function of the commission. Judicial discipline decisions can in no way be characterized as "incidental" or "ancillary" to the commission's functions as set out in article VI, section 18.

The Supreme Court has not hesitated to strike down laws that defeat or materially impair the exercise of core functions of the judicial branch. The issue has been addressed in the context of the judicial branch's power to regulate the practice of law, including attorney discipline,

which has been recognized as an inherent power of the state courts. See, e.g., *Hustedt*, 30 Cal.3d at 336-342 (Legislature overreached its authority when it permitted the Workers' Compensation Appeals Board to discipline an attorney, undermining the Supreme Court's unlimited original jurisdiction over disciplinary proceedings); *Merco Constr. Engineers, Inc. v. Municipal Court* (1978) 21 Cal.3d 724, 727-33 (Legislature violated separation of powers principle when it enacted legislation that encroached on Supreme Court's authority over standards for engaging in the practice of law).

On these bases, it appears that the Legislature exceeded its authority in enacting section 5 of SBX2 11, purporting to preclude the commission and from disciplining judges who authorize or receive supplemental compensation that is not authorized by law.

In reaching our conclusion, we are mindful that the California Constitution is a restriction on the Legislature's powers, and that the Legislature may exercise any and all legislative powers which are not expressly, or by necessary implication, denied to it by the Constitution. We are also mindful that doubts about the Legislature's power to act must be resolved in the Legislature's favor. *Methodist Hosp. of Sacramento v. Saylor* (1971) 5.Cal.3d 685, 691 (citations omitted); *Levit* 52 Cal.2d at 452 ("[a]ll presumptions and ntendments are in favor of

constitutionality;" and "[t]he general rule is that the invalidity of a legislative act must be clear before it can be declared unconstitutional").

But, there appears to be cause to temper this deference here. As the Supreme Court has stated, this presumption in favor of the Legislature is particularly appropriate when the Legislature has enacted the statute with the relevant constitutional prescriptions clearly in mind, and the statute represents a "considered legislative judgment" as to the appropriate reach of the constitutional provision. *Pacific Legal Foundation*, 29 Cal.3d at 180 (citations omitted). SBX2 11 reflects no such "considered legislative judgment." There is nothing in the bill analyses of SBX2 11 indicative of any consideration of the commission's or the Supreme Court's jurisdiction. As noted, there were no public hearings. The bill was inserted into the Budget Act of 2008 at the last minute on February 14, 2008, and passed the same day.

**2. Does section 2 of SBX2 11 (a) simply identify which judges are permitted as of the effective date of SBX2 11 to continue receiving supplemental compensation from the effective date forward, on the terms and conditions in effect on July 1, 2008 or (b) retroactively authorize all or some portion of supplemental compensation provided by counties to judges, or to judges by the judges themselves, so long as it was being provided as of July 1, 2008?**

It appears that section 2 of SBX2 11 most likely identifies which judges are permitted as of the effective date of SBX2 11 to continue receiving supplemental compensation from that date forward on the terms and condition in effect on July 1, 2008, and that it is not a retroactive authorization of past supplemental compensation.



**Analysis**

Section 2 of SBX2 11, adding Section 68220(a) the Government Code states:

Judges of a court whose judges received supplemental judicial benefits provided by the county or court, or both, as of July 1, 2008, shall continue to receive supplemental benefits from the

county or court then paying the benefits on the same terms and conditions as were in effect on that date.

Section 2 does not state from what date the supplemental compensation "shall continue." Nor does it state that supplemental compensation received prior to the effective date of the statute is authorized (except possibly supplemental compensation received on or after July 1, 2008). Section 2 may mean that the subset of state court judges receiving supplemental compensation on July 1, 2008 are permitted, as of the effective date of SBX2 11, to continue to receive the compensation on the same terms and conditions in effect on July 1, 2008. In that case, there is still no legislative enactment authorizing receipt of such compensation before the effective date of SBX2 11, and assuming the immunity provision in section 5 is invalid, judges who authorized or received it may be subject to discipline by the commission if their conduct is found to constitute misconduct. ·

Alternatively, it might be contended that because the Legislature's stated intent in section l(a) of SBX2 11 was to "address" *Sturgeon I*, and the central finding in *Sturgeon I* was that there was no legislative enactment from 1997 until 2009 permitting the supplemental compensation at issue in the case (paid from 1997 to date in at least some cases), the Legislature must necessarily have intended SBX2 11 to be the missing legislative

enactment authorizing the supplemental compensation for this entire period.

Retroactive legislation is not impermissible, within limits.[47] Nevertheless, based on the following principles, it appears that section 2 of SBX2 11 does not constitute retroactive authorization of supplemental compensation, but operates only prospectively.

First, statutes are presumed to be prospective.



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[47] Where it is clear that the Legislature intended a statute to have retroactive application, separation of powers principles do not preclude the application of the legislature to both pending and future cases through any such law cannot "readjudicate" or otherwise "disregard" judgments already final. *People v. Bunn* (2003) 27 Cal.4th 1, 17 (citations omitted)(new criminal statute applicable because it was in effect when judicial review became final); *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1207 (citations omitted)(statute held not retroactive); *Mandel v. Myers* (1981) 29 Cal.3d 531, 547 (rejecting legislative attempt, as part of state budget process, to review the merits of an attorney fee award previously entered and affirmed on appeal); *Hunt v. Superior Court* (1999) 21 Cal.4th 984, 1008 (judgments are not final for separation of powers purposes until both the trial and appellate process is complete and the case no longer pending in the courts).

The principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student. [Citations.]. This court has often pointed out: "[T]he first rule of construction is that legislation must be considered as addressed to the future, not to the past... The rule has been expressed in varying degrees of strength but always of one import, that a retrospective operation will not be given to a statute which interferes with antecedent rights...unless such be "the unequivocal and inflexible import of the terms, and the manifest intention of the legislature."

*Evangelatos*, 44 Cal.3d at 1207, quoting *United States Security Industrial Bank* (l982) 459 U.S. 70, 79-80; see also *Aetna Cas. & Surety Co. v. Ind. Acc. Com*. (1947) 30 Cal.2d 388, 393 ("[i]t is an established canon of interpretation that statutes are not to be given a retrospective operation unless it is clearly made to appear that such was the legislative intent"). The lack of an express statement of retroactivity in a statute has been held to mean that the presumption of prospective application should apply. *Bolen v. Woo* (1979) 96 Cal.App.3d 944, 958-959 (Observing that if the Legislature had intended the statute to be retroactive, "it could very easily have inserted such language in the statute itself. It chose not to do so."); *Robins v. Pediatric Affiliates Medical Group. Inc.* (1979) 98 Cal.App.3d 907, 911-912; see also *Evangelatos*, 44 Cal.3d at 1211-1212.

Second, "In the absence of an express retroactivity provision, a statute will not be applied retroactively unless it is very clear from extrinsic sources that the Legislature ... must have intended a retroactive application." *Evangelatos*, 44 Cal.3d at 1209. The California Supreme Court has repeatedly given retroactive application to statutes "even when a statute did not contain an express provision mandating retroactive application, where the legislative history or the context of the enactment provided a sufficiently clear indication that the Legislature intended the statute to operate retrospectively." *Id*. at 1210 (citations omitted).

Applying these principles here, SBX2 11 appears to have only prospective application.

First, there is no express statement of retroactivity in SBX2 11. Section 2 of SBX2 11 does not state that it is retroactive. Nor is there an express statement of retroactivity in the findings and declaration of purpose in section l(a). Section 1(a) states only that the legislation was intended "to address" *Sturgeon*. Consistent with *Bolen, Robins* and *Evangelatos*, the absence of an express statement of retroactivity should mean that the presumption of prospective application applies. As in *Bolen*, had the Legislature intended to retroactively authorize judges to receive supplemental compensation, it could have said so. For example, section 2 might have stated, "This provision is intended to be retroactive, and to authorize such

supplemental compensation as provided in this section, beginning in 1997." But, it does not. Instead, it states that judges "shall continue to receive" such supplemental compensation as was in place on July l, 2008. This phrase has a prospective meaning.



Nor is there an express statement of retroactivity in any other section of SBX2 11. Although sections l(b) and (c) of the findings and declarations refer to events in the past tense (the "benefits were considered by the Legislature in enacting the Lockyer-Isenberg Trial Court Funding Act of 1997," counties and courts "established" the supplemental compensation, and judges "relied upon the existence of the longstanding supplemental benefits"), these statements appear to reflect only an awareness of the history of the supplemental compensation, and it seems unreasonable to construe them as retroactive authorization. Similarly, while section 4 acknowledges the existence of past supplemental compensation by stating that neither the Judicial Council nor the state are obliged to "pay for benefits previously provided by the county, city and county, or the court," this does not state that such past supplemental compensation is now retroactively authorized, it simply immunizes the state from any claims for repayment. Nor does the

retroactive immunity provision in section 5 expressly authorize the supplemental compensation retroactively. To the contrary, the fact that the Legislature felt it was necessary to immunize judges from liability and discipline on the ground that such supplemental compensation was not authorized by law, as held by *Sturgeon I*, suggests that the Legislature recognized that such benefits were not authorized, thus requiring an immunity provision.

Second, we have located nothing in the legislative history of SBX2 11 that meets the standard in *Evangelatos*, 44 Cal.3d at 1209 (in the absence of an express retroactivity provision it must be "very clear from extrinsic sources that the Legislature ... must have intended a retroactive application"). Regarding the legislative history, bill analyses obtained from the Legislative Counsel's Office (enclosed) echo the "continue to receive" language of section 2 of the bill, and support a prospective interpretation. The Assembly floor analysis states that the bill makes statutory changes "to address *Sturgeon*, and provides that "counties and courts who, subsequent to the Lockyer-Isenberg Trial Court Funding Act of 1997, established supplemental benefits to retain qualified applicants for judicial office and where [sic] paying such benefits as of July 1, 2008 ... *shall continue to provide* supplemental benefits to judges on the same terms and conditions as were in effect on July 1, 2008." (Italics added.) The digest section of the Senate floor analysis similarly states that, "This bill now

responds to a recent state court of appeal decision by authorizing counties and courts *to continue providing* existing local benefits to trial court judges." (Italics added.) The analysis section of that same document states, "This bill addresses the Court's holding in *Sturgeon* by expressly authorizing counties and courts *to continue* providing existing local benefits to trial court judges." (Italics added.)[48]

On the foregoing bases, we conclude that section 2 of SBX2 11 is not a retroactive authorization of past supplemental compensation.

Confidential letter to Attorney General
Kamala Harris
May 23, 2011
Page 9 of 9

The commission appreciates your attention to this matter. To the extent that the Attorney General's Office will entertain input from other parties on this issue, we ask that the commission be given an opportunity to respond to that input prior to your final opinion.

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[48] The statement in the Senate Floor analysis that after the Lockyer-Isenberg Trial Court Funding Act of 1997 was enacted, "counties and courts *were permitted* to continue providing supplemental benefits to trial court judges, as had been the practice prior to 1997" appears questionable in view of *Sturgeon's* extensive analysis of whether such benefits were "permitted", and conclusion that there was no law "permitting" it (until SBX2 11 was signed by the Governor on February 20, 2009).

Please do not hesitate to contact me if you would like to discuss this further.

Very truly yours,

s/Victoria B. Henley
Director-Chief Counsel

VBH:al/1051Harris.doc
Enclosures

**APPENDIX M**

Court of Appeal, Second Appellate District, Division Two - No. B230208

S200215

**IN THE SUPREME COURT OF CALIFORNIA**
**En Banc**

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JUSTICE CANDACE COOPER (RET.),
Plaintiff and Appellant
v.
CONTROLLER OF THE STATE OF CALIFORNIA,
Defendant and Respondent

---

The petition for review is denied

SUPREME COURT
FILED
MAR 28 2012
Frederick K. Ohlrich

_____
Deputy

s/ CANTIL-SAKAUYE

_____
Chief Justice

**APPENDIX N**

SUPREME COURT

S220748
FILED
AUG 25 2014
Frank A. McGuire Clerk

_____
Deputy
G049148

Law Office of Nina Ringgold
9420 Reseda Blvd # 361
Northridge, CA 91324
(818) 773-2409 Telephone
(866) 340-4312 Facsimile

August 25, 2014

Justices of the California Supreme Court
California Supreme Court
350 McAllister Street
San Francisco, CA 94102-7303

**Re: Request For Depublication Of *Arthur Gilbert v. John Chiang, As State Controller, Etc.* Pursuant California Rule Of Court, Rule 8.1125 By ASAP Copy And Print, Ali Tazhibi, David Juarez, Nathalee Evans, Nazie Azam, Karim Shabazz, Cornelius Turner, Justin Ringgold-Lockhart, Lisa Havel, Kijhana Burks, Qadeer Azam, Nina Ringgold, Esq., And The Law**

**Offices Of Nina Ringgold**

Dear Justices of the Supreme Court:

ASAP COPY and Print, Ali Tazhibi, David Juarez, Nathalee Evans, Nazie Azam, Karim Shabazz, Cornelius Turner, Justin Ringgold-Lockhart, Lisa Havel, Kijhana Burks, Qadeer Azam, Nina Ringgold, Esq., and the Law Offices of Nina Ringgold request that the published opinion rendered in the *Arthur Gilbert v. John Chiang, as State Controller, etc*, (2014) 227 Cal.App.4th 537 dated June 27, 2014 be depublished. See California Rule of Court, Rule 8.1125. The decision became final thirty days after filing on July 27, 2013. (Cal. Rule of Court, Rule 8.264 (b)). This request is timely delivered to the Supreme Court within 30 days after the decision is final in the Court of Appeal. (Cal. Rule of Court, Rule 8.1125 (a)(4)).

A. **Statement of Interets**

The persons or entities requesting depublication are interested in one or all of the following categories:

1. Court users; and/or

2. Register California Voters; and/or

3. Members of a protected case under the Civil Rights Act of 1866 or the Civil Rights Act of 1964; and/or

4. Members of the case, *Law Offices of Nina Ringgold and All Current Clients Thereof v. Jerry Brown* (United States District Court for the Eastern District Case No. 2:12-cv-00717-JAM-JFM) ("Voting Rights case").

The decision of the Court of Appeal Fourth Appellate District Division Three held that California Constitution Article VI § 17 "does not prohibit [Justice Arthur Gilbert] from commencing other public office or public employment immediately following his resignation or retirement from judicial office, even if that resignation or retirement occurs before the end of his current judicial term". This determination is in contradiction to longstanding law in the State of California and is expressly contrary to the plain language in the California Ballot Pamphlet for the General Election on November 8, 1988 concerning the Legislative Constitutional Amendment to California Constitution Art. VI § 17. (Proposition 94). Moreover, the panel rendering the decision had specific financial interests and should not have been involved in the decision making process. If there is an effort by members of the judicial branch to modify the longstanding interpretation and plain language of the constitution, the matter should be determined by *all* voters of the State of California. See *Alex v. County of Los*

*Angeles*, (1973) 35 Cal. App.3d 994, *Abbott v. McNutt*, 218 Cal. 225 (Cal. 1933), Cal. Attorney General Opn 83-607, 66 Cal. Attorney General 440. Not only has an interested panel of decision makers written an opinion in conflict with well-established law, it is also in conflict with the information provided to the electorate. Additionally, the panel determines that the public must bear the expense of Justice Gilbert's appeal. *Gilbert* at 876.

B. **Context**

The *Gilbert* decision was decided while there is a fundamental controversy between voters and court users and member of the judiciary concerning Section 5 of California Senate Bill X2 11 ("Section 5 of SBX2 11"). Section 5 of SBX2 11 states as follows:

> *Notwithstanding any other law,* no governmental entity, or officer or employee of a governmental entity, shall incur any liability or be subject to prosecution or disciplinary action because of benefits provided to a judge under the official action of a governmental entity prior to the effective date of this act on the ground that those benefits were not authorized under law.

The California Commission on Judicial Performance has twice issued opinions that the

uncodified immunity provision is unconstitutional. The provision also conflicts with the Supremacy Clause and federal law pertaining to racial equality. It is designed to conceal the fact that in existing proceedings, judges of the courts of record must disclose current public employment and they must obtain consent from litigants in the proceedings. (Cal. Const. Art. VI §§ 17, 21).

California Government Code § 53200.3 stated that "judges of the superior and municipal courts…whose salaries are paid either in whole or in part from the salary fund of the county are county employees…." This provision was deemed unconstitutional in *Sturgeon v. County of Los Angeles*, (2008) 167 Cal.App4th 630 ("*Sturgeon I*"). *Sturgeon I* did not deal directly with section 5 of SBX2 11.

The County of Los Angeles pays for the premium for the public bond of the judges of the courts of record. Also, the same judges were designated by statute to be county officials. (See Cal. Govt. Code §§ 1505, 1651, 29320 (thr 9/23/12)).

The pending Voting Rights Case challenges section 5 of SBX2 11 and is seeking to implement disclosure and consent requirements mandated by California Constitution Article VI § 17 and § 21. It is seeking a special judicial election in the municipal districts that existed before trial court unification (a point where public employment and office of the

judges of the courts of record expanded). The plaintiffs claim there are existing constitutional resignations and vacancies of judicial office which must be disclosed to court users and the California voters. The constitutional provisions at issue state as follows:

**Article VI, Section 17**

A judge of a court of record may not practice law and during the term for which the judge was selected is ineligible for public employment or public office other than judicial employment or judicial office, except a judge of a court of record may accept a part-time teaching position that is outside the normal hours of his or her judicial position and that does not interfere with the regular performance of his or her judicial duties while holding office. A judge of a trial court of record may, however, become eligible for election to other public office by taking a leave of absence without pay prior to filing a declaration of candidacy. Acceptance of the public office is a resignation from the office of judge.

A judicial officer may not receive fines or fees for personal use.

A judicial officer may not earn retirement service credit from a public teaching position while holding judicial office.

**Article VI, Section 21**

On stipulation of the parties litigant the court may order a cause to be tried by a temporary judge who is a member of the State Bar, sworn and empowered to act until final determination of the cause.

There is serious doubt whether the appeal of Justice Gilbert presented a justiciable controversy. The justice never identified a specific job opportunity at issue that he was intending to accept immediately. He identified a friendly offer by the Governor for possible work after retirement. There is no doubt that the information provided to voters is in direct conflict with Justice Gilbert's position.

The ballot pamphlet stated the following:

"The Constitution prohibits judges of courts of record from accepting public employment or public office outside their judicial position during their term of office. This prohibition has been interpreted to mean that a judge cannot accept a teaching position at a public school, but may accept one at a private School. ***The prohibition applies during the time the judge is actually in office and during the entire term for which the judge was selected, even if the judge has resigned part way through the term.***" (See **Exhibit 1**)

**C. The Rule of Necessity Did Not Authorize The Fourth District's Resolution of the Appeal**

The decision begins its analysis by attempting to explain why members the panel did not recuse themselves in the appeal. The decision states that *the panel* asked the California Supreme Court Committee on Judicial Ethics Opinions "to advise *us* if the rule of necessity authorizes us to decide this case. The committee advises *us* '[u]nder the 'rule of necessity,' a judge is not precluded from adjudicating a cause because of a disqualifying financial interest if there is no judge or court available to hear and resolve the cause." (Emphasis added). *Gilbert* at 869.

First, there is no evidence of a request by the panel. CJEO Oral Advice Summary No. 2014-008 states that "[t]he question was asked by an appellate justice assigned to author an opinion". The author of the decision is Justice William F. Rylaarsdam who was formerly a judge of the Orange County Superior Court. The Orange County Superior Court has a similar compensation structure as the Los Angeles Superior Court and therefore the justice is a recipient of the same immunity promise of section 5 of SBX2 11.

Not every judge in the State of California has the same conflicting interest as Judge Rylaarsdam and the panel deciding the *Gilbert* case. CJEO Oral

Advice Summary No. 2014-008 expressly states that the rule of necessity does not preclude a judge from adjudicating a cause because of a disqualifying financial interest "if there is no judge or court available to hear and resolve the cause."

The judicial branch reported to the Legislature that as of July 1, 2008 that there were at least 151 judgeships which received no supplemental benefits. (See **Exhibit 2**). Initially Justice Gilbert's case was transferred out of his home court, the Second Appellate District. The case was not transferred to a district, panel, or judges pro tempore who were not impacted by the promise of immunity through section 5 of SBX2 11. Even if theoretically a discussion of California Constitution Art. VI § 17 would impact any judge, the reality is that only certain judges are subject to a self-effectuating constitutional resignation from judicial office.

Justice Arthur Gilbert was formerly a judge of the Los Angeles Superior Court and clearly a person intended to be covered by section 5 of SBX2 11. Because there exist a segment of the judicial branch which have more specific disqualifying interests and are intended to benefit from the uncodified immunity provision, those persons should have been excluded from the decision making process. Moreover, the test of whether the complaint presented a justiciable controversy should have been strictly construed requiring a showing of actual retirement, or admission of judicial resignation by acceptance of

public employment or office, or a specific offer of employment which the impacted person intends to accept immediately.

Application of the rule of necessity was not proper because (1) there were other justices which did not have the same disqualifying interest[49], (2) there are pending cases in the federal court addressing the issue, (3) this court had already denied the petition for review of Justice Candace Cooper (ret) after the Voting Rights case was filed on March 21, 2012. (See denial of petition for review in S200215 on 3/28/12), and (4) the seriousness of the disqualifying interest of the panel goes well beyond that identified by the Fourth District which failed to take into consideration the existence and detrimental impact of section 5 of SBX2 11.

### D. It Is The Decision Which Leads To Absurd Results Not The Controller's Defense Of The Longstanding Interpretation Of California Constitution Article VI § 17

The plain language of California Constitution Art. VI § 17 states that a judge may not accept public office *during the term for which the judge was selected*. The term of office is set forth in the constitution. The fact that a judge resigns early does

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[49] i.e., There are justices and judges which receive no benefit from the promised immunity under section 5 of SBX2 11 and justices and judges which have never accepted public employment or office).

not nullify the disqualification during the term of office. Not only is the language unambiguous, the rational for the provision makes practical and common sense. It is intended to bar a judge from jumping ship to join those who were appearing before the judge (and possibly receiving favorable treatment from the judge).

*Alex v. County of Los Angeles supra* demonstrates that there could not realistically have been a doubt as to the interpretation of California Constitution Article VI § 17. This case stressed that 20 million citizens speaking through the initiative process at the ballot box, approximately 40,000 attorneys through the State Bar, and 1,000 judges speaking through the Judicial Council did not want judges to be diverted from the impartial performance of their work and that these desires were reflected in California Constitution Article VI § 17 in order to foster confidence in the courts. *Alex* at 1009. The judge signed an affidavit acknowledging the risk of forfeiture of judicial office. *Gilbert v. Chiang* undermines public confidence. Moreover, section 5 of SBX2 11 and Justice Gilbert's pursuit of Assembly Bill 2693 (Introduced by Assembly Member Bloom) while the Gilbert's case was pending undermines the right of California citizens to have the benefit of the constitutional amendment which they adopted.

## IV. CONCLUSION

It is respectfully requested that this court depublish the case of *Gilbert v. Chiang* and that this

court strike the provision which provides that the state is to pay for the expenses associated with the appeal. Under the cloud of section 5 of SBX2 11 the attempt to amend or modify the California Constitution without participation of the electorate by judges that have specific and unique disqualifying interests beyond general retirement is void. See *Legislature v. Eu,* 54 Cal.3d 492, 506-512 (Cal. 1991), *Amador Valley Joint Union High School v. State Bd. Of Equalization,* 22 Cal.3d 208 (Cal. 1978).

Date: August 24, 2014

Respectfully Submitted

By: s/ Nina R. Ringgold, Esq.
Nina Ringgold, Esq.
ASAP Copy And Print, Ali Tazhibi, David Juarez, Nathalee Evans, Nazie Azam, Karim Shabazz, Cornelius Turner, Justin Ringgold-Lockhart, Lisa Havel, Kijhana Burks, Qadeer Azam, Nina Ringgold, Esq., And The Law Offices Of Nina Ringgold

**PROOF OF SERVICE**

I hereby declare and state:

I am over the age of eighteen years, employed in the City of Los Angeles, County of Los Angeles, California, and not a party to the within action.

On August 24, 2014 I served the following:

**REQUEST FOR DEPUBLICATION OF *ARTHUR GILBERT V. JOHN CHIANG, AS STATE CONTROLLER, ETC.* PURSUANT CALIFORNIA RULE OF COURT, RULE 8.1125 BY ASAP COPY AND PRINT, ALI TAZHIBI, DAVID JUAREZ, NATHALEE EVANS, NAZIE AZAM, KARIM SHABAZZ, CORNELIUS TURNER, JUSTIN RINGGOLD-LOCKHART, LISA HAVEL, KIJHANA BURKS, QADEER AZAM, NINA RINGGOLD, ESQ., AND THE LAW OFFICES OF NINA RINGGOLD**

by electronic service and personal delivery to the following:

California Supreme Court
350 McAllister Street
San Francisco, CA 94102-7303

by deposit of a true and correct copy in the United States Mail to the following:

Hon. Richard Fruin
c/o Clerk of Court
Los Angeles Superior Court
Department 15
111 No. Hill Street
LA, CA 90012

Anthony R. Hakl
Deputy Attorney General
Government Law Section
Office of the Attorney General
Department of Justice
1300 I Street, Suite 125
P.O. Box 9442255
Sacramento, CA 94244-2550

Legal Office
State Controller's Office
300 Capitol Mall, Suite 1850
Sacramento, CA 95814

Elwood Lui
Jones Day
555 S. Flower Street, Fifth Floor
Los Angeles, CA 90071-2300

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at Los Angeles, California on August 24, 2014.

# APPENDIX O

CALIFORNIA SUPREME COURT COMMITTEE
ON JUDICIAL ETHICS OPINIONS
350 McAllister Street, Room 1144A
San Francisco, CA 94102
(855) 854-5366
*www.JudicialEthicsOpinions.ca.gov*

CJEO Formal Opinion 2017-011
*[Issued May 2, 2017]*

## JUDICIAL SERVICE ON A NONPROFIT CHARTER SCHOOL BOARD

## I. Question Presented

The Committee on Judicial Ethics Opinions has been asked to provide an opinion on the following question:

"May a judicial officer serve on the board of a charter school or a nonprofit organization operating one or more charter schools? The charter school receives public funds but is not likely to be involved in litigation within the jurisdiction of the judge's court. It does not have an open enrollment policy and board membership is uncompensated and unelected."

## II. Summary of Conclusions

Judges are encouraged to participate in extrajudicial activities, so long as these activities adhere to the restrictions within the California Code of Judicial Ethics.[50] One of these restrictions is that judges are prohibited from receiving appointment to a governmental committee or commission or other governmental position that is concerned with issues of fact or policy on matters other than the

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[50] All further references to canons and to Advisory Committee commentary are to the California Code of Judicial Ethics unless otherwise indicated,

improvement of the law, the legal system, or the administration of justice. (Canon 4C(2).) However, canon 4 permits a judge to serve as an officer, director, trustee, or nonlegal advisor of an educational, religious, charitable, service, or civic organization not conducted for profit, so long as such service does not violate any other provisions within the canons. (Canon 4C(3)(b).)

Charter schools are similar to both public and private schools. Like private schools, charter schools are commonly operated by nonprofit organizations. They are relatively autonomous and, for the most part, are given freedom to operate outside of most of the regulations governing traditional public schools. On the other hand, charter schools are statutorily characterized as a part of California's single, statewide public school system and receive public funds. Adding to the uncertainty, California courts have held that charter schools are public entities for some purposes (for example, for receiving public monies) but are private entities for other purposes (such as for purposes of the Government Claims Act),

and that charter school officials are equivalent to officers of public schools.

In analyzing whether service on the board of a charter school is ethically permissible, the committee evaluated relevant case law and considered whether such service is a governmental position or public office and therefore prohibited by canon 4C(2) or whether it constitutes service on the board of an educational nonprofit organization that is permitted by canon 4C(3)(b). The committee also examined article VI, section 17 of the California Constitution, which provides that a judge is "ineligible for public employment or public office" and that "[a]cceptance of [a] public office is a resignation from the office of judge."

Because the law is unsettled on the question of whether a charter school board member holds a "governmental position" as that term is used in the canon, or a "public office" as that term is used in the Constitution, *and* because the Constitution absolutely proscribes a judicial officer from holding public office, a judge runs the risk of automatic

resignation from judicial office if he or she serves on a charter school board. The committee therefore advises that a judge not serve on a charter school board. [51] Based on the committee's recommendation, the committee does not address whether service on a

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[51] This conclusion does not necessarily prohibit retired judges in the assigned judges program (AJP) from serving as members of a charter school board. Canon 6B provides that a retired judge who "has received an acknowledgement of participation in the Assigned Judges Program shall comply with all provisions of this code, except for" canon 4C(2) and canon 4E. Moreover, article VI, section 17 of the California Constitution "applies only to sitting judges and not to persons who have resigned or retired from a judicial office" and, therefore, retired judges are not prohibited from holding other public office or engaging in other public employment. (*Gilbert v. Chiang* (2014) 227 Cal.App.4th 537, 540-41.) The Chief Justice, however, has sole discretion to determine the eligibility of retired judges for service in the AJP. (Cal. Const., art. VI, § 6, subd. (e) [the Chief Justice has authority to assign consenting retired judges to any court]; Judicial Council of Cal., AJP Handbook: Standards and Guidelines for Judicial Assignments (Apr. 2016) p. 1 (AJP Handbook) [adopted by the Chief Justice in the exercise of constitutional authority to make assignments through the AJP].) The current AJP standards and guidelines do not expressly preclude appointment to a nonelected governmental position, but they do prohibit a judge from seeking or accepting elected or political office. (AJP Handbook, at pp. 5-7.) The AJP standards and guidelines also provide that the Chief Justice's discretion regarding assignment-based decisions is not limited by the AJP Standards and Guidelines, nor do the AJP standards and guidelines necessarily encompass all of the factors upon which the Chief Justice may base such decisions. (AJP Handbook, at p. 1.)

charter school board may also cast doubt on the judge's capacity to act impartially, interfere with the proper performance of judicial duties, or lead to frequent disqualification as prohibited by canon 4A, or whether such service may also create an appearance of impropriety prohibited by canon 2.

## III. Authorities

### A. Canons

**Canon 2**: "A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities."

**Canon 4A**: "A judge shall conduct all of the judge's extrajudicial activities so that they do not [¶] (1) cast reasonable doubt on the judge's capacity to act impartially, [¶] (2) demean the judicial office, [¶] (3) interfere with the proper performance of judicial duties, or [¶] (4) lead to frequent disqualification of the judge."

**Canon 4C(2)**: "A judge shall not accept appointment to a governmental committee or commission or other governmental position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice. . . ."

***Advisory Committee commentary following canon 4C(2)***: *"The appropriateness of accepting extrajudicial assignments must be assessed in light of the demands on judicial resources and the need to protect the courts from involvement in extrajudicial matters that may prove to be controversial. Judges shall not accept governmental appointments that are likely to interfere with the effectiveness and independence of the judiciary, or that constitute a public office within the meaning of article VI, section 17 of the California Constitution.*

*"Canon 4C(2) does not govern a judge's service in a nongovernmental position. See Canon 4C(3) permitting service by a judge with organizations devoted to the improvement of the law, the legal system, or the administration of justice and with educational, religious, charitable, service, or civic organizations not conducted for profit. For example, service on the board of a public educational institution, other than a law school, would be prohibited under Canon 4C(2), but service on the board of a public law school or any private educational institution would generally be permitted under Canon 4C(3)."*

**Canon 4C(3)(a)**: "[A] judge may serve as an officer, director, trustee, or nonlegal advisor of an organization or governmental agency devoted to the improvement of the law, the legal system, or the administration of justice provided that such position does not constitute a public office within the meaning

of article VI, section 17 of the California Constitution . . . ."

**Canon 4C(3)(b)**: "[A] judge may serve as an officer, director, trustee, or nonlegal advisor of an educational, religious, charitable, service, or civic organization not conducted for profit . . . ."

***Advisory Committee commentary following canon 4C(3)***: "*Canon 4C(3) does not apply to a judge's service in a governmental position unconnected with the improvement of the law, the legal system, or the administration of justice. See Canon 4C(2).*"

**Canon 4C(3)(c)**: "[A] judge shall not serve as an officer, director, trustee, or nonlegal advisor if it is likely that the organization [¶] (i) will be engaged in judicial proceedings that would ordinarily come before the judge, or [¶] (ii) will be engaged frequently in adversary proceedings in the court of which the judge in a member or in any court subject to the appellate jurisdiction of the court of which the judge is a member."

## B. Other Authorities

California Constitution, article VI, sections 6 and 17

California Charter Schools Act (Ed. Code, § 47600 et seq.) *Abbott v. McNutt* (1933) 218 Cal. 225

*California School Bds. Assn. v. State Bd. of Education* (2010) 186 Cal.App.4th 1298

*Ghafur v. Bernstein* (2005) 131 Cal.App.4th 1230

*Gilbert v. Chiang* (2014) 227 Cal.App.4th 537, 550

*Knapp v. Palisades Charter High School* (2007) 146 Cal.App.4th 708

*Lungren v. Davis* (1991) 234 Cal.App.3d 806

*Wells v. One2One Learning Foundation* (2006) 39 Cal.4th 1164

*Wilson v. State Board of Education* (1999) 75 Cal.App.4th 1125, 1139

*Caviness v. Horizon Cmty. Learning Ctr., Inc.* (9th Cir. 2010) 590 F.3d 806

*Doe ex rel. Kristen D. v. Willits Unified School Dist.* (N.D.Cal., Mar. 8, 2010, No. C 09-03655 JSW) 2010 WL 890158

*Sufi v. Leadership High School* (N.D.Cal. 2013) 2013 U.S.Dist.Lexis 92432, [2013 WL 3339441]

Judicial Council of Cal., AJP Handbook: Standards and Guidelines for Judicial Assignments (Apr. 2016)

67 Ops.Cal.Atty.Gen. 385 (1984)

Rothman, California Judicial Conduct Handbook (3d ed. 2007) sections 10.01, 10.02, 10.31, 10.36, 10.38

California Judges Association, Formal Opinion Nos.

31, 46, 61 California Judges Association, Judicial

Ethics Update (1989)

Arizona Supreme Court Judicial Ethics Advisory Committee, Advisory Opinion 96-05

Colorado Judicial Ethics Advisory Board, Advisory

Opinion 2007-02 Connecticut Committee on Judicial

Ethics, Informal Opinion 2015-22 Delaware Judicial

Ethics Advisory Committee, Advisory Opinion 2001-2

Florida Judicial Ethics Advisory Committee, Judicial

Ethics Opinion 2016-01 New York Advisory

Committee on Judicial Ethics, Advisory Opinion 11-

44

South Carolina Advisory Committee on Standards of Judicial Conduct, Advisory Opinion 16-2002

## IV. Discussion

### A. Restrictions on Extrajudicial Activities

The California Code of Judicial Ethics governs the ethical conduct of judges both on and off the bench. Off the bench, community activity by a judge is encouraged, subject to limitations that minimize the risk of conflict with a judge's judicial obligations. (Rothman, Cal. Judicial Conduct Handbook (3d ed. 2007) § 10.02, p. 525 (Rothman) ["Although community activity is encouraged and considered a judicial duty, there are limitations that judges must know."].) While all extrajudicial activities must comply with the entirety of the code, canon 4 provides specific guidance to judges regarding extrajudicial conduct. In general, canon 4 requires a judge to conduct all of the judge's extrajudicial activities in a manner that does not cast reasonable doubt on the judge's capacity to act impartially, demean the judicial office, interfere with the proper performance

of judicial duties, or lead to frequent disqualification of the judge. (Canon 4A.)

Canon 4C(2) explicitly prohibits a judge from accepting "appointment to a governmental committee or commission or other governmental position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice." Stating the inverse, canon 4C(3)(a) permits service within an "organization or governmental agency devoted to the improvement of the law, the legal system, or the administration of justice provided that such position does not constitute a public office within the meaning of article VI, section 17 of the California Constitution." Public educational institutions are governmental bodies. (See *Wells v. One2One Learning Foundation* (2006) 39 Cal.4th 1164, 1190 (*Wells*) [a public school district cannot be sued under the California False Claims Act as the statute does not include governmental entities]; Advisory Com. com. foll. canon 4C(2); Cal. Judges Assoc., Judicial Ethics Update (1989) pp. 2-3 [a judge may not serve

on a school board]; Rothman, *supra*, § 10.31, pp. 541-42 ["Membership on a public school board of education or a committee of same does not relate to the law, legal system, or administration of justice and, therefore, would be improper."].)

Canon 4C(3)(b), however, allows for a judge to "serve as an officer, director, trustee, or nonlegal advisor of an educational, religious, charitable, service, or civic organization not conducted for profit," so long as such service complies with the remainder of the code. Specifically, a judge is further restricted from serving "as an officer, director, or nonlegal advisor if it is likely that the organization [¶] (i) will be engaged in judicial proceedings that would ordinarily come before the judge, or [¶] (ii) will be engaged frequently in adversary proceedings in the court of which the judge is a member or in any court subject to the appellate jurisdiction of the court of which the judge is a member." (Canon 4C(3)(c).) Even if an extrajudicial assignment is permissible, "[t]he appropriateness of accepting extrajudicial assignments must be assessed in light of the

demands on judicial resources and the need to protect the courts from involvement in extrajudicial matters that may prove to be controversial." (Advisory Com. com. foll. canon 4C(2).)

To summarize, canon 4C permits a judge to be a member of the board of a private educational institution and prohibits service on a public school board. Assuming compliance with the remainder of the code, a judge's ability to serve on a charter school board depends on whether such service constitutes a governmental committee or commission or other governmental position, i.e., whether canon 4C(2) or canon 4C(3)(b) applies. In deciding whether service on a charter school board is a governmental position, a judge must look to California's distinct legal framework regarding charter schools, examine the differences between traditional public schools and charter schools, and evaluate the instances in which charter schools are determined to be more akin to private or public institutions.

## B. Charter Schools

### a. Background

Through enactment of the Charter Schools Act of 1992 (Charter Schools Act) (Ed. Code, § 47600 et seq.), the Legislature intended "to improve learning; create learning opportunities, especially for those who are academically low-achieving; encourage innovative teaching methods; create new opportunities for teachers; provide parents and students expanded choices in the types of educational opportunities available; hold the charter schools accountable for meeting quantifiable outcomes; and provide 'vigorous competition within the public school system to stimulate continual improvements in all public schools.'" (*California School Bds. Assn. v. State Bd. of Education* (2010) 186 Cal.App.4th 1298, 1306, citing Ed. Code, § 47601.) In furtherance of these goals, charter schools are, for the most part, permitted to be autonomous. They operate independently from the existing school district

structure and are "given substantial freedom to achieve academic results free of interference by the public educational bureaucracy. The sole relationship between the charter school operators and the chartering districts in this case is through the charters governing the schools' operation." (*Wells, supra,* 39 Cal.4th at p. 1201.) A charter school may operate as a nonprofit benefit corporation, and such nonprofit's board of directors makes decisions that are specific only to the nonprofit organization and its charter school or schools. (Ed. Code, § 47604, subd. (a).)

Despite their independence, however, charter schools are subject to some of the same restrictions imposed on their traditional public school counterparts as well as oversight by the chartering authority. The school district that grants a charter is entitled to one representative on the board of directors of the charter school. (Ed. Code, § 47604, subd. (b).) They are also subject to, among other traditional public school requirements, a minimum number of school days and instructional minutes (*id.*,

§ 47612, subd. (d)(3)- (4)), teacher credential requirements equivalent to those of other public schools (*id*., § 47605, subd. (l)), free tuition, and a prohibition on discrimination against students who wish to attend the school (*id*., § 47605, subd. (d)(1)). Absent these and a few other requirements, however, charter schools and their operators are "exempt from the laws governing school districts." (*Id*., § 47610; see *Wells*, *supra*, 39 Cal.4th at p. 1201.)

**b.** Charter Schools Are Public Schools and Charter School Officials Are Officers of Public Schools

Perhaps due to the hybrid structure of charter schools, which "in some respects blur[s] the distinction between public and private schools" (*Ghafur v. Bernstein* (2005) 131 Cal.App.4th 1230, 1239 (*Ghafur*)), it is unresolved whether a charter school is a public or private entity for all purposes. To allow for public funding, the Legislature has declared that charter schools are part of the public school system pursuant to article IX of the California

Constitution. (Ed. Code, § 47615.) In *Wilson v. State Board of Education*, (1999) 75 Cal.App.4th 1125, the First District Court of Appeal examined the constitutionality of the Charter Schools Act and found that charter schools are within the mandatory state system of common schools and permissibly funded by public money. (*Id.* at pp. 1137-1141.) To establish that charter schools are constitutionally permissible, the court determined that charter schools are public schools, charter schools are under the exclusive control of the officers of public schools, and "charter school officials are officers of public schools to the same extent as members of other boards of education of public school districts." (*Id.* at pp. 1139-1141.) Moreover, each charter school is deemed to be its own school district for purposes of statutory and constitutional funding allocations. (*Id.* at p. 1141; Ed. Code, § 47612, subd. (c).)

Applying the same logic used to find that charter school officials are akin to traditional public school officials, the First District Court of Appeal has determined that a former charter school

superintendent was a public official for defamation purposes. The court first concluded that a traditional public school superintendent, though unelected, is a public official because the head of a school district has "substantial responsibilities in the operation of the [school] system" and the public has "a substantial interest in the qualifications and performance of the person appointed as its superintendent." (*Ghafur*, *supra*, 131 Cal.App.4th at p. 1238, citation omitted.)

Examining whether the same reasoning applied to a charter school superintendent, the court concluded that to differentiate the public official status of a public school superintendent from that of a charter school superintendent would "overlook 'the intent of the Legislature that charter schools are and should become an integral part of the California educational system' (Ed. Code, § 47605, subd. (b))." (*Ghafur, supra,* 131 Cal.App.4th at p. 1240.) Charter schools are public schools, and the positions of charter school superintendent and charter school board member are of equal public concern and

importance as those of their traditional public school counterparts. Charter school superintendents retain "substantial responsibility for or control over the conduct of governmental affairs." (*Ibid*., quoting *Rosenblatt v. Baer* (1966) 383 U.S. 75, 85.) Therefore, at least for defamation purposes, the *Ghafur* court held that charter school board members and superintendents are equivalent to traditional public school board members and superintendents. Charter Schools Are Both Public and Private Entities

Charter schools are not consistently treated as public or private entities for liability or immunity purposes. In some instances, charter schools have been determined to be arms of the state to establish immunity. (*Doe ex rel. Kristen D. v. Willits Unified School Dist.* (N.D.Cal., Mar. 8, 2010, No. C 09-03655 JSW) 2010 WL 890158 [charter schools are arms of the state for 11th Amend. immunity purposes].) In other instances, however, charter schools have been distinguished from public schools in determining liability.

In *Wells*, the Supreme Court held that, although "charter schools are deemed part of the system of public schools for purposes of academics and state funding eligibility, and are subject to some oversight by public school officials [citation], the charter schools here are operated, not by the public school system, but by distinct outside entities." (*Wells, supra,* 39 Cal.4th. at pp. 1200-1201.) Therefore, based on their private operation, the court determined that charter schools were not considered local public entities for purposes of the Government Claims Act. (*Id.* at p. 1214; see also *Knapp v. Palisades Charter High School* (2007) 146 Cal.App.4th 708, 717 [following *Wells* and concluding that the plaintiff was not required to present written claims to the charter school under the Government Claims Act before filing sexual harassment and tort claims].) The court further concluded that although traditional public school districts are not persons subject to suit under the California False Claims Act and the unfair competition law, charter schools and their operators are not public or governmental

entities and not exempt from these laws "merely because such schools are deemed part of the public schools system." (*Wells*, *supra*, 39 Cal.4th at p. 1164; see *id*. at pp. 1179, 1202, 1204; see also *Sufi v. Leadership High School* (N.D.Cal., July 1, 2013, No. C-13-01598(EDL)) 2013 WL 3339441, at *8 [2013 U.S.Dist.Lexis 92432] [a charter school is not a state actor for purposes of 42 U.S.C. § 1983] (*Sufi*); *Caviness v. Horizon Community Learning Center, Inc.* (9th Cir. 2010) 590 F.3d 806, 812-814 (*Caviness*) [an Ariz. charter school is acting as a private actor in connection with employment decisions and not a state actor for purposes of 42 U.S.C. § 1983].) As evidenced by the case law, a charter school can be considered a public or private entity depending upon the issue. (*Caviness*, *supra*, 590 F.3d at pp. 812-813 ["an entity may be a State actor for some purposes but not for others"].) Nothing affirmatively resolves whether service on a nonprofit charter school board is a governmental position for the purpose of judicial ethics. However, the decisions of a charter school board and a traditional public school board have

substantially similar impacts, affecting the operation of the local school system and playing significant roles in local communities. (See *Ghafur, supra,* 131 Cal.App.4th at pp. 1238-1239.) The committee advises that based on the case law and the substantially similar impact that decisions of either a charter school board or a traditional school board have on a community, service on a local charter school board would likely be considered a governmental position.

**c. Other State Advisory Opinions on Charter School Board Service**

Judicial ethics advisory bodies in other jurisdictions are also divided on whether service on a charter school board constitutes a governmental position prohibited by the canons, supporting the committee's recommendation not to accept a charter school board position. Some states with similar canons, constitutional prohibitions on holding dual offices, and charter school laws as in California advise that a judge may not serve on the board of a charter school. The New York Advisory Committee

on Judicial Ethics advises that a judge may not serve on the board of a charter school because, like public schools, a charter school may "generate quasi-political and highly controversial issues that could interfere with a judge's judicial duties and compromise his/her appearance of impartiality."[52] 3 (N.Y. Jud. Advisory Com. Jud. Ethics, Op. 11-44.) The New York committee found "no reason to distinguish between service on a public school board and a public charter school board." (*Ibid*.) Similarly, a Florida Judicial Ethics Advisory Committee opinion advises simply that because in Florida, charter schools are part of the state's program on

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[52] In New York, charter schools are also deemed public schools (N.Y. Educ. Law § 2853, subd. (1)(c)-(d)), and judicial officers are prohibited from simultaneously holding any other public office, absent limited exceptions (N.Y. Const., art. VI, § 20). Like the California canon, New York's canon 4 prohibits a judge from accepting appointment to a governmental committee, commission, or other governmental position that is not concerned with the improvement of the law, the legal system, or the administration of justice, but permits service as an officer, director, trustee, or nonlegal advisory of an educational organization not conducted for profit. (N.Y. State Rules of the Unified Court System, Rules of the Chief Admin. Judge, § 100.4(C)(2)(a), 100.4(C)(3).)

public education and all charter schools in the state are public schools, such service is prohibited. (Fla. Jud. Ethics Advisory Com., Opn. 2016-01.)

Other states have advised that service on a charter school board is permitted under the state's canons. The Arizona Supreme Court Judicial Ethics Advisory Committee, also with substantially similar canons, constitutional prohibitions on holding dual offices, and charter school laws, has determined that service on a charter school board is not a governmental position and is therefore permitted, subject to the other provisions within the canons. (See Ariz. Const., art. VI, § 28; Ariz. Supreme Ct. Rules, Judicial Ethics, rules 3.4, 3.7(A)(6); *Sufi*, *supra,* 2013U.S.Dist.Lexis 92432 [2013 WL 3339441] [comparing Ariz. and Cal. charter schools and finding that the two states have substantially similar charter school laws].) The Arizona committee has determined that, based on the purpose of the canon and the differences between charter schools and public schools and service on a local school board and a charter school board, "[m]embership on the board of

directors of a non-profit corporation that operates a charter school is not a governmental position." (Ariz. Jud. Ethics Advisory com., Op. 96-5, p. 1.) Other states have reached similar conclusions. (See Conn. Com. on Jud. Ethics, Opn. 2015-22 [judicial officer may serve on the board of a nonprofit that consists of four public charter schools so long as the judge meets nine conditions within the canons]; Del. Jud. Ethics Advisory Com., Opn. 2001-2 [judge may serve as a board member for a military academy operated as a charter school after assuming that although publicly funded, the charter school would not be considered a governmental committee or commission]; Colo. Jud. Ethics Advisory Bd., Op. 2007-02 [board of directors of a nonprofit public charter school is not a governmental organization and service on a charter school board in a different county and different judicial district was not prohibited]; S.C. Advisory Com. on Standards Jud. Conduct, Opn. 16-2002 [judge may accept appointment to serve on a charter school board in a county not served by the judge].) Significantly, however, none of these opinions

address or resolve the concerns regarding dual offices, such as the prohibition within article VI, section 17 of the California Constitution and the potential for automatic resignation from judicial office if service on a charter school board is deemed a public office.

**C.** Prohibition on Holding Dual Offices

In addition to the restrictions within the code, service in a governmental position may also be prohibited by the California Constitution. Article VI, section 17, provides that a judge "is ineligible for public employment or public office other than judicial employment or judicial office." (Cal. Const., art. VI, § 17.) Most significantly, the acceptance of a public office "is a resignation from the office of judge." (*Ibid*.) Therefore, "[a]fter taking judicial office, a judge must be cautious in undertaking or accepting appointment to any local, county or state government position, board, agency or commission without first making sure that the position is not a 'public employment or public office other than judicial

employment or judicial office.'" (Rothman, *supra,* § 10.01, pp. 524-525.)

Article VI, section 17 is "intended to exclude judicial officers from such activities as may tend to militate against the free, disinterested and impartial exercise of their judicial functions." (*Abbott v. McNutt* (1933) 218 Cal. 225, 229 [judges are prohibited from serving on a qualification board formed to submit a list of qualified candidates to the board of supervisors for a county manager position]; see also 67 Ops.Cal.Atty.Gen. 385 (1984).) Specifically, it is intended "conserve the time of the judges for the performance of their work, and to save them from the entanglements, at times the partisan suspicions, so often the result of other and conflicting duties." (*Abbott*, *supra*, 218 Cal. At p. 229, quoting *In re Richardson* (1928) 247 N.Y. 401, 420.) The prohibition creates a distinct separation of the judiciary from the rest of the government, protecting the independence and impartiality of the judicial branch. (*Gilbert v. Chiang*, *supra*, 227 Cal.App.4th 537, 550; *Lungren v. Davis* (1991) 234 Cal.App.3d

806, 819.) These goals are closely aligned with the limitations on extrajudicial activities within the code.

Like the code, article VI, section 17 fails to define the term public employment or public office. It is, however, widely accepted that public school board members are public officials. (Cal. Const., art. VI, § 17; *Ghafur*, *supra*, 131 Cal.App.4th at p. 1238; Rothman, *supra*, § 10.01, p. 524.) It is less certain whether service on a charter school board is "public employment or public office" within article VI, section 17 of the California Constitution. (Rothman, *supra*, § 10.31, pp. 541-42 ["Memberships on boards of, or leadership positions in connection with, public educational institutions are governmental activities not related to the law, legal system, and administration of justice, and may amount to public employment or holding public office"].) If so, a judge is constitutionally ineligible for a charter school board position unless he or she resigns from judicial office. To accept a public office would result in automatic resignation from judicial office.

## V. Conclusions

Judges are prohibited from serving in a governmental position that is not concerned with the improvement of the law, the legal system, or the administration of justice. (Canon 4C(2).) A judge may serve as an officer, director, trustee, or nonlegal advisor of an educational organization not conducted for profit, so long as such service does not violate any other provisions within the canons. (Canon 4C(3)(b).) The committee believes that charter schools blur the distinction between governmental entities and nonprofit organizations, and service on a charter school board may constitute a violation of canon 4C(2), or implicate the constitutional provision prohibiting a judicial officer from holding public office.

The case law regarding whether service on a charter school board is a governmental position and therefore prohibited by canon 4C(2), or is a public office and therefore prohibited by the Constitution, is unsettled. Given the grave risk of *automatic*

*resignation* from judicial office upon acceptance of a charter school board position, if such a position is ultimately found to be a public office, the committee advises against service on a charter school board.

*This opinion is advisory only (Cal. Rules of Court, rule 9.80(a), (e); Cal. Com. Jud. Ethics Opns., Internal Operating Rules & Proc. (CJEO) rule 1(a), (b)). It is based on facts and issues, or topics of interest, presented to the California Supreme Court Committee on Judicial Ethics Opinions in a request for an opinion (Cal. Rules of Court, rule 9.80(i)(3); CJEO rule 2(f), 6(c)), or on subjects deemed appropriate by the committee (Cal. Rules of Court, rule 9.80(i)(1); CJEO rule 6(a)).*

## APPENDIX P

Pertinent California Authorities

California Constitution Article VI Section 17 states:

> A judge of a court of record may not practice law and during the term for which the judge was selected is ineligible for public employment or public office other than judicial employment or judicial office, except a judge of a court of record may accept a part-time teaching position that is outside the normal hours of his or her judicial position and that does not interfere with the regular performance of his or her judicial duties while holding office. A judge of a trial court of record may, however, become eligible for election to other public office by taking a leave of absence without pay prior to filing a declaration of candidacy. Acceptance of the public office is a resignation from the office of judge.

A judicial officer may not receive fines or fees for personal use.

A judicial officer may not earn retirement service credit from a public

> teaching position while holding judicial office.

California Constitution Article VI Section 21 states:

> On stipulation of the parties litigant the court may order a cause to be tried by a temporary judge who is a member of the State Bar, sworn and empowered to act until final determination of the cause.

Cal. Govt Code § 1770

> An office becomes vacant on the happening of the following events before the expiration of the term:
>
> (c)(1) His or her resignation, except as provided in paragraph (2).

Cal. Govt. Code § 53200.3. -Judges, officers and attachés of superiorand municipal courts as county employees

> For the limited purpose of the application of this article, judges of the superior and municipal courts and the officers and attachés of said courts whose salaries are paid either in whole or in part from the salary fund of the county are county employees and shall be subject to the same or similar obligations

and be granted the same or similar employee benefits as are now required or granted to employees of the county in which the court of said judge, officer, or attaché is located.

California Rules of Court, Rule 3.300 (a)

(a) Definition of "related case"

A pending civil case is related to another pending civil case, or to a civil case that was dismissed with or without prejudice, or to a civil case that was disposed of by judgment, if the cases:

(1) Involve the same parties and are based on the same or similar claims;

(2) Arise from the same or substantially identical transactions, incidents, or events requiring the determination of the same or substantially identical questions of law or fact;

(3) Involve claims against, title to, possession of, or damages to the same property; or

(4) Are likely for other reasons to require substantial duplication of judicial resources if heard by different judges.

*(Subd (a) adopted effective January 1, 2007.)*

Los Angeles Superior Court Local Rule 3.22 - Case Removed To Federal Court

If a case is removed to federal court, the court will order a date, not earlier than 90 days from the date of removal, by which counsel must file a Notice of Status of Removed Case. If the case has not remanded to the trial court by that time, it will be recorded as completed without the need to conduct a further status conference.

(Rule 3.22 new and effective July 1, 2011)