No. _____

IN THE
Supreme Court of the United States

IN RE LORI SKLAR,
Petitioner.

ON PETITION FOR A WRIT OF MANDAMUS TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

APPENDIX TO THE PETITION FOR A WRIT OF MANDAMUS

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Petitioner Pro Se

December 2021

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S269098

IN THE SUPREME COURT OF CALIFORNIA

En Banc

LORI SKLAR, Petitioner,

v.

COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION ONE,
Respondent;

TOSHIBA AMERICA INFORMATION SYSTEMS, INC., Real Party in Interest.

The petition for a writ of mandate or other appropriate relief is denied.

Corrigan, J., was absent and did not participate.

CANTIL-SAKAUYE
Chief Justice

APPENDIX A

STATE OF CALIFORNIA
BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

INQUIRY CONCERNING JUSTICE JEFFREY W. JOHNSON, No. 204	DECISION AND ORDER REMOVING JUSTICE JEFFREY W. JOHNSON FROM OFFICE

I. INTRODUCTION

This disciplinary matter concerns Justice Jeffrey W. Johnson of the California Court of Appeal, Second Appellate District, Division One. Justice Johnson was notified of the commission's investigation in July 2018. A notice of formal proceedings was filed on January 4, 2019. The notice was amended three times to add charges. A third amended notice was filed on June 18, 2019.

Justice Johnson was charged with 10 counts, which with subparts contain 62 allegations of misconduct. The charges involve sexual misconduct toward 17 women he encountered at the courts where he worked and at professional functions (Counts One, Two, Three, Four, Five, Seven, and Nine), including the unwanted touching of several women; disparaging women with whom he works (Count Ten); poor demeanor toward those with whom he works (Count Six); and multiple instances of undignified conduct while under the influence of alcohol, which demeaned the judicial office (Count Eight).

The California Supreme Court appointed Hon. Judith L. Haller, Associate Justice of the Court of Appeal, Fourth Appellate District, Division One; Hon. Louis R. Hanoian, Judge of the San Diego County Superior Court; and Hon. William D. Lehman, Judge of the Imperial County Superior Court, as special masters to conduct an evidentiary hearing and prepare a report to the commission of their findings of fact and conclusions of law.

The special masters presided over 17 days of testimony, with over 100 witnesses and 120 admitted exhibits, and multiple discovery motions. The hearing took place between August 5 and 27, 2019, with an additional day of testimony on September 11, 2019, and closing arguments on October 8, 2019. The masters filed their report to the commission on January 3, 2020. The commission heard oral argument, presided over by then-chairperson Nanci E. Nishimura, Esq., on May 7, 2020.

The masters found that the allegations in Count One (in part), Two (in part), Three, Four (in part), Five, Six, Seven (in part), Eight (in part), Nine, and Ten were proven by clear and convincing evidence. They concluded that Justice Johnson engaged in 15 instances of prejudicial misconduct (comprised of 42 proven allegations), as well as 5 instances of improper action (comprised of 5 proven allegations).

Based on our independent review of the record, we conclude that the findings of fact in the masters' report are supported by clear and convincing evidence, and we adopt them in their entirety. In this decision, we summarize the factual findings. The findings include that Justice Johnson was, at times, intentionally dishonest in his testimony.

We adopt the masters' legal conclusions as to most of the allegations, but respectfully reach our own independent legal conclusions as to certain allegations. We find that Justice Johnson engaged in 18 instances of prejudicial misconduct.

In their report, the masters stated:

> The proven allegations establish Justice Johnson lacked personal boundaries; engaged in unwanted touching of several women; attempted to use the prestige of the judicial office to create personal relationships with women; and engaged in ongoing improper touching and sexually related comments toward his colleague, Court of Appeal Justice Victoria Chaney.

> Justice Johnson's pattern of conduct toward these women reflects ethical lapses that undermine the public's trust in the judicial process and erodes the confidence we ask the public to place in our individual judges. These lapses are compounded by Justice Johnson's failure to take responsibility for many of his actions and to manifest insight into his behavior. We find particularly concerning Justice Johnson's actions towards women who had recently graduated from law school; were in the early stages of their legal careers; and welcomed the opportunity to establish professional contacts with a Court of Appeal justice. Additionally, the evidence established the most serious misconduct occurred when Justice Johnson was intoxicated, impairing both his judgment and his recollection of events.
>
> In making these findings, we have carefully considered, but largely rejected, Justice Johnson's defenses, including that (1) witness memories of the relevant events were exaggerated or misconstrued because widespread negative publicity and unsubstantiated gossip caused many of the women to rethink and overstate their encounters; and (2) many of the witnesses (including Justice Chaney) should not be believed because they did not tell him his conduct was unwelcome or report his actions until many years later.

We find that, by engaging in sexual misconduct, Justice Johnson severely undermined public esteem for the integrity of the judiciary. Treating women disrespectfully, including unwanted touching and making inappropriate sexual comments, reflects a sense of entitlement completely at odds with the canons of judicial ethics and the role of any judge. Sexual misconduct has no place in the judiciary and is an affront to the dignity of the judicial office.

Justice Johnson refused to admit his most serious sexual misconduct. Rather than take responsibility for his offensive behavior, he maligned the victims, including his colleague Justice Chaney, and accused them of testifying

falsely. But it is Justice Johnson whom the masters found, and we find, testified untruthfully in many instances.

As to the sexual misconduct Justice Johnson does admit, he claimed that he did not know it was wrong. At his appearance before the commission, he attributed the misconduct he has admitted to his being "friendly." But friendliness does not extend to sexualized behavior. Judges have been on notice for many years that men and women alike are entitled to a professional workplace free from inappropriate and unwelcome conduct, particularly from judges, who are held to a higher standard of behavior. Judges, including Justice Johnson, receive ethics training that reinforces this concept. In addition, Justice Johnson was personally cautioned about some of his inappropriate conduct. He failed to heed these warnings and to comport himself in a professional manner befitting his position.

At his appearance before the commission, Justice Johnson told commission members that he was raised to treat everyone "with respect and dignity." Yet he failed to treat everyone at the appellate court with dignity and respect, not only by engaging in sexual misconduct, but also by displaying poor demeanor to coworkers and making disparaging remarks about colleagues, and by becoming intoxicated and using the courthouse to socialize late at night, sometimes in the presence of courthouse custodians and court personnel who were working there.

Justice Johnson's misconduct has severely tarnished the esteem of the judiciary in the eyes of the public. Given his persistent denials of serious misconduct, we do not have confidence that he can reform, as he has not conveyed that he recognizes the extent of his wrongdoing. Further, given his lack of candor during this proceeding, we do not have confidence that he has the fundamental qualities of honesty and integrity required of a judge. Consequently, in order to fulfill our mandate of protecting the public, enforcing high judicial standards, and preserving public respect for the judiciary, we remove Justice Johnson from office.

Justice Johnson is represented by Paul S. Meyer, Esq., Reginald A. Vitek, Esq., Willie L. Brown, Jr., Esq., and Thomas J. Warwick, Jr., Esq. The examiners for the commission are acting commission trial counsel Emma Bradford, Esq., trial counsel Mark A. Lizarraga, Esq., and commission assistant trial counsel Bradford Battson, Esq.

II. LEGAL STANDARDS

A. Three Levels of Judicial Misconduct

Willful misconduct consists of unjudicial conduct, committed in bad faith, by a judge acting in a judicial capacity. (*Broadman v. Commission on Judicial Performance* (1998) 18 Cal.4th 1079, 1091.)

Prejudicial misconduct is "conduct prejudicial to the administration of justice that brings the judicial office into disrepute." (Cal. Const., art. VI, § 18, subd. (d).) The California Supreme Court has defined prejudicial misconduct as either "willful misconduct out of office, i.e., unjudicial conduct committed in bad faith by a judge not then acting in a judicial capacity" or "conduct which a judge undertakes in good faith but which nevertheless would appear to an objective observer to be not only unjudicial conduct but conduct prejudicial to public esteem for the judicial office." (*Broadman, supra,* 18 Cal.4th at pp. 1092-1093.) The subjective intent or motivation of the judge is not a significant factor in assessing whether prejudicial conduct has occurred. (*Adams v. Commission on Judicial Performance* (1995) 10 Cal.4th 866, 878 (*Adams II*).)

Improper action occurs when the judge's conduct violates the canons of the California Code of Judicial Ethics, but an objective observer aware of the circumstances would not deem the conduct to have an adverse effect on the reputation of the judiciary. (*Inquiry Concerning Ross* (2005) 49 Cal.4th CJP Supp. 79, 89.) A judge may be removed from office or censured based on willful misconduct or prejudicial misconduct, but not improper action. (Cal. Const., art. VI, § 18, subd. (d).)

Only prejudicial misconduct and improper action are relevant in this matter because the examiner did not argue, and the special masters did not find, that any of Justice Johnson's misconduct constitutes willful misconduct, based on the assertion that it did not involve him acting in his judicial capacity. The masters accepted the parties' agreement that Justice Johnson was not acting in a judicial capacity in connection with the allegations. The commission accepts this agreement for purposes of this decision only, but notes that certain instances of misconduct occurred in the courthouse, while Justice Johnson was working with others on judicial matters, and other instances of misconduct occurred while he was at professional events in his capacity as an appellate justice.

B. Burden of Proof

The examiner has the burden of proving the charges by clear and convincing evidence. (*Broadman, supra,* 18 Cal.4th at p. 1090.) "Evidence of a charge is clear and convincing so long as there is a 'high probability' that the charge is true. [Citations.]" (*Ibid.*) Clear and convincing evidence is so clear as to leave no substantial doubt. It is sufficiently strong to command the unhesitating assent of every reasonable mind, but need not establish the facts beyond a reasonable doubt. (*Ibid.*)

C. Standards Regarding Masters' Findings and Conclusions

The factual findings of the masters are given special weight because the masters have "the advantage of observing the demeanor of the witnesses." (*Broadman, supra,* 18 Cal.4th at p. 1090.) The legal conclusions of the commission are given great weight because of the commission's expertise in evaluating judicial misconduct. (*Ibid.*) The commission may determine, however, that it is appropriate to disregard the factual findings and the legal conclusions of the special masters and make its own determinations based on its own independent review of the record. (See *Inquiry Concerning Clarke* (2016) 1 Cal.5th CJP Supp. 1, 7.)

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

BACKGROUND

Justice Johnson has been a judge for 19 years. He attended Duke University, studied at Oxford University as a Duke Scholar, and graduated from Yale Law School in 1985. He worked as an attorney in private practice from 1985 to 1989 and was an Assistant United States Attorney from 1989 to 1999. In 1999, he was selected as a United States Magistrate Judge for the Central District, where he served until his appointment in 2009 to the Court of Appeal, Second District, Division One.

COUNT ONE—Sexual harassment of Justice Chaney

Justice Johnson was charged with a pattern of conduct toward his colleague on the bench, Justice Victoria Chaney, that was unwelcome, undignified, discourteous, and offensive, and would reasonably be perceived as sexual harassment or gender bias (counts 1A-1J). The alleged misconduct involved multiple instances of unwanted touching and other sexual misconduct.

A. Proven charges found to constitute misconduct

The masters found, based on clear and convincing evidence, that Justice Johnson, while at court, asked Justice Chaney to have an affair with him after she had already declined his request (count 1C), said he wanted to "squeeze" her "titties" to make her "feel better" and then squeezed one of her breasts in the courthouse hallway (count 1D), repeatedly touched her breasts while hugging her (count 1E), occasionally patted her buttocks in the courthouse hallway (count 1F), commented on her nipples (count 1G), and warned her not to report him for sexual harassment (count 1J). They also found that, when they were on a work trip, he entered her hotel room uninvited (count 1B), and, at a restaurant, implied that she should not report him for sexual harassment (count 1H).

1. Findings of Fact

Count 1B: Entering hotel room uninvited

Justices Johnson and Chaney attended the National Judicial College in Reno in 2010. They had dinner together each evening. During these dinners, Justice Johnson drank alcohol and appeared to be intoxicated. Justice Chaney testified that, during dinner the first night, Justice Johnson asked her if she ever had an affair. She perceived this as a "come on." When they returned to the hotel, he escorted her back to her room and then followed her into her room uninvited, which made her uncomfortable. Justice Chaney testified that Justice Johnson did not say anything inappropriate, but he touched her shoulder, arm, and back, which made her feel uncomfortable. Although she felt uncomfortable the first night, she continued to spend time with Justice Johnson because they were colleagues on a court together, and were going to be working together for the foreseeable future. Justice Chaney also testified that, after subsequent dinners together, Justice Johnson again entered her room by walking close behind her when she opened her hotel room door. He left when she asked him to, but she felt upset and uncomfortable because she "felt that he wanted sex."

Justice Chaney's testimony about what occurred the first night was corroborated by the testimony of her best friend, Emily Bernardis, whom the masters viewed as an "open and honest witness." Bernardis testified that Justice Chaney called her from her hotel room and told her that Justice Johnson had been drinking and "pushed his way into the room," which made Justice Chaney "freaked out" and "very upset." Justice Chaney's testimony was also corroborated by Daniel Alexander (her friend and later her research attorney), and Raphael Gunner (her private yoga instructor of 17 years), each of whom testified that she told them about the incident. Gunner testified that Justice Chaney told him that, one evening, Justice Johnson pressured her to let him into her room, that it was obvious to her that he wanted to have a sexual encounter with her, and that she had to firmly keep him from entering the room. Alexander

testified that, one year after the trip, Justice Chaney told him that she had dinner with Justice Johnson in Reno and that he had pushed into her hotel room, and she could not get him out. The masters found that, even though the testimony of Bernardis and Gunner did not precisely match Justice Chaney's testimony, it supported the fact that Justice Johnson came into Justice Chaney's hotel room uninvited for at least a few minutes on one night, and the witnesses confirmed the essence of what occurred. The masters also concluded that Justice Chaney's clear explanation of the incident was believable and consistent with other evidence showing Justice Johnson's overly friendly and overly familiar conduct with women, particularly when he is drinking alcohol.

The masters determined, however, that other details in Justice Chaney's testimony—that Justice Johnson touched her when he came into her hotel room the first night, and that he came into her room uninvited on additional nights after the first night—were not alleged in the notice, and were not disclosed to Bernardis, Gunner, Alexander, commission staff, or Administrative Presiding Justice Elwood G. Lui, to whom she reported Justice Johnson's conduct in connection with a workplace investigation conducted in July 2018 by outside counsel at the court's request. As a result, the masters declined to credit Justice Chaney's testimony on these points, and found that the truth of what actually happened in Reno was somewhere in between each party's version of the events.

Justice Johnson denied propositioning Justice Chaney or going to her room at any time during the trip, and said that he did not know where her room was located. He testified that her testimony that he came to her room was an "unequivocal lie." Justice Johnson also denied being intoxicated the first evening, claiming that he had one or two beers and that this matter is "full of stereotypes." The masters found Justice Johnson's denials about what occurred the first evening in Reno to be "untrue" and that his testimony reflected "intentional misrepresentations."

Justice Johnson asserted that Justice Chaney should not be believed because she testified incorrectly regarding certain details about the trip, such as the name of the hotel, the precise date of the event, and whether she had rented a car. Justice Chaney testified that she rented a car when they arrived in Reno, that she gave Justice Johnson a ride to their hotel, and that they stopped at a convenience store where she purchased Diet Cokes and he purchased a bottle of liquor of some sort. Justice Johnson called her testimony that she drove him in the rental car, and that he stopped to buy liquor, a "total fabrication." He produced copies of expense reimbursement requests he submitted in 2010 that show that he paid $45 for a taxi he and Justice Chaney shared between the hotel and the judicial college each day, and he testified that Justice Chaney paid for a taxi in the other direction each day. He asserted that this proved they used taxis to travel to the judicial college, not Justice Chaney's rental car. He also provided evidence that the program ended at 4:00 p.m. the last day and that his flight was at 5:30 p.m., so they would not have had time to return the rental car before his flight.

The masters agreed that some of Justice Chaney's testimony was not fully substantiated and/or conflicted with written records of the trip, but they concluded that this was the result of her "misremembering, rather than any intentional misrepresentation." They stated: "It makes sense that Justice Chaney would not remember the details of a trip that occurred more than nine years before she testified, but that she would recall an unsettling event—the fact that Justice Johnson came into her hotel room with some suggestion that he would like to carry things further."

The masters stated that this conclusion is consistent with the opinions of Dr. Mark Kalish, a forensic psychiatrist who testified on Justice Johnson's behalf regarding memory and how it is impacted by internal factors (e.g., an individual's personality, former experiences, and perspective), and external factors (e.g., the passage of time, "social contagion," which is the desire to be part of a group

dynamic, and confirmation bias). They noted that Dr. Kalish has not conducted research in the area of sexual harassment. With regard to Justice Johnson's assertion that factors identified by Dr. Kalish as impacting witness memories are present in this matter, the masters stated: "In evaluating testimony, we have carefully considered these views and found some relevant and others inapplicable. For example, we agree that in the case of an emotionally traumatic event, witnesses accurately recall the 'gist' of the encounter, even if they are mistaken regarding details. Likewise, because the passage of time is always an important factor in evaluating witness testimony, we have found contemporaneous corroborating evidence quite helpful."

Justice Chaney and Justice Johnson also each testified that the other had made a sexual proposition while they were at the conference. The masters declined to fully credit either Justice Chaney's or Justice Johnson's versions regarding the propositions, noting that this allegation was not charged in the notice. They concluded that Justice Chaney and Justice Johnson had conversations about various personal topics, some of which may have included comments of a sexual nature, but did not encompass any form of sexual propositioning. Because this allegation was not charged, and neither party's version was found to be true, we decline to go into detail about the alleged sexual propositioning.

Count 1C: Asking her to have an affair

Between about February to April 2010, while they were in Justice Johnson's chambers, Justice Johnson told Justice Chaney that he wanted to have an affair with her and that they were "perfect together," or words to that effect. His affair proposal made her feel "more than uncomfortable," frustrated, angry, and nervous, and she became concerned about how she was going to get out of it. She responded that she was happily married, and said, "It's not good to dip your pen in the company inkwell," referring to the fact that a romantic

relationship at work can be "complicated." Although she rebuffed his advances, within the next two months he again asked her to have an affair with him.

The masters found this improper because the conversations occurred at court during working hours while they were finishing a discussion about a case, and Justice Johnson continued to ask Justice Chaney to have an affair after she declined his offer. They found her detailed recall of this proposal to be "highly credible" and consistent with their findings regarding the events in Reno. Justice Chaney's testimony was corroborated by Justice Thomas L. Willhite, Jr. and Justice Lui, each of whom said that Justice Chaney told them about the incident. They also found it consistent with testimony given by independent rebuttal witness Nina Park, who testified that, during the same time period, Justice Johnson told her that he "wished his wife would have an affair or something to that effect because that would then kind of give him an open license to have affairs."

Justice Johnson denied the allegations. He testified that, in 2017, Justice Chaney said: "Wouldn't it be funny if we had an affair and no one knew. It would be our laugh alone, and no one else would know about it." He said he ignored the statement. He also said that she asked him if he wanted to see her MRI or X-ray, which he thought was strange because it would have been essentially a "naked" picture of her. The masters found that Justice Johnson's testimony on this subject, including that he "categorially denied ever asking Justice Chaney to have an affair," reflected "his failure to tell the truth."

Count 1D: Wanting to "kiss and squeeze [her] titties" and touching her breast

In approximately the summer of 2010, when Justice Johnson saw Justice Chaney in the courthouse hallway after a difficult hearing she had just finished, he said to her, "Well, I should kiss and squeeze your titties to make you feel better," or words to that effect, and then squeezed one of her breasts. Justice Chaney testified that she was shocked and upset, but did not say anything to

Justice Johnson. She went immediately to her chambers and told her research attorney Adam Phipps what had happened. Justice Chaney testified that she was either crying or on the verge of crying, and that she was upset and shaking. The masters found Justice Chaney's testimony on this matter to be "highly credible." They further found that Justice Chaney's testimony about the motion Justice Johnson made with his hands, as though he would place them on her breasts, to be highly similar to his conduct with federal court employee Isabel Martinez, to whom he made a similar gesture after her breast augmentation surgery.

Justice Chaney's testimony was compellingly corroborated by attorney Eric George, to whom she disclosed the incident at a professional event later that day, only after he observed that she appeared to be upset and repeatedly asked her what was wrong. George confirmed Justice Chaney's account of what occurred. He testified that Justice Chaney told him that Justice Johnson had said he would "rub her breasts to make her feel better." Justice Chaney testified that she told George that she was having problems with Justice Johnson and was afraid of him, but she did not want to take any action because she was concerned that it would upset the "delicate balance" in her division at court.

Justice Chaney also discussed Justice Johnson's conduct with her friend Bernardis, her research attorney Alexander, and California Highway Patrol (CHP) Officers Tatiana Sauquillo and Matthew Barnachia. In October 2016, Justice Chaney had lunch with Officers Sauquillo and Barnachia and disclosed to them some of Justice Johnson's inappropriate conduct toward her. Officer Barnachia testified that, during the lunch, Justice Chaney "mentioned something to the effect that when she was hugging Justice Johnson, he grabbed maybe her breast or breasts," and that Justice Johnson had "offered to kiss her boobs to make her feel better." Texts between Officers Sauquillo and Barnachia after the lunch further corroborated Justice Chaney's testimony. Among other things, Officer Barnachia texted: "I can't believe he told her that kissing her boobs will make her

feel better!!! And I saw her afterwards, the harassment still goes on according to her. It's not just a few random incidents. He wants that ass!! [emojis]" Officer Barnachia also texted: "He is a creep!"

Justice Johnson "strenuously denied" that this incident ever occurred and testified that he does not use the word "titties." He asserted that Justice Chaney was using every stereotype people want to buy into to blame him. The masters specifically rejected his denials about the incident.

Count 1E: Hugging and breast touching

On multiple occasions between January 2010 and June 2018, Justice Johnson hugged Justice Chaney and pressed against her entire body, intentionally touched her breast, and made comments such as, "Mmm-mmm" and "You feel good." Justice Chaney described the touching of her breast as "significant," and not light or fleeting. She testified that this occurred only when they were alone. She would pull away as fast as she could.

Justice Chaney's testimony was corroborated by the testimony of Gunner and Bernardis, whom she told about the breast-touching incidents close to when they were occurring. Justice Chaney's testimony was also corroborated by Alexander, who said that, in August or September 2017, Justice Chaney came into his office, upset and shaking, and told him that Justice Johnson had grabbed her breast again. And Justice Chaney's testimony was consistent with the independent testimony of former Assistant United States Attorney (AUSA) Barbara Curry, who described receiving similar hugs and hearing similar sounds from Justice Johnson, but without the breast-touching, many years earlier. Curry also said that Justice Johnson sometimes asked her questions about her sex life with her husband.

Justice Johnson denied ever touching Justice Chaney's breasts and said the hugs were mutual. As to the allegation that he would say "Mmm-mmm" while hugging her, he testified that she was "telling lies" and that the "stereotypical

allegations" of him "being inarticulate and animal-like and making animal noises is a total insult."

The masters found that Justice Chaney had no motive to lie about the nature of the hugs or breast touching. The masters did not find, however, that the hugs occurred with the regularity to which Justice Chaney testified because there was no specific evidence of hugs occurring after 2014 until about September 2017, when Justice Chaney told Alexander that Justice Johnson had hugged her "again," suggesting that the offensive hugs had resumed following an extended period without hugs.

In addition, in February 2014, Justice Johnson told Justice Chaney that he was going to apply for a position on the California Supreme Court and asked her to write a recommendation letter in support of the appointment. Justice Chaney wrote a letter to the Governor's appointments secretary, along with Justice Robert M. Mallano, recommending Justice Johnson for the appointment. In the letter, Justice Chaney praised Justice Johnson as a "family man" who was "eminently qualified to sit on the California Supreme Court," who would "make a great contribution to our state," and who "has common sense and is collegial in dealing with the justices on his panel." When asked why she signed the letter given the ongoing harassment issues, Justice Chaney testified that she was not sure how much Justice Johnson understood about his inappropriate behavior and, given that she thought she was the only person at the court who was being sexually harassed, it was okay with her if he was appointed to the California Supreme Court. The masters found it doubtful that Justice Chaney would have written such a glowing letter if Justice Johnson had been grabbing her breasts with "significant pressure" once or twice a month during the years before she signed the letter.

Count 1F: Buttocks-patting

Between January 2010 and June 2018, Justice Johnson occasionally patted Justice Chaney on her buttocks while the justices were walking into oral

argument. The masters found this conduct was consistent with Justice Johnson's overly personal and overly familiar conduct toward women in the workplace. Bernardis and Gunner corroborated Justice Chaney's testimony by testifying that she had told them about Justice Johnson patting her bottom.

Justice Johnson testified that this "never happened." He argued that witnesses, including four justices who walked with Justice Johnson and Justice Chaney to oral argument many times, testified that they never noticed any discomfort on the part of Justice Chaney when she was around Justice Johnson.

Count 1G: Comments about nipples

Between January 2010 and June 2018, Justice Johnson would make comments such as "You're happy to see me" or "Looking good today," and make sounds, such as "Mmm, mmm, mmm," while he was looking at Justice Chaney's chest area and the outline of her nipple was visible when she was wearing a sweater. Justice Chaney testified that she would change the subject, back away, or turn around, and that she tried using devices to cover her nipples, but they were uncomfortable and did not remedy the problem.

Gunner corroborated that Justice Chaney told him about the nipples issue. The masters found that this was a highly embarrassing topic for Justice Chaney to testify about, and she had no motive to testify about the comments if they did not occur. They also found that this conduct is consistent with Justice Johnson's overly personal behavior, his comments about breast implants to staff members when he worked at the federal court, and his repeated touching of Justice Chaney's breasts.

Justice Johnson testified that he did not remember Justice Chaney wearing a sweater, but if she did, he was not paying attention. He did not specifically deny this conduct, but he denied making the "noises" Justice Chaney was trying to attribute to him.

Count 1H: Squeezing and sexual harassment remark

In December 2013, Division One of the Second Appellate District held a holiday party at the Taix French Restaurant, attended by 35 to 40 staff members. Justice Chaney and research attorney Peter Israel approached the open bar, where there was an opening next to where Justice Johnson was standing. Justice Chaney testified that she and Israel squeezed in so that she was standing between Justice Johnson and Israel at the bar. Justice Chaney testified that Justice Johnson, who was drinking an alcoholic beverage, put his arm around her, touched her left breast, stroked her buttocks area, and made a "raunchy" comment about her breast or body part. She could not remember the exact comment. She said she was startled and embarrassed, and pulled away. She testified that Israel saw it and appeared startled, and that Justice Johnson said to her and Israel, "You can't sexually harass someone who's on your own level," or words to that effect. She further testified that Israel responded, "Justice Johnson didn't know the law of sexual harassment if he believed that."

Israel testified that he did not recall the incident or making the comment. Justice Chaney's research attorney Alexander testified that she later told him about this incident. Justice Chaney also told Justice Willhite about it.

Justice Johnson testified that Justice Chaney walked up to him and pressed against him, and that he did not rub his hand up and down her side, or put his hands on her bottom, or make the comment she attributes to him.

The masters found that Justice Johnson squeezed Justice Chaney against him as she stood next to him because this was consistent with their outwardly close and friendly relationship, they were at a holiday party where Justice Johnson was acting in an informal manner and was drinking alcohol, and his conduct in physically touching her had apparently become, in his view, a normal part of their relationship.

The masters did not find, however, that he squeezed her breast or buttocks or rubbed her body or made a vulgar comment about her body, as Justice Chaney testified, because Israel testified that he was present at the restaurant but did not observe such conduct. They also noted that many people were at the Taix event, and they did not believe that Justice Johnson would engage in the breast and buttocks touching, or make a "raunchy" comment, in view of others. The masters also did not believe that Justice Chaney would have written a positive letter about Justice Johnson to the Governor's appointments secretary in connection with his being considered for the California Supreme Court if all of the conduct she described had occurred.

Count 1J: Comment about reporting sexual harassment

In December 2017, during a discussion about sexual harassment, Justice Johnson said to Justice Chaney, "You would never report me [for sexual harassment], would you?" or words to that effect, and he was not joking when he said this. Justice Chaney testified that he was glaring at her and looked a little frightened, and she felt threatened. She responded by staring at him for a moment and then said, "No." Alexander testified that Justice Chaney told him about the incident.

The masters found little doubt that, by that time, because Justice Johnson knew of ongoing sexual harassment investigations of other judges, the widespread public conversation about the "Me Too" movement, and his own prior conduct, he would have serious concerns about whether information about his past conduct toward Justice Chaney and other women would come to the attention of the authorities.

Justice Johnson testified that he did not recall saying anything like that, but if he did, it would have been a joke.

The examiner did not object to the masters' factual findings regarding the foregoing charges (counts 1B through 1J). Justice Johnson's objections to these factual findings are addressed below.

2. Justice Johnson's objections to allegations involving Justice Chaney

In his post-masters' report briefing, Justice Johnson objected to the foregoing factual findings and argued that Justice Chaney should not be believed about any of the proven charges for the following reasons.

First, Justice Johnson argued that, if Justice Chaney actually believed she was a victim of sexual harassment, she would have reported him, but she never reported him to any authority, despite her duty under canon 3 to report judicial misconduct ("Whenever a judge has reliable information that another judge has violated any provision of the Code of Judicial Ethics, that judge shall take appropriate corrective action, which may include reporting the violation to the appropriate authority.").

Second, she treated him in a friendly manner, spent time alone with him, and referred to him as her "conjoined twin" and to herself as "the other twin." She would frequently engage in friendly communications with Justice Johnson in person and by telephone, email, and texting. They occasionally had lunch together, and, about six months after the alleged incident at the Taix restaurant, they had dinner alone together at a restaurant during an appellate justices' conference, rather than attending the official group dinner. In January 2017, Justice Chaney sent Justice Johnson a crude political cartoon with sexual overtones. It showed President Trump putting his hand underneath a woman's dress and grabbing her bottom, and, in the next panel, showed Russian President Putin grabbing Trump's bottom. Justice Chaney testified that she sent the cartoon to Justice Johnson because they had been having a conversation with Justice Frances Rothschild about President Trump, and the cartoon fit into what they were discussing.

Third, many witnesses (including four justices) testified that they did not see Justice Chaney displaying discomfort with Justice Johnson; rather, the two acted as if they were good friends and colleagues.

Fourth, Justice Chaney wrote the letter of recommendation to the Governor about Justice Johnson in February of 2014, listing his many positive attributes.

Justice Chaney testified about the following reasons she did not report Justice Johnson or tell him to stop sexually harassing her. She was concerned about the negative effect that such a report would have on the court's work, particularly in light of her awareness of conflicts and divisiveness among the justices of her division. She did not think there was a person at the court to whom she could report him who would take action on her complaint. She believed that, until the "Me Too" movement, women who complained were not believed and instead were ridiculed, fired, or marginalized. She was afraid of how Justice Johnson would respond based on his temper, which she had previously observed him display at court. She had conflicting feelings about him. She thought she was the only one being subjected to his sexual harassment and believed she could handle it because she is a "tough lady." Although she had heard rumors that Justice Johnson sexually harassed women outside the court, she did not know anything specific about his treatment of women at the court. Once she learned that others at the court claimed he had sexually harassed them and that she would be interviewed as part of a workplace investigation, she decided to report his conduct. Justice Chaney's concerns about the consequences of reporting Justice Johnson were corroborated by her friend Bernardis, her yoga teacher Gunner, research attorney Alexander, Justice Willhite, and Justice Lui.

In late 2013 or early 2014, Justice Chaney told Justice Willhite about various incidents involving Justice Johnson, including comments he made to her about her body, an affair, and Black men, and that he had touched her breast. Justice Willhite testified that he urged Justice Chaney to report Justice Johnson, but she did not think Justice Mallano, then the administrative presiding justice, would do anything about it because he and Justice Johnson were Yale grads and

"seemed to be palling around together." Justice Willhite further testified that Justice Chaney said she was afraid of Justice Johnson's temper (see count 6A), that she was afraid it would be a "he-said, she-said, and he might insert racial overtones into it," and she did "not want to go through all that." She also said she had to work with Justice Johnson. She asked Justice Willhite to keep their conversation confidential, and he did.

In 2018, when Justice Chaney learned that she would be interviewed as part of a workplace investigation, she met with Justice Lui, who testified that she told him that Justice Johnson had asked her to have an affair, would grab her breast when he hugged her, said he should hug her "titties" and kiss them, and grabbed her breast at the Taix holiday party. Justice Lui testified that Justice Chaney told him she had not reported Justice Johnson earlier because she was "fearful" and "women of her generation didn't do that," she wanted to get along with the people in her division, and she could not just transfer somewhere else.

Dr. Louise Fitzgerald, an expert witness in sexual harassment called by the examiner, testified that women generally do not report sexual harassment because there is a "very high personal and professional cost to reporting, and reporting does not necessarily preclude further harassment." She also testified that if a victim has previously stayed silent about sexual harassment, she is more likely to come forward to prevent the same conduct from happening to other women. Dr. Fitzgerald said that learning that other women have been harassed or are at risk of being harassed can change the calculus and can outweigh the personal costs of reporting.

Based on Justice Chaney's testimony, and that of the expert witness, the masters accepted Justice Chaney's explanation that she believed disclosing Justice Johnson's conduct would seriously disrupt the work of their division, so she committed to maintaining a collegial relationship with him. Although they found her decision to write the letter to the Governor's appointments secretary "perplexing," and stated that her representations in the letter about his fitness,

character, and collegial nature stand in "stark contrast" to her testimony, they concluded that Justice Chaney's statements in the letter "do not negate the reliability of her overall testimony." Further, while they agreed with Justice Johnson that Justice Chaney's failure to report his conduct raises "legitimate questions," they found that, despite her awareness of her duty, she made the deliberate decision to address the situation by working cooperatively with him, "an appeasement strategy commonly used by sexual harassment victims." The masters stated:

> Although in retrospect Justice Chaney's decision not to report or at least tell Justice Johnson his behavior made her uncomfortable may have been ill-advised, there was nothing in her actions that excused Justice Johnson's conduct.
>
> Any reasonable judicial officer should and would have known that you do not touch a colleague's breasts; you do not pat a colleague's buttocks; you do not comment on her nipples; and you do not state that you want to squeeze her "titties." The conduct would be wrongful under any circumstance, but was particularly objectionable because it occurred at the courthouse and reflected "an utter disrespect for the dignity and decorum of the court and is seriously at odds with a judge's duty to avoid conduct that tarnishes the esteem of the judicial office." [Citation.]

Justice Johnson also argued that Justice Chaney should not be found credible due to inconsistencies between some of her testimony and that of other witnesses. For example, Justice Chaney testified that she was unaware that other women at court were being harassed, but she admitted being aware in 2010 of numerous rumors that Justice Johnson harassed women outside of court, knowing that Officer Sauquillo was uncomfortable with Justice Johnson while Officer Sauquillo worked at the court, and knowing by February 2018 that Officer Sauquillo alleged that Justice Johnson propositioned her with sexually explicit language. Further, Justice Chaney did not identify Officer Sauquillo or

Officer Barnachia as persons with knowledge of the relevant events during the workplace investigation at the court, even though she disclosed serious misconduct claims to them two years earlier.

The masters determined that the conflicts in the evidence concern "primarily collateral matters and/or reflect faded memories based on the passage of time, and do not suggest that Justice Chaney cannot be believed on the larger issues of whether [Justice Johnson] engaged in unwanted touching and inappropriate statements." They concluded that her omitting to identify Officers Sauquillo and Barnachia as individuals knowledgeable about Justice Johnson's conduct is consistent with her lack of recall about a conversation she had with Officer Barnachia two years earlier, as well as her desire to protect Officer Sauquillo's confidentiality.

Justice Johnson also posited that Justice Chaney should not be believed because some of her testimony about a telephone conversation she had with Justice Lui in July 2018 was impeached by Justice Lui. Justice Chaney testified that she thought Justice Lui asked her about a female officer in the judicial protection unit during their conversation, and he testified that he did not ask her anything about Officer Sauquillo and does not recall whether Justice Chaney mentioned Officer Sauquillo's name. This conflict or confusion seems to be based on whether Justice Lui identified Sauquillo by name during that conversation. Justice Lui's testimony on the subject is unclear and does not unequivocally impeach Justice Chaney's testimony. And it does not establish that Justice Chaney lacked credibility as to all her allegations.

Justice Johnson further argued that the masters used a "double standard" to credit Justice Chaney's testimony and discredit his testimony. The masters, however, did not unquestioningly accept Justice Chaney's testimony wholesale. To the contrary, they specifically declined to credit some of her testimony, including that Justice Johnson came to her hotel room uninvited all three nights of the conference in Reno, that he grabbed her breasts with "significant pressure"

once or twice a month in the years before she wrote the letter of recommendation to the Governor, that he hugged her and touched her breast as frequently as she claimed, and that he touched her inappropriately and made a "raunchy" comment about her body at the Taix restaurant. They also credited Justice Johnson's testimony about Officer Sauquillo's most serious allegations by finding that the touching and sexual propositioning she alleged did not occur.

Based on our independent review of the evidence, we have determined that the masters properly evaluated the evidence and reached a balanced and correct assessment of what was proven—and what was not proven—by clear and convincing evidence as to the allegations in Count One. We agree that some of Justice Chaney's conduct while she was experiencing sexual harassment by Justice Johnson—particularly the letter to the Governor praising Justice Johnson, her ongoing friendly behavior, and referring to herself as his "conjoined twin"—seems odd and hard to explain. Nevertheless, we also agree with the masters that Justice Chaney's behavior toward Justice Johnson was part of her appeasement strategy, born of her desire to get along with her colleagues and maintain conviviality at the court. And we understand that this desire was one of the several reasons that she did not report him. Justice Chaney's attitude is supported by the testimony of Justice Mallano, who testified that he could understand why she might not want to report sexual harassment if it happened, and remarked: "How could you have four people working as partners, if one suggested that the other committed a sexual battery on them?" Finally, we accept that Justice Chaney had conflicting feelings about Justice Johnson, including being afraid of him, having witnessed his angry demeanor toward her and others.

We do not find Justice Johnson's objections to the masters' findings of fact regarding Justice Chaney persuasive or consistent with the evidence, and we adopt the masters' factual findings.

3. Conclusions of Law

The masters determined that Justice Johnson's conduct toward Justice Chaney, as described above, was unwelcome, undignified, discourteous, offensive, and would reasonably be perceived as sexual harassment of Justice Chaney. They also concluded that it constituted conduct prejudicial to public esteem for the judicial office and violated canons 1 (a judge shall observe high standards of conduct so that the integrity of the judiciary is preserved); 2 (a judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities); 2A (a judge shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary); 3B(4) (a judge shall be patient, dignified, and courteous to persons with whom the judge deals in an official capacity); 3B(5) (a judge shall not, in the performance of judicial duties, engage in speech, gestures, or other conduct that would reasonably be perceived as sexual harassment); 3C(1) (a judge shall not, in the performance of administrative duties, engage in speech, gestures, or other conduct that would reasonably be perceived as sexual harassment); and 4A(2) (a judge shall conduct all of the judge's extrajudicial activities so that they do not demean the judicial office).

The examiner did not object to these legal conclusions. Justice Johnson's objections to these legal conclusions are the same as his objections to the masters' factual findings, which we find are neither persuasive nor consistent with the evidence. We adopt the masters' legal conclusions.

B. Charges not proven to be misconduct

The masters also found that the facts in two charges involving Justice Chaney (counts 1A and 1I) were proven by clear and convincing evidence, as summarized below, but that they did not constitute misconduct.

Count 1A: Telephone call in 2009

1. Findings of Fact

In June 2009, Justice Johnson and Justice Chaney were nominated to the Court of Appeal, Second Appellate District, Division One, on the same day. Justice Mallano wanted to encourage collegiality at the court. He asked Justice Chaney to call Justice Johnson to welcome him to the court. Justice Chaney called Justice Johnson and told him that she was looking forward to working with him. He responded, "I didn't know you were so beautiful," and said he had seen her photograph in the newspaper that morning. The comment confused her, but did not make her uncomfortable.

Justice Chaney's testimony was corroborated by Alexander and Gunner, each of whom testified that she told them about the comment. Gunner testified that Justice Chaney told him about it shortly after the telephone conversation. The comment was also consistent with Justice Johnson's own testimony that he regularly complimented people, including on their physical attributes, as his way of creating a positive relationship.

Justice Johnson denied that the telephone call occurred. He testified that he had received calls from the two other justices on the panel and thought it was "unusual" that he had not received a telephone call from "the third person on the panel" to congratulate him.

The masters found Justice Johnson's credibility on this point to be questionable because he and Justice Chaney were nominated the same day, and Justice Chaney was not on the panel at that time. They stated that Justice Johnson's denial that the telephone call occurred illustrates his "lack of candor."

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

2. Conclusions of Law

The masters concluded that the comment was not judicial misconduct because a single comment to a colleague who was not necessarily offended by it does not rise to the level of a violation of the canons of judicial ethics.[1]

Neither side objected to the masters' legal conclusions, and we adopt them. We dismiss count 1A.

Count 1I: Remark re genitals

1. Findings of Fact

Around the time Justice Chaney signed the Supreme Court recommendation letter to the Governor, she had several conversations with Justice Johnson about why the Governor might not select him for the position. Justice Chaney testified that Justice Johnson discussed his belief that his being a Black male would be a negative factor. She testified that he said that a Black man is very powerful and people are "afraid of the size of a Black man's penis or 'cock' or 'dick'," and that "Black men can pleasure women or something on that order."

The masters found that Justice Johnson made the comments about the size of African-American male genitals, but not in a sexually suggestive or stereotyping manner.

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

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[1] The masters also concluded (incorrectly) that because Justice Johnson made the comment before he was confirmed, it falls outside the commission's jurisdiction as pre-bench conduct. The commission has jurisdiction over conduct occurring within six years before the commencement of the judge's current term. (Cal. Const., art. VI, § 18, subd. (d).) Justice Johnson's current term began in January of 2015. The commission has frequently disciplined judges for pre-bench conduct (e.g., *Inquiry Concerning Couwenberg* (2001) 48 Cal.4th CJP Supp. 205, *Public Censure of Judge Paul D. Seeman* (2013), *Public Censure of Judge Charles R. Brehmer* (2012), *In re Charles S. Stevens* (1982) 31 Cal.3d 403).

2. Conclusions of Law

The masters concluded that no misconduct occurred because the comments did not contravene the canons.

Neither party objected to the masters' legal conclusions, and we adopt them. We dismiss count 1I.

COUNT TWO—Conduct toward CHP Officers Sauquillo and Davison

It was alleged that Justice Johnson made vulgar sexual comments to CHP Officer Tatiana Sauquillo (count 2A), made comments about her appearance (count 2B), put his hand on her thigh while she was driving him (count 2C), and propositioned her for sex (count 2D). It was also alleged that he spoke to CHP Officer Shawna Davison in a sexually suggestive tone (count 2E).

A. Proven charges found to constitute misconduct

The masters found that Justice Johnson made comments to Officer Sauquillo about her appearance and his wife that made her uncomfortable and were improper (count 2B).

Count 2B: Comments to Officer Sauquillo about her appearance

1. Findings of Fact

Officer Sauquillo worked in the Judicial Protection Section (JPS) between 2013 and 2016. Her assignments included transporting Court of Appeal justices to work-related functions. Between October 2013 and May 2016, Justice Johnson occasionally made comments to Officer Sauquillo about her appearance when they were in his chambers, in the court hallways, and when she was driving him while she was assigned to the JPS unit. These comments included that she looked good in her uniform, that he would like to see her out of her uniform, that she looked cute and pretty, that he liked what she was wearing, and unflattering comments about his wife in comparison to Officer Sauquillo. His comments made her uncomfortable.

Justice Johnson admitted that he may have told Officer Sauquillo, "You look nice," but he denied making the other comments.

The masters found that Justice Johnson made the comments because he admitted complimenting Officer Sauquillo's appearance, Officer Barnachia believed that Justice Johnson had a "crush" on Officer Sauquillo, and Justice Johnson's comments were consistent with evidence that he often made these types of comments to women with whom he worked.

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

2. Conclusions of Law

The masters concluded that Justice Johnson's comments to Officer Sauquillo about her appearance and his wife would reasonably be perceived as sexual harassment, constituted prejudicial misconduct, and violated canons 1, 2, 2A, 3B(4), and 3C(1).[2]

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

B. Charges not proven to be misconduct

The masters found that three counts of alleged inappropriate conduct involving crude sexual propositioning and touching of Officer Sauquillo (counts 2A, 2C, and 2D), and one count of alleged suggestive conduct toward Officer Davison (count 2E), were not proven by clear and convincing evidence.

Count 2A, 2C and 2D: Touching Officer Sauquillo's thigh and propositioning her in vulgar language

1. Findings of Fact

Officer Sauquillo testified that, on April 11, 2014, when she was driving Justice Johnson back to court from a professional event in Baldwin Hills, he put

[2] The masters specified that their conclusion that the conduct would reasonably be perceived as sexual harassment does not include a finding that the conduct was in fact sexual harassment under California law because sexual harassment requires severe and pervasive conduct. (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 283.)

his hand on her thigh and propositioned her for sex. She said that he asked if she wanted to go have drinks with him afterwards, and if she would go back to his chambers "to essentially have sex." She also testified that she was "pretty sure" it was at that event when he asked her to "pull over" to "have sex." She declined his overtures. During her direct testimony, she did not say that he said he wanted to "bend her over" or "fuck her from behind," as alleged. When asked on cross-examination if the drive from Baldwin Hills was when Justice Johnson made the "gross statements" to her (i.e., "bend her over," etc.), she said, "Yes," without elaboration.

She did not recall telling anyone about the alleged touching, crude statements, and propositioning while she still worked at the court. When she requested a transfer from the JPS, she did not tell anyone that it was because of Justice Johnson's conduct. She testified that she did not file a complaint about him because she wanted to avoid retaliation, which she had experienced when she previously reported her former CHP supervisor for sexual harassment. She testified that, after she left the court, she told Justice Chaney and Officer Barnachia about Justice Johnson's conduct, but was unsure whether she told either of them about the sexual propositioning with vulgar language. Officer Barnachia testified that he did not recall Officer Sauquillo saying anything to him about Justice Johnson making vulgar comments, propositioning her, or putting his hand on her thigh. Justice Chaney testified that she did not learn of Officer Sauquillo's specific claims until February 2018.

Justice Johnson strenuously denied these allegations and presented evidence that, in April 2014, he and his family were under tremendous stress arising from an incident in which his daughter was being stalked. He also provided evidence that Officer Sauquillo requested a transfer from the JPS unit due to conflicts with her supervisor, and she did not tell anyone it was because of him.

The masters found that the allegations that Justice Johnson once put his hand on Officer Sauquillo's thigh while she was driving him and sexually propositioned her in crude, graphic terms were not proven for several reasons.

First, Officer Sauquillo testified about only one occasion when he sexually propositioned her and touched her, which was while she was driving him from the Baldwin Hills event, and her testimony about this was "equivocal and evasive." For example, when asked to identify all of Justice Johnson's comments that made her feel uncomfortable, Officer Sauquillo briefly stated that, during the drive back, he asked her to have drinks and go to his chambers "to essentially have sex" and she was "pretty sure it was that event, too, when he asked [her] if [she] would pull over [to have sex]."

Second, she admitted that, several years earlier, a CHP supervisor had made vulgar comments to her that were identical to those she alleged Justice Johnson had made (i.e., wanting to "bend her over" and "fuck her from behind"). The masters found that, absent some connection, the possibility of Justice Johnson saying the exact same comments to Officer Sauquillo is "remote."

Third, the masters found it "troubling" that she did not recall telling anyone about the propositioning and vulgar comments until she met with Justice Lui in June 2018 in connection with the workplace investigation. While the masters acknowledge that delayed and selective reporting of sexual harassment is common, and that Officer Sauquillo had suffered retaliation when she reported her previous CHP supervisor for sexual harassment, they viewed these factors "under the unique circumstances" of her close relationships, and highly candid conversations, with Justice Chaney and Officer Barnachia and believed that she would have revealed his behavior to her trusted friends before finally doing so four years later, in February 2018.

Fourth, Officer Sauquillo continued to drive Justice Johnson for about two years and did not ask to not be assigned to drive him or testify about any similar conduct during that time.

Fifth, she testified that she left the JPS unit because she was worried about Justice Johnson's conduct, but her personnel records do not mention that reason, and two witnesses who were close with her testified that she complained about her then-supervisor, not Justice Johnson.

Sixth, no evidence was presented that Justice Johnson was intoxicated the evening of the Baldwin Hills event, which is distinguishable from other incidents in which Justice Johnson engaged in unwanted touching of women while he was intoxicated.

Seventh, Justice Johnson's testimony about the stress he was experiencing due to the events involving his daughter undermines the allegation that he engaged in the conduct at the time. The masters stated that all of these factors together "create serious misgivings about the accuracy of the charged allegations."

Neither party objected to these factual findings, and we adopt them.

2. Conclusions of Law

The masters concluded that the allegations were not proven with clear and convincing evidence.

Neither party objected to these legal conclusions, and we adopt them. We dismiss counts 2A, 2C, and 2D.

Count 2E: Invitation to Officer Davison

1. Findings of Fact

In November 2015, CHP Officer Shawna Davison was assigned to drive Justice Johnson home from the airport. This was the only time she performed a protective service detail for him. She testified that, when they arrived at his house, he invited her inside more than once to use the restroom and told her that no one was home. She perceived it as "sexual in nature" and "sexually suggestive," but she did not testify why she perceived it that way. She declined his offer.

The masters found that Justice Johnson invited Officer Davison into his house after she drove him home, but not that it was in a "sexually suggestive" tone or other improper manner.

Justice Johnson testified that he might have said she should feel free to use his bathroom because he knew she had another 50 miles to drive. He also said that he was upset and distracted that day because his best friend from college had died unexpectedly a few days earlier, he was involved with funeral arrangements and eulogies, and his wife was home to assist him. His wife corroborated that she was home that day to assist him.

Neither side objected to these factual findings, and we adopt them.

2. Conclusions of Law

While the masters found Officer Davison credible in thinking that his invitation was "suggestive," they found no misconduct based on the lack of any objective factors supporting her conclusion, as well as on Justice Johnson's credible testimony that he was distracted and upset that afternoon, and that he may have been concerned that Officer Davison would need to use the facilities before making a long drive.

Neither side objected to these legal conclusions, and we adopt them. We dismiss charge 2E.

COUNT THREE—Conduct toward attorney Butterick

Justice Johnson was charged with engaging in unwelcome, undignified, discourteous behavior toward research attorney Jessica Butterick, that would reasonably be perceived as sexual harassment, on three occasions in 2015 and 2018 (counts 3A, 3B, and 3C). The masters found that these counts were proven.

1. Findings of Fact

Butterick began working for Justice Luis A. Lavin at the Court of Appeal in August 2015. Justice Lavin's chambers were in the North Tower; Justice

Johnson's are in the South Tower. In September 2015, while Butterick was temporarily working in the South Tower, she encountered Justice Johnson. He asked her what she was doing there, and, while stroking her arm between her elbow and shoulder, said, "Well, we got to get you back over here more often." This made her feel uncomfortable.

Butterick's testimony was corroborated by research attorney Alex Ray, who testified that Butterick told him that she had just met Justice Johnson in the hallway, and that he had said something like, "I've never seen you around here before," and touched her arm or shoulder. Butterick also later told research attorney Merete Rietveld about it, which further corroborated her testimony.

At the evidentiary hearing in this matter, Butterick described the way in which Justice Johnson stroked her arm, which included touching her arm in an intimate manner such that his thumb was squeezing her upper arm or near her underarm.

Two months later, she told other attorneys she would not take an office near Justice Johnson's chambers because she felt uncomfortable being so close to his chambers. Ray corroborated this.

In February or March 2018, Butterick encountered Justice Johnson near his chambers in a hallway with photographs of Court of Appeal justices. When he saw her, he said, "You're new," and she responded that she had been Justice Lavin's research attorney for several years. He reached out to shake her hand for what she thought was an "unusual amount of time. Justice Johnson said, "Well, I'm Jeff Johnson. Why haven't we met before?" She replied, "Judge, we met a couple of times." He looked at the row of photographs of appellate justices, which Butterick described as a "row of very [W]hite men," and said to her, "Well, not a lot of people around here look like me." She responded, "Well, everyone here looks like me," because she believed most of the research attorneys were White women. He said words to the effect of, "No. Not a lot of people look like you." Butterick found this overly familiar, and it made her feel a

little bit uncomfortable. Butterick's testimony about this encounter was corroborated by Ray, who testified that she discussed the incident with him at the time. The masters found that, in context, Justice Johnson's statements were intended to be a comment on Butterick's attractiveness and were overly familiar, and that the extended handshake was inappropriate in the workplace.

Later that week, Butterick again saw Justice Johnson in the hallway. He said to Butterick, "Twice in one week," and briefly stroked her arm, which was unwelcome.

Butterick testified that she did not report the conduct in 2015 because reporting inappropriate behavior is "never good for anyone's career," and she believed it would be "career suicide" and would not make a difference. In 2018, she learned that another research attorney, Katie Wohn, had reported Justice Johnson's inappropriate conduct to Justice Lui, so she gave Rietveld, who was communicating with Justice Lui about the workplace investigation, permission to give her name to Justice Lui because she wanted to support Wohn and protect other women.

Justice Johnson admitted the three encounters with Butterick and that they may have included "some form of physical touching," but he denied stroking her arm, particularly in the manner she demonstrated.

The masters found that the three encounters occurred, and that Justice Johnson put his hand on Butterick's arm and stroked it between her elbow and shoulder as he was shaking her hand and greeting her in 2015 and 2018, but that he did not do it in the manner she demonstrated at the hearing because that was not included in her earlier description of the touching to her friends or to commission staff.

Neither party objected to these factual findings, and we adopt them.

2. Conclusions of Law

The masters concluded that the conduct described above constituted a pattern that would reasonably be perceived as sexual harassment,[3] was prejudicial misconduct, and violated canons 1, 2, 2A, 3B(4), and 3C(1).

Neither party objected to these legal conclusions, and we adopt them.

COUNT FOUR—Conduct toward attorney Blatchford

Justice Johnson was charged with engaging in unwelcome, undignified, discourteous behavior toward his research attorney, Andrea Blatchford, that would reasonably be perceived as sexual harassment on six occasions in 2018 (counts 4A-4F). The masters found that all but one of these charges were proven.

A. Proven charges found to constitute misconduct

1. Findings of Fact

Count 4A: Hug and comment

Blatchford worked as a research attorney on Justice Johnson's staff, starting in February 2018. She transferred after five months. About a month after Blatchford began working in his chambers, Justice Johnson raised his voice and reprimanded her during a phone conversation. Afterward, they had a nice conversation about it, and he asked her for a hug. He hugged her and commented that he was very fond of her. Neither the hug nor the comment made her uncomfortable.

Justice Johnson acknowledged that Blatchford "basically told the truth" about the various incidents and that some of his conduct might have been inappropriate.

[3] See footnote 2.

Count 4B: Questions about tattoos

In about May 2018, Justice Johnson and Blatchford were in his chambers, and he pointed to her forearm and asked, "Is that a tat?" [referring to tattoos]. She responded, "Yes." He asked her if she had any more. She said she had five and identified some of them. After the conversation ended, she returned to her office and was working when Justice Johnson came to her office and asked, "Where are the other two?" His question made her a little uncomfortable because he reinitiated the conversation "sort of randomly."

Justice Johnson admitted asking about the tattoos but said he believed the discussion was appropriate because he thought of tattoos as "art" and did not intend anything sexual by his question. He now understands that his behavior was not appropriate. The masters found his "attempts to justify or explain his comments to be unsupported."

Count 4C: Questions about boyfriend

In April or May 2018, Justice Johnson asked Blatchford several questions about her boyfriend. He asked if her boyfriend was an intellectual and said, "You strike me as an intellectual . . . I think it's very important for two people to share that in common." Blatchford felt this discussion was "too personal."

Shortly thereafter, while discussing how to value stolen property in connection with a restitution issue, Blatchford, seeking to show the difficulty in valuing items, noted that a necklace from Tiffany that she was wearing had cost only $200. Justice Johnson asked, "Is that necklace a gift from your boyfriend?" The question made her a little bit uncomfortable because she was wondering why he was asking about her boyfriend again.

In June 2018, Justice Johnson brought up Blatchford's boyfriend again. When she mentioned that she lived in Baldwin Hills, a historically Black neighborhood, he asked, "Oh, is your boyfriend Black?" She said, "No." He then asked her, "Have you ever dated Black guys?" She replied, "Yes." He said, "Well, I guess you went back then." Blatchford understood that Justice Johnson

was referring to a well-known joke that, "Once you go Black, you never go back." Blatchford said she felt shocked by the comment because the only other time someone said that to her was when a Black man was hitting on her or flirting with her, and because it is a "very explicit reference to the stereotype that Black men are well-endowed," compared to White men. Blatchford felt really uncomfortable, and she just wanted to "make it stop and get out."

Justice Johnson admitted asking the questions and making the "Well, I guess you went back then" comment, but said it was a "really dumb joke" that was intended to make fun of a stereotype. He testified that he thought she would see how he was making fun of a stereotype because Blatchford "seemed to be a really enlightened person." He also testified that he now understands that she felt uncomfortable, and acknowledged that the joke was in poor taste. He apologized for the joke and accepted full responsibility for it.

Count 4D: Comment about President Trump and Stormy Daniels

Justice Johnson, Blatchford, and others were at a staff lunch at the Blue Cube restaurant in May 2018. A research attorney raised the subject of a recent television interview of Stormy Daniels and said she did not believe the sexual contact between Daniels and President Trump was consensual. Justice Johnson commented, "To me, it just sounded like it was pedestrian sex." Blatchford understood this to mean that the sex itself was "standard, boring, and not kinky," and it made her uncomfortable because the discussion had been about consent versus coercion, not sex.

Justice Johnson admitted making the statement, but testified that it was merely a shorthand or sanitized version of Daniels's comments about the quality of President Trump's sexual performance. The masters found "his attempts to justify or explain his comments to be unsupported." Justice Johnson testified that he now realizes that there were different sensibilities among those present, and he did not appreciate or respect them the way he should have at the time.

Count 4F: Comment about prostate exam

During a chambers conversation with Blatchford and Justice Helen Bendix, after Justice Bendix mentioned her gynecologist appointment and said, "You men don't have to go through the kinds of things women do," Justice Johnson responded, "Well, there is a prostate exam," and then said, "But it's not like we get aroused during those exams," and laughed. This made Blatchford uncomfortable because "it was yet another instance when he was sort of injecting sex into a conversation that really had nothing to do with sex." Justice Bendix testified that she recalled saying something about the appointment and that women need to go to these appointments regularly, but she did not remember Justice Johnson responding to her statements.

Justice Johnson denied making the comment about "arousal," but the masters credited Blatchford's testimony on this issue because she recalled that the comment was unnecessary to the conversation, and it was consistent with her observations that Justice Johnson frequently injects sex-related topics into routine conversations.

Neither party objected to the factual findings regarding the foregoing counts, and we adopt them.

2. Conclusions of Law

The masters stated: "Justice Johnson engaged in a pattern of conduct toward his research attorney Blatchford that made her feel uncomfortable. The conduct included asking her overly personal questions about topics related to her tattoos and her boyfriend; making a joke based on sexual and racial stereotypes; making a sexual reference during a staff lunch that was out of context for the specific topic being discussed; and making a joke about sexual arousal while in his chambers. Considered together, the comments were unwanted and had no place in the courthouse or at the staff lunch during the work day." They concluded that allegations proven in counts 4A, 4B, 4C, 4D, and 4F were part of

a pattern that would reasonably be perceived as sexual harassment,[4] constituted prejudicial misconduct, and violated canons 1, 2, 2A, 3B(4), and 3C(1).

Neither party objected to these legal conclusions, and we adopt them.

B. Charges not proven to be misconduct

Count 4E: Comment about being his "favorite"

Justice Johnson told Blatchford that she was his "favorite" and put his finger to his lips. Blatchford felt uncomfortable because she did not think it was healthy to compare employees that way, and she did not want to keep secrets from her coworkers. She told him that she did not like him saying that, but he continued to make the comment to her several times. She acknowledged that the comments were made in the context of Justice Johnson's appreciation for her work.

Justice Johnson admitted making the comment that Blatchford was his favorite and putting his finger to his lips. He said he did so because he did not want to make his other attorneys feel bad.

The masters found that, although these facts were proven, the "favorite" comments did not constitute misconduct because Blatchford and Justice Johnson understood that they were made in reference to Blatchford's work.

Neither party objected to these factual findings or legal conclusions, and we adopt them. We dismiss count 4E.

COUNT FIVE—Conduct toward other women at the appellate court

Justice Johnson was alleged to have engaged in inappropriate conduct toward several Court of Appeal employees: judicial assistants Trisha Velez (count 5A) and Carolyn Currie (count 5C), research attorney Katie Wohn (count 5B), and Court of Appeal Justice Elizabeth Grimes (count 5D). All of these charges were found proven.

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[4] See footnote 2.

Count 5A: Judicial assistant Velez

1. Findings of Fact

In 2013, Justice Johnson repeatedly asked Justice Chaney's judicial assistant Trisha Velez to join him for coffee, which she declined about five times. He later saw her walking into the courthouse when Justice Chaney was scheduled to be absent, and told her she had no excuse not to join him for coffee. She reluctantly agreed. During their conversation at the Syrup café, he told her that, if he were appointed to the California Supreme Court, he would like to bring her as one of his judicial assistants. She agreed to have coffee with him a second time, during which he told her he was "unhappily married" and asked about her private life. When she said her first husband was a "philanderer," he replied that if he were married to her, he "would never leave her bed," and that he liked her. This incident had a big impact on her and made her very uncomfortable and upset. Two weeks later, Justice Johnson approached her at her desk, and she told him that she was never going to coffee or anywhere with him again. Five minutes later, he telephoned her and asked her to come to his chambers and said he wanted to talk to her. This made her feel "panicked," and she contacted research attorney Kristi Cook, who suggested that they immediately leave the court together, which they did. During the five years following the coffee outings, Justice Johnson made comments like, "You're my favorite," "I love you" and wink at her, "I got your back," and "We're good," and would blow kisses at her. Justice Johnson also told Justice Chaney and Justice Rothschild about Velez's private life, which he learned about from Arash Goleh, a friend of his who had attended high school with Velez. Velez was embarrassed and horrified that the justices were discussing her personal life.

Justice Johnson admitted having coffee with Velez twice, asking her to come to his chambers, and making personal statements about her private life to others. He said he regretted revealing Velez's personal information. Justice Johnson denied making the comment that, if he were married to her, he would

never leave her bed. He testified that he was "100 percent confident" that he said, "A good man wouldn't leave his wife at home in bed wondering where he was." He also denied telling her he was unhappy in his marriage.

The masters found that his testimony denying the "I would never leave your bed" remark was "not credible" and reflects his "intentional fabrication of the relevant facts." They noted that, in his written response to the preliminary investigation letter, Justice Johnson denied conveying to Velez "anything about a bed." They said: "This evolution in his description of the conversation suggests that Justice Johnson is being untruthful and is attempting—upon further reflection—to posit an innocent (but false) context for his remarks." They further noted that, although in his response to the commission's preliminary investigation letter he denied calling her his favorite and blowing her kisses, he did not attempt to rebut these allegations at the evidentiary hearing.

The masters found Velez to be a credible witness who described the events in a detailed and straightforward manner, without embellishment, and who had no motive to misrepresent the facts. Her testimony about her conversations at the Syrup café were corroborated by Cook, with whom Velez discussed Justice Johnson's actions, including the remark about never leaving her bed. Velez's testimony was further corroborated by Justice Johnson's judicial assistant Carolyn Currie, who testified that Velez told her about going to coffee with Justice Johnson, his comment about never leaving her bed, and Velez's statement to her that Justice Johnson was the "biggest sexual harasser." The masters also found Justice Johnson's statements to be consistent with those he made to other women about being in love with them if they had met when they were younger and being unhappily married.

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

2. Conclusions of Law

The masters concluded that seeking to create a personal or romantic relationship with Velez during working hours, making sexually suggestive

remarks at a café, making inappropriate and overly personal statements to her for the next five years, and discussing her personal life with others without her permission was part of a pattern that would reasonably be perceived as sexual harassment,[5] constituted prejudicial misconduct, and violated canons 1, 2, 2A, 3B(4), and 3C(1). As the masters stated, "Respect for the judicial office is diminished when a judicial officer uses sexually suggestive language and seeks to establish a personal or romantic relationship with a judicial assistant during working hours over her clear discomfort."

Neither party objected to these legal conclusions, and we adopt them.

Count 5B: Attorney Wohn

1. Findings of Fact

Katie Wohn was Justice Johnson's research attorney between 2009 and 2015. Between August 2009 through November or December 2012, Justice Johnson made multiple comments about Wohn's appearance and scent, including telling her that certain clothing "looked great" on her, that she "smelled nice," and that she had "beautiful eyes," which made her feel uncomfortable. He also invited her to lunch for her birthday in 2012. She tried to invite other people to join, but no one was available. It was the first time she went to lunch with Justice Johnson. During the lunch, Justice Johnson told Wohn that if he had been in high school with her, he would have been in love with her. This made her feel very uncomfortable because he was looking straight at her and "it seemed flirtatious." She felt it was a "lead-in to looking for more of a relationship" than a work relationship. She responded with something like, "No, you wouldn't," and they left soon after. Wohn testified that Justice Johnson stopped making compliments and personal comments to her after they had a disagreement about her work schedule.

[5] See footnote 2.

Wohn also testified that Justice Johnson would often sit in a guest chair in his office that allowed him to stare directly into her office, which made her so uncomfortable that she would bring in large flower arrangements to block his view. She also testified that she saw him intoxicated and with a woman late at night in his chambers, and that she saw beer bottles in his office trash can when she arrived in the morning. She did not report his conduct because she did not believe the court would follow up.

Justice Johnson did not specifically deny saying that he would have been in love with Wohn if he had been in high school with her. He admitted making the statements to Wohn about her appearance and smell, but denied that he did so for an improper purpose or to make Wohn uncomfortable. He argued that they were only "social compliments" that are "part and parcel of casual conversation amongst adults." The masters rejected this contention and stated that his comments about his supervised employee's appearance were not appropriate conversation at work. Justice Johnson also claimed that Wohn's testimony reflected an embellished memory after she spoke with other Court of Appeal attorneys. The masters also rejected this, stating that, based on Wohn's testimony, they were convinced that, from day one, Wohn was uncomfortable with Justice Johnson's informal and overly personal communications with his staff and became increasingly offended when he began making compliments about her appearance and staring at her.

Neither party objected to these factual findings, and we adopt them.

2. Conclusions of law

The masters concluded that Justice Johnson's remarks would reasonably be perceived as sexual harassment[6] and violated canons 1, 2, 2A, 3B(4), and 3C(1), but because they were isolated and the content did not bring disrepute to

[6] See footnote 2.

the judicial office, they constituted improper action, rather than prejudicial misconduct.

Justice Johnson did not object to these legal conclusions. The examiner objected and requested that this charge be combined with four others (counts 5A, 5C, 5D, and 10) and be found to constitute prejudicial misconduct. We agree with the examiner that Justice Johnson's remarks to Wohn should be deemed prejudicial misconduct, rather than improper action. We agree with the masters that the conduct would reasonably be perceived as sexual harassment and conclude, therefore, that because the perception of sexual harassment is involved, a reasonable observer would find it prejudicial to public esteem for the judicial office. In addition, the fact that Justice Johnson was Wohn's supervisor while he was engaging in the misconduct is relevant to our determination. Accordingly, we find that the allegations involving Wohn constituted prejudicial misconduct. We do not find it necessary to consolidate these charges with others, as the examiner suggests, in order to conclude that Justice Johnson's conduct toward Wohn constitutes prejudicial misconduct.

Count 5C: Judicial assistant Currie

1. Findings of Fact

Between 2009 and 2011, Justice Johnson made comments to his judicial assistant Carolyn Currie about her appearance and scent, such as "You look hot," and "You smell good," that made her uncomfortable. Currie said she did not report Justice Johnson's conduct because she did not know what the process was, she did not know of anyone to go to, and Justice Johnson was her boss and had the power to fire her.

The masters found that Currie's testimony was "highly credible," and that her testimony was supported by evidence showing that Justice Johnson frequently did not conduct himself in accord with professional standards at work, and that he often acted in an overly personal and inappropriate manner with his staff and other employees.

Justice Johnson admitted making the complimentary comments. He said he did not realize that using the word "hot" to compliment someone's outfit was socially inappropriate, and that his intent was solely to express that something looks "really good" on the person.

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

2. Conclusions of law

The masters concluded that Justice Johnson's remarks would reasonably be perceived as sexual harassment[7] and violated canons 1, 2, 2A, 3B(4), and 3C(1), but because they were isolated and the content did not bring disrepute to the judicial bench, they constituted improper action, rather than prejudicial misconduct.

The examiner objected on the ground that the conduct should constitute prejudicial misconduct. We agree with the examiner that if the conduct would reasonably be perceived as sexual harassment, a reasonable observer would find it prejudicial to public esteem for the judicial office. We also find it relevant that Justice Johnson was Currie's supervisor while he was engaging in the misconduct. Accordingly, we find that the allegations involving Currie constitute prejudicial misconduct. We decline the examiner's request to consolidate this charge with others because we find that it constitutes prejudicial misconduct on its own.

Count 5D: Justice Grimes

1. Findings of Fact

In about 2010, Justice Johnson told Justice Elizabeth Grimes, who was wearing workout shorts and a top at lunchtime, something like, "You have the cutest little ass in the Second Appellate District." He repeated his remark to Justice Chaney, who was present and asked him what he had said. Justice Chaney's testimony on this subject was supported by evidence showing that

[7] See footnote 2.

Justice Johnson would regularly notice and remark on the physical attributes of women, including those with whom he worked (see, e.g., testimony of Officer Barnachia, Officer Sauquillo, Wohn, Currie, and Butterick).

Justice Grimes testified that she did not recall the remark. She acknowledged, however, that she would regularly work out with a personal trainer during the relevant time period. Justice Lui testified that, after Justice Chaney told him about the "best ass" remark, he asked Justice Trisha Bigelow whether she was aware of any inappropriate actions or statements by Justice Johnson, and she volunteered that Justice Grimes had told her about the "best ass" statement.

Justice Johnson denied making the remark and said it was "another lie" by Justice Chaney.

Neither party objected to these factual findings, and we adopt them.

2. Conclusions of law

The masters found that Justice Johnson made the "cutest ass" (or similar) statement in a public space that could have been overheard by others (and was overheard by Justice Chaney) during work hours in front of the courthouse building, which, even if in jest, was inappropriate and undignified, in violation of canons 1, 2, 2A, and 3B(4). They concluded that because it was a single remark and not in a courtroom setting, an objective observer would not conclude that it diminished public esteem for the judicial office; therefore, it was improper action and not prejudicial misconduct. They also did not find that it created the appearance of sexual harassment.

The examiner requested that this charge be grouped with others as prejudicial misconduct. We decline to do so because we do not believe a reasonable observer would necessarily find that the comment, made by one judge to a peer, would tarnish public esteem for the judiciary. We adopt the masters' legal conclusions.

COUNT SIX—Demeanor toward people at the appellate court

Justice Johnson was charged with displaying poor demeanor toward four court employees: Justice Chaney (count 6A), judicial assistant Carolyn Currie (count 6B), his research attorney Ellen Lin (count 6C), and Justice Chaney's research attorney Daniel Alexander (count 6D). All of these charges were found proven.

Count 6A: Justice Chaney

1. Findings of Fact

Shortly after an oral argument session in October or November 2009, Justice Johnson approached Justice Chaney in the courthouse hallway, got very close to her, pointed and shook his finger in her face, and said, "Don't you ever interrupt me again." The encounter left her shocked and frightened. Justice Chaney's yoga teacher Gunner testified that she told him about this incident, which left her shaken.

Justice Johnson denied that the incident occurred and suggested that Justice Chaney is overly sensitive.

The examiner did not object to the masters' factual findings. Justice Johnson objected on the general grounds that Justice Chaney was not credible, as discussed in Count One above. We do not find Justice Johnson's objections persuasive or consistent with the evidence, and we adopt the masters' factual findings.

2. Conclusions of Law

The masters concluded that Justice Johnson displayed anger toward Justice Chaney without justification and that this was prejudicial misconduct and violated canons 1, 2, 2A, and 3B(4).

The examiner did not object to the masters' legal conclusions. Justice Johnson objected on the general grounds regarding Justice Chaney, as discussed in Count One above. We do not find Justice Johnson's objections

persuasive or consistent with the evidence, and we adopt the masters' legal conclusions.

Count 6B: Judicial assistant Currie

1. Findings of Fact

On multiple occasions between 2009 and 2018, when Justice Johnson's judicial assistant Currie questioned his instructions, he raised his voice (but did not yell), called her "defiant," and told her he was the boss and she needed to do what he said. Currie testified that she would generally respond by going to the bathroom and crying. The masters found that his conduct was not justified because, although a supervisor can become frustrated and angry when a supervised employee challenges his or her decisions, a judge is required to be patient, dignified, and courteous with all persons with whom the judge deals, including court personnel.

Justice Johnson admitted becoming upset with Currie six or seven times and talking to her in a stern tone, but he denied yelling at her.

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

2. Conclusions of Law

The masters concluded that the conduct toward Currie was improper action because Justice Johnson's discourteous treatment of her happened only a "handful" of times in eight years, the conduct reflected frustrations that are not uncommon when supervisors and staff disagree, and the remarks were not flagrant. They concluded that the conduct violated canons 1, 2, 2A, and 3B(4).

Neither party objected to these legal conclusions, and we adopt them.

Count 6C: Attorney Lin

1. Findings of Fact

Between October 1, 2015 and September 9, 2016, Justice Johnson told his research attorney Ellen Lin that her work on draft opinions was "horrible" and "ignorant," yelled at her on numerous occasions, and stomped his feet while yelling at her on at least one occasion. The masters found Lin to be highly

believable, and her testimony was corroborated by Currie, who testified that she twice heard Justice Johnson "aggressively yelling" at Lin when he was in Lin's office with the door closed, and by judicial assistant Tracey Bumgarner, who testified that she once heard Justice Johnson yelling at Lin. The masters stated that the fact that Justice Johnson was not satisfied with Lin's work did not provide justification to yell and stomp his feet at a supervised employee.

Justice Johnson did not specifically deny yelling at Lin. He acknowledged that he was highly frustrated with the quality of Lin's work.

The examiner did not object to the masters' factual findings. Justice Johnson objected that the findings regarding yelling are unsubstantiated. Because the masters found that Currie and Bumgarner corroborated the yelling allegation, we adopt the masters' factual findings, including as to yelling.

2. Conclusions of Law

The masters concluded that Justice Johnson used derogatory and humiliating words to criticize Lin's work, which was prejudicial misconduct and violated canons 1, 2, 2A, and 3B(4).

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

Count 6D: Attorney Alexander

1. Findings of Fact

In approximately December 2017 or January 2018, when Justice Johnson was discussing a case with Justice Chaney and Justice Rothschild, and research attorney Alexander, he disagreed with Alexander about how the case should be decided and became angry and yelled at Alexander over their difference of opinion. Alexander testified that it was like an "explosion," and that Justice Johnson called him and Justice Chaney "stupid," which felt humiliating. The masters found his testimony credible.

Justice Chaney corroborated Alexander's testimony, stating that Justice Johnson disagreed with Alexander "strongly, rudely, aggressively" and called

them "stupid." She said it was frightening and upsetting. Justice Rothschild also corroborated Alexander's testimony, testifying that Justice Johnson became angry and aggressive with Alexander, and she believed his anger to be inappropriate to the situation.

The masters found that Justice Johnson attacked Alexander personally by yelling at him in a demeaning fashion, which was offensive and discourteous.

Justice Johnson denied acting inappropriately or calling Alexander "stupid." He described Alexander's claim that he called Alexander "stupid" an "abject lie." Johnson's defense was supported by the testimony of Roger Smith, his former research attorney, who described Johnson's communication style as forceful and direct, but without animosity or ill will. He said he never saw Justice Johnson show anger. Smith said that when Justice Johnson engaged in a vigorous discussion about the law, his voice would go up in volume and acquire an edge, which he did not regard as yelling, although others might. Rebekah Young, another former research attorney, also testified that she never saw Justice Johnson act inappropriately in terms of tone or demeanor, and she always observed him to be respectful of staff attorneys from other chambers.

The examiner did not object to the masters' factual findings. Justice Johnson objected that the findings regarding yelling are unsubstantiated, as corroborated by Justice Rothschild. But Justice Rothschild corroborated that Justice Johnson displayed inappropriate anger toward Alexander. Because the masters found that Justice Rothschild and Justice Chaney corroborated the yelling allegation, we adopt the masters' factual findings, including as to yelling.

2. Conclusions of Law

The masters concluded that Justice Johnson's disrespectful conduct toward Alexander was not patient, dignified, or courteous, which was prejudicial misconduct, and violated canons 1, 2, 2A, and 3B(4).

Neither party objected to these legal conclusions, and we adopt them.

COUNT SEVEN—Conduct toward other women attorneys

Justice Johnson was charged with engaging in a pattern of conduct toward other women attorneys that demeaned the judicial office and lent the prestige of judicial office to advance his personal interests. The alleged conduct involved the following female attorneys, who did not work at the Court of Appeal: Melanie Palmer (count 7A), Allison Schulman (count 7B), Wendy Segall (count 7C), Price Kent (count 7D), Roberta Burnette (count 7E), and Taylor Wagniere (count 7F). The masters found that the allegations were proven as to all of these women except Segall.

A. Proven charges found to constitute misconduct

With respect to Palmer, Justice Johnson was attempting to engage in a personal relationship by seeking to impress her with his status and power, and the trappings of his judicial office, by inviting her to the courthouse and making inappropriate comments to her (count 7A). With respect to Schulman, Justice Johnson became intoxicated, repeatedly touched her body in inappropriate ways, grabbed her waist and wrist, kissed her, and made inappropriate statements to her at one professional event, and became intoxicated and made inappropriate statements to her at another event (count 7B). With respect to Kent, Justice Johnson became highly intoxicated at a dinner, discussed inappropriate personal subjects, suggested he could assist her career, and ran his hand up her thigh under the table (count 7D).

Count 7A: Attorney Palmer

1. Findings of Fact

Attorney Melanie Palmer met Justice Johnson at a mentorship event for new attorneys in 2013. He encouraged the new attorneys there to reach out to him for mentorship. Palmer did so. They agreed to meet for dinner. During the dinner, Palmer told Justice Johnson that she was interested in working at the district attorney's office. They had dinner and drinks, during which he told her that she looked "pretty and young," and that she would have to "prove herself."

After dinner and drinks, Justice Johnson took her back to his chambers at the courthouse, where he commented on her legs and told her she was fit and beautiful, and suggested that his wife used to be attractive, but no longer cared about fitness. This made Palmer uncomfortable. He also told her that he knew Los Angeles County District Attorney (DA) Jackie Lacey and walked his dogs with her, implying that he could help Palmer get a job at the DA's office. He also sent sexually suggestive texts to Palmer over the course of the next few months. This made her feel uncomfortable and "gross." In 2016, she told her friend, attorney Allison Schulman, about Justice Johnson inviting her to his chambers and that it made her feel uncomfortable. Palmer also told Helen Zukin, then a partner at her law firm and now a judge, that she had had a bad experience with Justice Johnson when she was a new lawyer, and that he had taken her back to his chambers after dinner, where he complimented her body and made negative comments about his wife's body, and then sent her texts that were very suggestive and inappropriate.

The masters said, "Viewing the totality of the circumstances, Justice Johnson was attempting to create a personal or romantic relationship with Palmer by bringing her to his chambers, impressing her with his power and status, suggesting that he could assist her with employment opportunities, and then sending her sexually suggestive texts for about four months."

Justice Johnson admitted bringing Palmer back to the courthouse at night and talking to her, but he denied mentioning anything about his wife or sending her suggestive texts. Justice Johnson said he took Palmer to the courthouse because she was asking questions about it, he believes it is one of the most beautiful courtrooms in the state, and he wanted to show her photographs of himself with his family and famous people. He denied that taking a young woman back to his chambers alone after dinner and drinks created any appearance of impropriety. He specifically denied that he told her that he knows DA Lacey and walks his dogs with her, and that he said or implied he could help

her get a job with the DA's office. He testified that he told Palmer that he knows DA Lacey and walks his dogs past her house a lot of mornings. He acknowledged that he was willing to help advance Palmer's career, but said he was not trying to create the impression that he could help her get into the DA's office.

The masters found Justice Johnson's denials "not credible." They found Palmer credible because the conduct about which she testified was consistent with that of other witnesses who had no connection to her, there was no evidence she had any motive to fabricate or exaggerate her testimony, she told a friend about her visit to Justice Johnson's chambers and that it made her uncomfortable well before the court's workplace investigation began, she fit the pattern of the type of women with whom Justice Johnson tried to cultivate a personal or romantic relationship, a superior court judge vouched for her credibility, and she was worried about what the reporting would do to her career. Further, the number and timing of the texts from Justice Johnson do not support his testimony that they were work-related and instead support Palmer's testimony that they were inappropriate. The masters also found that one allegation about a text stating that he felt "insecure" and that she needed to "give [him] something" was not proven because no evidence was produced to support this allegation.

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

2. Conclusions of Law

The masters concluded that Justice Johnson's conduct toward Palmer violated his obligations to uphold the integrity of the judiciary, demeaned the judicial office, impaired the dignity and prestige of the institution of the Court of Appeal, and lent the prestige of the judicial office to advance his personal goals. They stated that a "judicial officer must act in an honorable fashion and must participate in maintaining standards of conduct so that the integrity of the judiciary is preserved." They further concluded that Justice Johnson's actions toward Palmer constituted prejudicial misconduct and violated canons 1, 2, 2A,

2B(2) (judge shall not lend the prestige of judicial office to advance the judge's personal interests), and 4A(2).

The examiner did not object to the masters' legal conclusions. Justice Johnson objected by stating his belief that a conclusion of improper action should be applied to all of the findings in Count Seven, rather than prejudicial misconduct, because an objective observer would not conclude that his conduct would undermine public esteem for the judiciary or bring the judicial office into disrepute. Justice Johnson asserted that the findings in Count Seven "relate to social conversations unrelated to judicial conduct, and when examined separately reflect settings in which judicial officers routinely engage in casual private discussions."

We agree with the masters that Justice Johnson's attempts to cultivate a personal relationship with Palmer, and taking advantage of his position as a respected justice to do so, including by taking her to the courthouse alone at night, making inappropriate comments about her body and his wife, and sending her suggestive texts, bring the judicial office into disrepute and constitute prejudicial misconduct. We adopt the masters' legal conclusions.

Count 7B: Attorney Schulman

1. Findings of Fact

In June 2015, at a reception hosted by the Consumer Attorneys Association of Los Angeles (CAALA) for graduates of its trial academy for newer attorneys, Justice Johnson was introduced to young attorney Allison Schulman, who was excited to meet an appellate justice. He suggested that attorneys take photographs with him and then text him the photographs so he would remember their names. Schulman agreed, took a photograph with Justice Johnson, and texted it to him. Later at the reception, he began acting in a "touchy-feely" manner toward Schulman. He put his hand on her arm, and grabbed her stomach and waist area to turn her body around so that he could talk to her. She testified that he did this more than five times, which made her uncomfortable.

Schulman testified that she was uncomfortable with Justice Johnson's conduct and said, "I don't think it's really appropriate for a man I don't know that I just met to be touching my stomach, and he's in a power [position] and should be more professional than that." As Schulman was leaving the reception with Jake Finkel, a young male attorney who also had attended the trial course, Justice Johnson grabbed her wrist and pulled her toward him, and made comments about her leaving the party with Finkel, including telling her that Finkel was going to "rape" her. He also told her that his friends who were sheriffs or police chiefs would come looking for her if she did not text him the next morning to let him know she was okay. She told Justice Johnson that they were just going to their cars. She felt shocked by his behavior. As she started to exit, Justice Johnson pulled her forward and kissed her cheeks three times. She described the kisses as "really wet" and "gross." Schulman believed Justice Johnson was intoxicated based on the way he was speaking and his unprofessional behavior. She testified that she had only one drink that night. She did not ask him to stop his behavior because she "didn't want to have any problems with him, because he was a judge," and she "just wanted to get out of this situation."

The masters found that Schulman's testimony was "highly believable" regarding this event. They said she testified in a careful manner, provided specific details, and made no attempt to overstate the events. They also found that Justice Johnson was intoxicated at this event.

Schulman's testimony was corroborated by Finkel, who said that, as they were leaving, Schulman looked "surprised and shocked" and was "upset" and told him that Justice Johnson had grabbed her arm, kissed her on the cheek, and told her not to leave with Finkel because Finkel was going to rape her.

Schulman's testimony was also corroborated by the testimony of attorney Ariadne Giannis, who attended the reception and witnessed Justice Johnson touching Schulman inappropriately, putting his arm around Schulman's waist or shoulder, and "being generally touchy and feely." Giannis could tell from

Schulman's face that she was "incredibly offput and uncomfortable" by Justice Johnson's actions. When Schulman later told Giannis that she was very upset, Giannis indicated that she had seen what had happened and understood why Schulman would be upset.

Schulman's testimony was further corroborated by Facebook Messenger communications that she exchanged with attorney Michelle Iarusso that evening, in which she said that Justice Johnson was "groping all of the women" and told her that the guy she was talking to was going to rape her. When Schulman sent Iarusso a photograph of Justice Johnson, which she said was taken when he was "soberish," Iarusso responded, "Jeff," and "He likes a good drink." Iarusso was, coincidentally, friends with Justice Johnson.

Three months later, in September 2015, Schulman and Justice Johnson both attended a CAALA event in Las Vegas. Justice Johnson was a speaker and attended the event in his capacity as an appellate justice. He spent some of his free time with his close friend, Goleh. Goleh invited Schulman to an invitation-only dinner, and said they should meet at a cocktail party beforehand. When Schulman arrived at the cocktail party with Iarusso, Goleh was there and was soon joined by Justice Johnson and his friend Ray Patel. Goleh told Schulman that she would be going to the dinner alone with Justice Johnson because there were only two tickets. This made her feel very uncomfortable. She suggested that they all go to a party that they could all attend instead, which they did. At one point, Schulman was sitting on a couch with Justice Johnson, Patel, and Iarusso. When Iarusso left to get a drink, Justice Johnson asked Schulman to sit right next to him on the couch. When she declined, he asked her about her law firm. She told him she handled employment law cases. He responded that he had the perfect employment case, with "100 percent perfect liability" and "high damages," to refer to her, and said, "But I can only give it to you if you come sit right next to me." Schulman did not want to do this and got up. When she

started to walk away, he yelled at her. Schulman testified that she was "fairly sober" when this occurred.

The masters found that Schulman's testimony was "highly believable" as to the CAALA event and "highly credible" as to the Las Vegas event. They also found that there was "strong, highly credible" evidence that Justice Johnson was intoxicated at the CAALA event.

Schulman's testimony about the Las Vegas event was corroborated by texts between Schulman and Iarusso that were sent before there were any reports of Justice Johnson's alleged sexual harassment of others.

Justice Johnson claimed that Schulman was not credible because she was drinking alcohol at both events and was prone to overdramatizing incidents. He denied grabbing Schulman's stomach and wrists and said he put his arm around her waist only once when the photograph was taken, and he may have shaken her hand with two hands and kissed her "European style." Justice Johnson said he spent the entire evening in Las Vegas with Goleh and Patel, and his only exchange with Schulman and Iarusso was to briefly say hello. He denied sitting on a couch with Schulman and said it made no sense to refer a case to her because she was a brand-new lawyer.

Justice Johnson called his friend Goleh as a witness in his defense. Goleh testified that he was with Justice Johnson most of the evening of the CAALA reception and did not see Justice Johnson acting inappropriately, and that Justice Johnson routinely hugs and kisses people. Goleh said he saw Justice Johnson greet Schulman by shaking her hand and kissing her in a "European" or "Persian" style. He testified that Schulman is often "emotional" when she drinks, and he once saw her standing alone and crying at an unrelated event. Goleh further testified that he was with Justice Johnson the entire evening of the party in Las Vegas, except when he had to use the restroom, and he did not recall seeing Schulman.

The masters rejected Goleh's assertions that Justice Johnson always acted appropriately toward Schulman at the CAALA event because of Goleh's close relationship with Justice Johnson and the inconsistency of his testimony with established facts, including the testimony of Justice Johnson and Iarusso. They did not find it believable that Goleh would have been standing next to Justice Johnson most of the night of the CAALA reception and, therefore, did not accept his assertions that Justice Johnson always acted appropriately toward Schulman. And both Justice Johnson and Iarusso recalled seeing or being with Goleh and Schulman in Las Vegas, which undermines Goleh's testimony that he did not recall seeing Schulman there.

Justice Johnson also called Iarusso as a witness in his defense. The masters found that Iarusso's testimony was "unreliable and biased." Iarusso testified that she and Schulman "drank with abandon" in Las Vegas and that Schulman was "very intoxicated" when they met up with Justice Johnson and Goleh that evening. Iarusso testified that Schulman never complained about Justice Johnson's conduct at either event, but the masters found that Iarusso's testimony was "severely impeached" on cross-examination when she acknowledged her communications with Schulman the evening of the CAALA event. She admitted Schulman had texted her that Justice Johnson got "wasted," "was groping all of the women," and suggested Finkel was going to rape her, to which Iarusso responded that "Jeff" "likes a good drink." Iarusso had a text message exchange with Schulman about nine months after the Las Vegas event, in which Schulman complained about Justice Johnson's conduct and referenced Justice Johnson's "groping all of us" and "telling me that my friend was going to rape me" and that he was going to call his sheriff friends if she did not text him the next morning to tell him she was okay. Schulman also texted that, in Las Vegas, Justice Johnson "was telling me he had a great employment law case for me which he was completely making up, but that I could only have it if I came and sat right next to him."

The masters found Justice Johnson's defenses concerning the first event to be unsupported, and that his denials were overcome by strong, highly credible evidence. Concerning the Las Vegas event, they found that he was attempting to create a personal relationship with Schulman that evening, and that he was seeking to pressure Schulman to sit next to him on the couch by stating that he could refer a case to her. His anger when she refused is consistent with other evidence of his demeanor.

Schulman testified that she did not report the events involving Justice Johnson because she was concerned about retaliation and the consequences of reporting a judicial officer. She first reported the incidents to the commission in July 2018, after her acquaintance Melanie Palmer told her about the Daily Journal article discussing sexual harassment allegations against Justice Johnson.

Neither party objected to these factual findings, and we adopt them.

2. Conclusions of Law

The masters concluded that Justice Johnson's conduct toward Schulman violated his obligations to uphold the integrity of the judiciary, demeaned the judicial office, impaired the dignity and prestige of the institution of the Court of Appeal, and lent the prestige of the judicial office to advance his personal goals. They further concluded that it constituted prejudicial misconduct and violated canons 1, 2, 2A, 2B(2), and 4A(2).

The examiner did not object to the masters' legal conclusions. Justice Johnson objected by stating his belief that a conclusion of improper action should be applied to all of the findings in Count Seven, which he asserted "related to social conversations unrelated to judicial conduct," and, when examined separately, "reflect settings in which judicial officers routinely engage in casual private discussions."

We agree with the masters that Justice Johnson's conduct toward Schulman, including grabbing her waist and wrist, kissing her, saying the person

she was with was going to rape her, and trying to get her to sit next to him by taking advantage of his position and saying he would refer a case to her, bring the judicial office into disrepute. We adopt the masters' legal conclusions.

Count 7D: Attorney Kent

1. Findings of Fact

Attorney Price Kent worked as a young associate at the law firm of Marcin Lambirth from 2007 to 2012. At that time, the firm was managed by partners John Marcin and Timothy Lambirth. The firm is now closed. In about June 2009, the Marcin Lambirth partners invited Kent to attend Justice Johnson's Court of Appeal nomination party. Marcin was close friends with Justice Johnson. When Kent met Justice Johnson, he told her that he would like to invite her to his chambers to talk, so he could learn more about her and perhaps help her with her career. Two months later, the firm partners invited Kent to Justice Johnson's swearing-in ceremony and told her that Justice Johnson had been impressed with her and asked them to bring her to the ceremony.

In late 2009 or early 2010, the firm hosted a bowling event for its attorneys, followed by a dinner at Maggiano's restaurant. Justice Johnson attended both the bowling event and the dinner. At the bowling alley, Justice Johnson discussed inappropriate personal subjects with young attorneys. He drank a lot of alcohol and discussed with Kent his views that "humans were not meant to be a monogamous race" and identified various "powerful people" who agreed with him. Kent tried to change the subject and did not think it was professional or appropriate to be discussing "people's sexual exploits or whether it was okay to cheat." Kent felt Justice Johnson was acting "flirtatious," "overly friendly," and "entitled" toward her. At the dinner, Justice Johnson asked to sit next to Kent. He sat to her left, and the partners sat to her right. During the dinner, Justice Johnson again invited her to his chambers and said he could help her with her career and networking, and introduce her to people he knew "in the business." He then reached under the table, put his hand just over her knee, and slid his

hand up to the middle of her thigh. Kent was shocked and tried to remove his hand, and said something to the effect of, "Are you kidding me?" Justice Johnson did not immediately remove his hand and said something like, "What?" Kent immediately left the table because she was upset and in shock. She told her paralegal what had happened. When she returned to the table to get her things, Justice Johnson kept insisting that he walk her to her car. She repeatedly said, "No."

The next morning, Kent emailed the law firm partners telling them what had happened and that she was very upset about the incident. (The email was not produced, presumably because the firm dissolved years ago, and such records were not kept.) Kent expressed concern that Justice Johnson had an alcohol problem. The partners told her they would handle it and speak to Justice Johnson. They later told her they had done that and that Justice Johnson apologized and said he had had too much to drink.

Kent's testimony was corroborated by Regina Ashkinadze Spurley, a former Marcin Lambirth attorney who attended the bowling event and the dinner. Spurley recalled Justice Johnson leaning in toward Kent and paying attention only to Kent at the dinner, and that Kent was very upset later that night and Justice Johnson had said or done something during the dinner that made Kent highly upset and leave the event. Spurley remembered thinking that Justice Johnson was under the influence of alcohol that evening.

Justice Johnson recalled seeing Kent at a bowling alley event, but in 2012. He denied being intoxicated at the event that took place in 2009 or 2010. He did not recall sitting next to Kent at Maggiano's or speaking to her while he was there. He said the allegations about putting his hand on Kent's thigh was "pure fabrication." The masters found Kent's recall of the events to be "highly credible" and that there was no evidence she had any motive to misrepresent the truth. To the contrary, she was a reluctant witness. The masters declined to credit Justice Johnson's assertions that he did not engage in the wrongful conduct.

Justice Johnson called as a defense witness Timothy Lambirth, a partner at the firm where Kent was employed. Lambirth testified that he did not believe Justice Johnson was intoxicated at the bowling event. He did not testify about Justice Johnson's level of intoxication at the subsequent dinner. Lambirth also testified that the next day Kent, who was "a little bit agitated," told him that Justice Johnson had "hit on her" and walked her to her car, where he wanted, or tried, to kiss her. Lambirth did not recall Kent saying anything about Justice Johnson touching her thigh, but he acknowledged that he had suffered from a neurological condition that could cause some cognitive issues. The masters found Lambirth's testimony that Kent complained to him the next day about Justice Johnson's behavior to be corroborating.

Justice Johnson objected to the masters' factual findings on the grounds that there is no clear and convincing evidence of this charge based on Lambirth's testimony, Kent's conversation with "scorned" attorney Lisa Miller, and the influence of (unspecified) outside events. Justice Johnson asserted that Miller had propositioned him, and when he told the partners at the Lambirth firm, where she was employed, she lost her job.

Justice Johnson argued that Lambirth's memory was distinct as to certain details (Justice Johnson's level of intoxication and what Kent reported to Lambirth the next day), and that those details are in conflict with Kent's testimony. He also asserted that Lambirth's memory difficulties only kept him from managing full cases by himself.

Justice Johnson claimed that Lambirth, who attended the dinner, testified "unequivocally" that Justice Johnson was "sober for the entirety of the event." Lambirth did not testify that Justice Johnson was "sober" at the dinner; he testified that Justice Johnson "did not appear intoxicated" and, in his opinion, "had not been drinking much," at the bowling alley. This preceded the subsequent dinner at a restaurant, where the thigh touching of Kent occurred.

Moreover, Kent and Spurley each testified that Justice Johnson appeared to be intoxicated at the dinner.

Justice Johnson pointed to Lambirth's testimony that Kent told him Justice Johnson had tried to kiss her on her way to her car, but did not say that he touched her thigh. The masters apparently concluded, however, that Lambirth's memory was less reliable than Kent's about the actual conduct because Lambirth had neurological problems during the relevant time. And the touching was likely to make more of a memorable impact on Kent than on Lambirth, and she had no motive to misrepresent the truth.

Justice Johnson also argued that Kent's 2018 contact with Miller cast doubt on her credibility and motivation. The masters found no showing of any relationship between them, other than a professional relationship because they had both worked at the Lambirth firm. They also found no evidence that Kent had any reason to lie on the witness stand merely to gain favor with Miller.

We concur with the masters' factual findings and adopt them.

2. Conclusions of Law

The masters concluded that Justice Johnson's conduct toward Kent demeaned the judicial office and lent the prestige of the judicial office to advance his personal interests. They further concluded that it constituted prejudicial misconduct and violated canons 1, 2, 2A, 2B(2), and 4A(2).

The examiner did not object to the masters' legal conclusions. Justice Johnson objected by stating his belief that a conclusion of improper action should be applied to all of the findings in Count Seven, which he asserted "related to social conversations unrelated to judicial conduct," and, when examined separately, "reflect settings in which judicial officers routinely engage in casual private discussions."

We agree with the masters that Justice Johnson's actions toward Kent, including making inappropriate comments and running his hand up her thigh, bring the judicial office into disrepute. We adopt the masters' legal conclusions.

Count 7E: Attorney Burnette

1. Findings of Fact

In October 2015, attorney Roberta Burnette attended an Association of Business Trial Lawyers (ABTL) dinner at the Jonathan Club in Los Angeles as a networking event because she hoped to be appointed to the ABTL board by her firm. She attended with her then-boyfriend, now-husband Greg Elliot. Justice Johnson also attended the event. When she was alone at a table with Justice Johnson, he said to her, "You know, you're very voluptuous." Trying to brush it off, she said, "Thank you," and then "Hey, have you heard of the Los Angeles Lawyers Philharmonic Orchestra?" He nodded yes, and she said, "I'm in the orchestra. I play the viola. I'm the principal violist." He kept nodding, and she said, "My stand partner is Judge Bendix [then a superior court judge, now a justice on Justice Johnson's court]. Do you know Judge Bendix?" Justice Johnson continued to nod and said, "Yes." He then said, "So you play the viola?" When Burnette said, "Yes," he said, "You need to put your viola mouth on my big black dick." She was shocked and tried to treat it like he had been joking and said, "Oh, no. You don't play the viola with your mouth. It's a string instrument. It's like a big violin." She pantomimed how to play a viola. He responded, "Oh, so you stroke it?" She started saying, "Oh, no, no," and he blurted out, "You need to stroke my big black dick with your viola hand." She stood up, approached Elliot, and said to him, "Get me out of here right now." They left immediately. As they were leaving, she told Elliot what Justice Johnson had said to her.

Elliot corroborated substantially all of Burnette's testimony. He testified that after Burnette told him that she wanted him to get her out of there, as they were taking the elevator, she told him that Justice Johnson had made "very crude and disgusting" remarks to her. He could not recall the precise words used.

After Burnette reported Justice Johnson's actions to her law firm, they did not appoint her to the ABTL board. Burnette did not report Justice Johnson's

conduct to any authority because it was embarrassing, she thought it was a "one-off situation" involving a man who had "just made a really vulgar pass," and she was concerned about retaliation against her or her law firm.

Justice Johnson strenuously denied ever meeting Burnette and said her claims were false and "malicious," and based on a stereotype of a Black man. He testified: "She says that I told her she was voluptuous. So that stereotype, Black male sexualization. She says that I didn't know what the viola was. I'm a Duke, Yale, Oxford educated man whose wife plays cello, who grew up in a household full of music. And she assumed I didn't know what the viola was. So stereotype, ignorant Black man. Then she goes to my next thought being put your viola mouth on my genitals. I described my genitals. No educated Black man who wants to fit into the world and who has been as lucky, successful, and fortunate as I have been wants to be known by his genitals. I'm not going to say to somebody, the first time I meet them, something about my genitals or the color of my genitals or the size. This is not something I've ever said."

Justice Johnson provided a declaration from attorney Eric Swanholdt, which stated that Swanholdt was with Justice Johnson the entire evening, and he did not observe Justice Johnson acting in an improper manner.[8] Swanholdt also stated that he has never seen Justice Johnson show "aggressive sexual or improper intent" or use the type of vulgar language identified by Burnette.

In his post-masters' report briefing, Justice Johnson objected to the masters' factual findings and argued that the clear and convincing standard was not met, based on the following arguments.

First, he claimed that the masters' "reliance on what appear to be political considerations arising from the 'Me Too' movement prompted clear distortions and a reliance on a double standard."

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[8] The parties stipulated to the admissibility of the declaration due to Swanholdt's unavailability to testify in person.

Justice Johnson offered no evidence to support the notion that the masters credited Burnette's testimony due to political considerations, and there is none.

Second, Justice Johnson claimed that there is not a "single witness to corroborate [Burnette's] version of the events." He argued that the masters' conclusion that Burnette's testimony was corroborated by Elliot and two other witnesses is "demonstrably false." He asserts that Elliot's inability to recall the exact words allegedly used means that Elliot "did not corroborate anything."

To the contrary, Elliot testified that Burnette told him that Justice Johnson had made "very crude and disgusting" remarks to her that made her "creeped out" and "quite upset" and caused her to want to leave the event immediately. Elliot did not testify that he could not recall any of the words she spoke, as Justice Johnson asserts. He testified that Burnette told him the language used, but that he did not recall the "exact words." The masters found it surprising that Elliot did not remember the precise words used, but that this did not negate his credibility because it "is reasonable to conclude that an individual would not necessarily commit to memory the vulgar language used against his girlfriend." They also found Elliot credible because he could easily have pretended to remember the exact words since he and Burnette continued to discuss the event after she reported the facts to the commission.

The masters also found that Swanholdt's declaration corroborated Burnette's testimony, contrary to Justice Johnson's assertion that it supports his claim that he never met Burnette. Swanholdt's declaration states that he "believes" he and Justice Johnson were together the entire evening, he does not recall them being apart, and he did not see Justice Johnson sitting next to anyone alone at a table at any time. The masters gave little weight to this because "it is not realistic to assume that two friends would be physically together for an entire night at a professional event at which socializing and networking is expected." Further, Swanholdt declared that he and Justice Johnson joined a table with two other people near a bar, which is consistent with

Burnette's testimony that she walked up to a group of four or five people seated at a table near a bar.

Justice Johnson also contended that the testimony of Los Angeles County Superior Court Judge Kevin Brazile only corroborates that he had been drinking, and not that he "was 'highly intoxicated' to the point where he would black out," a conclusion he asserts is unsupported by any evidence.

The masters never stated that Justice Johnson was intoxicated "to the point of blacking out." What they said is: "Heavy intoxication can affect the ability to recall events. It is undisputed that Justice Johnson was drinking heavily that evening." Judge Brazile, who is Justice Johnson's friend, testified that Justice Johnson "had been drinking a bit much" and was headed to the bar to continue drinking, and that he expressed concern about how Justice Johnson was going to get home because he felt the justice was not in a condition to drive. Justice Johnson testified that he did not think he was able to drive.

Justice Johnson also argued that Burnette testified that she told her adult children and friends what occurred, but that there is no corroboration because these witnesses were not called.

Burnette and her husband Elliot testified convincingly about what occurred. The masters found Burnette and Elliot to be credible and deemed their testimony sufficient to prove the allegations. We concur that their testimony is sufficient.

Third, Justice Johnson claimed that Burnette's story is "unbelievable on its face." The masters found Burnette to be a "highly believable witness" and with "nothing to gain from the reporting" of Justice Johnson's conduct. They stated that there was "no evidence whatsoever supporting that she would concoct an elaborate story of Justice Johnson making vile comments to her in response to her mentioning that she plays in an orchestra." They also found no motive why she would fabricate a story to accuse an appellate justice she did not know of such offensive conduct.

Fourth, Justice Johnson argued that Burnette's "actions did not match her words" because she did not walk away after he allegedly called her "voluptuous." The masters found believable her explanation that she tried to divert his attention and allow him to save face. And she did walk away after his remarks became more offensive.

Fifth, Justice Johnson claims that the comments play into the worst racial stereotypes, that no self-respecting African-American man would ever use them, and that no witness has suggested that he has. He asserts that the vulgar language Burnette attributed to him "is the type of language that a Caucasian person might believe a [B]lack man would use based on stereotypes about how [B]lack men talk."

The masters found no evidence to support Justice Johnson's claim that Burnette's testimony is the result of stereotyping of Black males. The evidence also shows that Justice Johnson has invoked racial stereotypes himself (e.g., his comment to Blatchford about "going back," and his remarks to Justice Chaney about the size of an African-American man's genitals, both of which are based on a stereotype).

Justice Johnson also argued that "no witness came forward to suggest that these highly offensive, racially tinged remarks are any part of Justice Johnson's vocabulary or character," and that the masters improperly considered his alleged propensity to use sexually inappropriate language when drinking. The masters found Justice Johnson's claim that he never uses sexually inappropriate language to be "not credible." The evidence shows that Justice Johnson can be crude. He admitted giving his externs T-shirts stating "BAMF," which he testified stands for "badass motherfucker." They also found that he asked attorney Nina Park, "I've always been wondering, but do you shave your pussy?" (Park was a rebuttal witness whose testimony the masters considered solely for its relevance to certain issues, such as this one.) And Martinez testified that, at a dinner attended by law clerks, Justice Johnson said, "If you want a daughter, you need

to do it doggy style." He admitted making this comment. They further found that he told Justice Chaney that "people are afraid of the size of a Black man's . . . cock or dick."[9]

Sixth, he contended that Burnette could be helping her friend Lisa Miller by "embellishing" the story. Burnette described Miller as a "professional acquaintance" with whom she speaks only once every one or two years. Embellishment implies that Justice Johnson did meet Burnette that evening, but that Burnette exaggerated what occurred, whereas he denies ever meeting Burnette at all. The masters found "no evidence that Burnette had any reason to lie on the witness stand merely to gain favor with Miller or because Miller was angry with Justice Johnson."

Seventh, Justice Johnson argued that Burnette has her own ax to grind with him because she suggested that her then-law firm retaliated against her for complaining about him by denying her the position she wanted on the ABTL board. This makes no sense if, as Justice Johnson claims, he never met Burnette; there would be no reason for her to invent a complaint about an appellate justice *before* the firm decided not to put her on the board.

In our view, not only would Burnette have no reason to make up this story, but when her testimony is viewed in light of the corroborating testimony and the many claims of Justice Johnson's sexual impropriety toward women, including putting his hand on Kent's thigh at a different dinner, also while he was intoxicated, the evidence is clear and convincing that the alleged misconduct involving Burnette occurred. We do not find any of the justice's arguments or objections persuasive, and we adopt the masters' factual findings.

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[9] The masters concluded that this last statement was not misconduct under the circumstances in which it was said.

2. Conclusions of Law

The masters concluded that Justice Johnson's conduct toward Burnette demeaned the judicial office and the integrity of the judiciary. They further concluded that it constituted prejudicial misconduct and violated canons 1, 2, 2A, and 4A(2).

The examiner did not object to the masters' legal conclusions. Justice Johnson objected by stating his belief that a conclusion of improper action should be applied to all of the findings in Count Seven, which he asserted "related to social conversations unrelated to judicial conduct," and, when examined separately, "reflect settings in which judicial officers routinely engage in casual private discussions."

We agree with the masters that Justice Johnson's crude, graphic remarks to Burnette during a professional dinner bring the judicial office into disrepute. We adopt the masters' legal conclusions.

Count 7F: Attorney Wagniere

1. Findings of Fact

Taylor Wagniere met Justice Johnson when she was a law-student extern for a different justice at the Second District Court of Appeal in 2011. Between 2013 and 2015, after her externship had concluded, Justice Johnson and Wagniere had a friendly relationship and occasionally met for lunch or dinner. During that time, Justice Johnson sometimes made her feel uncomfortable by divulging more personal information than she felt was appropriate, commenting on her physical appearance, wanting to know who she was dating, and implying that their lunches or dinners were dates. Justice Johnson also told Wagniere that he was unhappily married, and that he and his wife were living separately, but in the same house. He once kissed her on the mouth, without her consent, which shocked her and made her feel uncomfortable. She continued to exchange texts with Justice Johnson and occasionally see him for meals until 2018.

Justice Johnson admitted kissing Wagniere once, but asserted that he did so to show her his support. He denied making the comments about his marriage.

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

2. Conclusions of Law

The masters concluded that Justice Johnson's conduct toward Wagniere constituted improper action and violated canons 1, 2, 2A, 2(B)2, and 4A(2).

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

B. Charges not proven to be misconduct

The masters found that the allegations in one charge (count 7C) were proven, but that they were not misconduct.

Count 7C: Deputy District Attorney Segall

1. Findings of Fact

When Justice Johnson was walking to lunch with then-Deputy District Attorney Wendy Segall (now a judge), he made comments about her appearance and put his hand on the small of her back to guide her across the street, both of which made her uncomfortable. At the lunch, when talking about Justice Johnson's children, Segall said something like, "You finally got a boy," to which Justice Johnson responded, "Well, it was fun trying," or words to that effect.

Justice Johnson admitted the allegations, but denied that they were canon violations.

Neither party objected to these factual findings, and we adopt them.

2. Conclusions of Law

The masters concluded that Justice Johnson's conduct toward Segall (count 7C) did not constitute a violation of the canons. They stated that, although Justice Johnson's comments during lunch could possibly be perceived as personal or overly friendly, and he may have had a hope or desire to develop a closer relationship in the future, the "judicial canons are not so broad that they

prohibit such thoughts or giving compliments to a lunch companion with whom he or she does not work."

Neither party objected to this legal conclusion, and we adopt it. We dismiss count 7C.

COUNT EIGHT—Alcohol-related behavior

Justice Johnson was charged with nine instances of demeaning the judicial office by appearing to be under the influence of alcohol, seven instances of which occurred at the courthouse late at night. The masters found that seven of the allegations were proven.

A. Proven charges found to constitute misconduct

The masters found that seven of the instances were proven and grouped them into three findings of prejudicial misconduct (one for a wedding he attended (count 8B), one for the CAALA event in Los Angeles (count 8C), and five incidents at the courthouse (counts 8D, 8E, 8G, 8H, and 8I).

1. Findings of Fact

Count 8B: Wedding

In September 2011, Justice Johnson attended the wedding of AUSA Julian Andre in Modesto. Andre was Justice Johnson's extern in 2005 or 2006, and the two have remained good friends. Justice Johnson performed the wedding ceremony, after which there was a cocktail hour, a dinner, and a reception. During the cocktail hour and dinner, Justice Johnson drank to excess. Around midnight, close to when the reception was ending, a staff member asked Justice Johnson to leave the establishment. He was the only guest asked to leave before the end of the reception. Andre testified that he heard Justice Johnson asking, in "an elevated voice," why he had to leave. Andre's brother saw Justice Johnson and a staff person "appear agitated," and it seemed that their voices were raised. Andre's brother and a friend told Justice Johnson it was time to go, and he agreed. The next day, some of Andre's friends thought Justice Johnson

may have had a little too much to drink and maybe was "a little flirty," and they felt "somewhat uncomfortable." Andre's brother did not think Justice Johnson appeared intoxicated at that point, but may have been "buzzed." The masters declined to give much weight to the testimony of Andre and his brother regarding Justice Johnson's level of intoxication due to their relationship with him and their status of groom and best man at the wedding.

The masters gave more credit to the notes of an interview given to commission staff by Daniel Nobel, a friend of Andre's who attended the wedding and is now a pediatric dentist.[10] According to the notes, Nobel said that, at the rehearsal dinner, Justice Johnson gave unwelcome attention to various young women and commented on their beauty. The notes reflect that Nobel said Justice Johnson was asked to leave by a restaurant employee and had said or done something disrespectful to a female employee. According to the notes, Justice Johnson was "drunk" and "loud, yelling, belligerent," and had "no level of decorum."

Justice Johnson testified that he had a glass or two of wine at the dinner, or maybe a couple of glasses during the remainder of the night, and when he asked for a beer at the end of the evening, the waiter said, "No, we're closing," and told him he had to leave. According to Justice Johnson, he asked why the waiter was yelling so loud, the waiter said it was because it was time for him to go, he responded, "Okay. That's not very nice of you, but I'll go," and Andre's brother and a "really big guy" showed up and said it was time to go. He denied that there was an incident involving a female staff member.

The masters stated: "The evidence was undisputed that Justice Johnson was the only guest who was asked to leave the reception before the end of the party. Instead of complying, he demanded another alcoholic beverage and, when this was refused, he became loud, yelled, and acted in a 'belligerent'

[10] The notes were admitted by stipulation because Nobel was unavailable to testify.

manner. This confrontation was noticeable to the guests and was so unsettling that the groom's brother and at least two others were required to intervene and make clear to Justice Johnson that he needed to leave the premises." The masters noted that Justice Johnson had served as the officiant at the wedding and those in attendance were aware of his status as a Court of Appeal justice, and his intoxicated state was a topic of discussion among the wedding guests the next day.

Count 8C: CAALA reception

The masters referred to the facts in count 7(B) regarding the CAALA reception in Los Angeles, at which Justice Johnson became highly intoxicated and engaged in inappropriate behavior with a young female attorney (Schulman) (i.e., grabbing her waist repeatedly, grabbing her wrist and pulling her toward him, kissing her on the cheeks, and telling her that the man she was going to leave with was going to rape her).

Justice Johnson denied being intoxicated at this event.

Count 8D: Incident in August or September 2016

In August or September 2016, custodian Rodney Pettie and Justice Rothschild's judicial assistant Tracey Bumgarner saw Justice Johnson intoxicated at the courthouse late at night. Bumgarner testified that she was working late, and Justice Johnson came into Justice Rothschild's chambers and said, "I got your back Trace, I got your back." She said Justice Johnson appeared to be "very, very, very intoxicated" and was "slurring his words a lot" and "speaking very slowly." Shortly after, she and custodian Pettie were leaving when they encountered Justice Johnson, who was also leaving, and they spoke with him for five to ten minutes. When Bumgarner took the elevator to the judicial parking area where her car was parked, she saw Justice Johnson get into his car and start driving away. As he was driving away, she heard his vehicle hit something or "he slammed his brakes on so hard it sounded like he hit something." Pettie testified that Justice Johnson appeared to have "had a few

drinks that night" and that he believed Justice Johnson was intoxicated based on the "slurring of words, the dialogue that he was having" with them, and the smell of alcohol.

Justice Johnson denied being intoxicated at the courthouse at any time.

Count 8E: Incident in summer of 2017

During the summer of 2017, custodian Darnice Benton saw Justice Johnson outside the courthouse at around 1:00 a.m., as she was driving away at the end of her shift. He was walking on the street and, in her opinion, looked "severely inebriated." She testified that he was walking "topsy-turvy" and in a manner consistent with others she has seen who were intoxicated. She demonstrated this by walking in an extremely unsteady manner, taking very high steps and waving her arms up and down. Benton pulled over to the side of the street and called her supervisor because she was worried about Justice Johnson's safety. Benton's supervisor told her Justice Johnson was a grown man and could handle himself. Benton saw Justice Johnson walk into the Court of Appeal building.

Justice Johnson denied being intoxicated at the courthouse at any time.

Count 8G: Incident involving statues

Custodians Pettie and Cruz Hermosillo testified that they saw Justice Johnson at the courthouse at approximately 1:00 a.m. one night in 2015 with two young women who were dressed as if they were going to a club, with short skirts and high heels. The women appeared to be drunk. The women climbed on large lion statues in the lobby of the courthouse and took "selfies." One of the women fell off a statue and was laughing hysterically. Justice Johnson was standing about ten feet away from them, acting nonchalant, and holding a brown paper bag. He looked at the custodians and shrugged his shoulders, saying, "What are you going to do?" He also asked custodian Hermosillo if he wanted to come to his chambers to "party" with him and the women. These findings are consistent with evidence that the masters found "convincingly shows" that Justice

Johnson would often leave court at about 5:00 p.m. or 5:30 p.m., go to bars or restaurants and drink alcohol, and then come back to the Court of Appeal many hours later.

Justice Johnson did not deny that this incident occurred, but he denied that he was intoxicated. He said he was with "two White women" whom he knew, and whom he said were close friends and "free spirits." He said he told them to get off the statue and they would not. He did not specifically deny asking Hermosillo whether Hermosillo wanted to "party" with him.

Count 8H: Incident in 2016

In 2016, custodian Hermosillo saw Justice Johnson, whom Hermosillo described as "over-the-top drunk," in the courthouse at approximately 11:00 p.m. Justice Johnson told Hermosillo that some people were going to come into the courthouse and asked if Hermosillo would bring them to his chambers. A man and a woman subsequently entered the building from the parking garage. The woman appeared to be intoxicated. Hermosillo took them to Justice Johnson's chambers, and they remained in the building past midnight.

Justice Johnson did not deny that this incident occurred, but he denied that he was intoxicated.

Count 8I: Incident in December 2017

In approximately December 2017, custodian Gabriel Gutierrez saw Justice Johnson in the courthouse hallway around 10:00 p.m. and thought the justice was "drunk." Justice Johnson was leaning against the wall, walking slowly, and stumbling a little bit. Gutierrez asked if Justice Johnson needed assistance. Justice Johnson responded that he was "okay," smiled and burped, while putting two fingers against his lips. He also said, "Take care. Happy holidays. Have a good night."

Justice Johnson denied being intoxicated at the courthouse at any time.

Additional Evidence

The masters considered as additional evidence the testimony of custodian Pettie, who has been cleaning Justice Johnson's chambers for nine years. He has a friendly relationship with Justice Johnson. Although a somewhat reluctant witness, he testified that, between 2016 and 2018, he saw Justice Johnson intoxicated in the late evening about five times. He occasionally saw beer bottles in Justice Johnson's office trash can, "maybe like twice in three or four months." The masters also considered the testimony of custodian Hermosillo, who testified that, between 2015 and 2018, he saw Justice Johnson at the courthouse "on a regular basis" and on "multiple occasions" with "different women" late at night, usually between 10:30 p.m. and 11:00 p.m. He could not tell for certain whether Justice Johnson was actually drunk. He said Justice Johnson would often be carrying a brown paper bag that appeared to contain a "six-pack." He told his supervisor about this behavior because he did not think it was "normal," but he was told to mind his own business. Hermosillo also testified that Pettie would tell him stories about "unusual things going on pertaining to Justice Johnson's chambers."

Justice Johnson's former research attorney Wohn testified that, between 2009 and 2015, she would sometimes see beer cans or bottles in Justice Johnson's trash can when she arrived in the morning. One evening when she was working late, she saw Justice Johnson come into chambers walking very carefully and hanging onto whatever was next to him. He appeared to be trying very carefully to look like he was not intoxicated. She also testified about an incident in about 2011 or 2012 when she heard Justice Johnson enter his chambers with a woman who was apparently not his wife, and they were laughing. Wohn left very soon thereafter.

2. Justice Johnson's defenses and objections to intoxication allegations

Justice Johnson testified that he has never been under the influence of alcohol at the courthouse and that all of the witnesses who testified that he was under the influence were "testifying falsely" as the result of a stereotype of a "shiftless, drunk, lazy Black man." The masters found no evidence that the witnesses who observed Justice Johnson intoxicated at the courthouse testified falsely or were motivated by racial stereotypes. We agree that there is none.

Justice Johnson also argued that he suffers from diabetes, and that this should be a mitigating factor for him. He asserted that both high blood sugar and low blood sugar can cause problems for him, and that high blood sugar causes him to stammer and stutter and experience headaches and fatigue. His wife and two close friends (Goleh and Ralph Galloway) testified that they have seen him unbalanced and unsteady, and slurring words, due to diabetes.

Justice Johnson provided a letter from his treating physician, Dr. Bennett Sloan, stating that he has Type 2 diabetes and that hypoglycemia can occur. The masters noted that Dr. Sloan does not state that Justice Johnson suffers from hypoglycemia or its symptoms.

Justice Johnson also provided a Mayo Clinic article entitled "Hypoglycemia," which states that shakiness, fatigue, pale skin, and tingling around the mouth can be caused by blood sugar levels that are too low. The masters noted that the article states that these same symptoms can also be caused by "excessive alcohol consumption." They concluded that hypoglycemia and its symptoms can also manifest if a person with diabetes consumes alcohol. They specifically rejected Justice Johnson's arguments that his symptoms were the result of low blood sugar, stating that he never presented any evidence that he was suffering from diabetes symptoms or low blood sugar when he was observed exhibiting symptoms of intoxication at the courthouse at night.

The masters also pointed out that Justice Johnson had a habit of going to bars after work and returning to court after drinking alcoholic beverages, and that two witnesses testified about beer bottles found in his chambers trash can. Twelve witnesses testified that they observed him under the influence of alcohol to a degree that he appeared intoxicated (Benton, Pettie, Gutierrez, Hermosillo, Kent, Justice Chaney, Judge Brazile, Burnette, Schulman, Bumgarner, Wohn, and Spurley). Further, he did not explain what he was doing at court late at night when he encountered Bumgarner and Pettie. His close friend Goleh could not recall a single instance, among the hundreds of times they had been together, when he had seen Justice Johnson with diabetic symptoms in the evening. The masters concluded that, by blaming his intoxication symptoms on his diabetes, Justice Johnson "ignores the facts, manifests a lack of awareness that he has a problem with alcohol, and reflects a lack of candor on his part."

We agree with the masters and reject Justice Johnson's arguments about diabetes. We adopt the masters' factual findings.

3. Conclusions of Law

The masters concluded that Justice Johnson's conduct at the wedding (count 8B), his conduct at the CAALA reception (count 8C), and his conduct at the courthouse taken as a group (counts 8D, 8E, 8G, 8H, and 8I) demeaned the judicial office, constituted prejudicial misconduct, and violated canons 1, 2, 2A, and 4A(2). His undignified conduct, as described in counts 8B, 8D, 8E, 8H, and 8I, also violated canon 3B(4).

Regarding the wedding, the masters stated that although it was a private event, "a judge must expect to be the subject of constant public scrutiny, and is prohibited from behaving with impropriety or the appearance of impropriety in both professional and personal conduct."

Regarding the intoxication at the courthouse, the masters found that Justice Johnson "was improperly using court facilities for his personal benefit as a venue to socialize with others in a fashion that was discourteous and disres-

pectful to others at the court facility." They stated: "Engaging in irresponsible and improper behavior in the courthouse 'reflects an utter disrespect for the dignity and decorum of the court and is seriously at odds with a judge's duty to avoid conduct that tarnishes the esteem of the judicial office in the public's eye,'" citing *Censure of Judge Steiner* (2014) at page 7.

The examiner did not object to the masters' legal conclusions. Justice Johnson's objections to their legal conclusions are predicated upon his objections, discussed above. We find those objections unavailing and adopt the masters' legal conclusions.

B. Charges not proven to be misconduct

Count 8A: Intoxication at bar on Spring Street

Justice Johnson was alleged to have been intoxicated at a bar on Spring Street near the Court of Appeal building (count 8A). The masters found that not all of the allegations in this count were proven and that no canons were violated by his actions.

Neither party objected to the masters' factual findings and legal conclusions, and we adopt both. We dismiss count 8A.

Count 8F: Smelling of alcohol at courthouse at night

Justice Johnson allegedly was frequently seen returning to the courthouse at approximately 10:30 p.m. or 11:00 p.m. with a strong smell of alcohol on his breath. The masters found that this charge was not proven.

Neither side objected to the masters' factual findings or legal conclusions, and we adopt both the findings and the conclusions. We dismiss count 8F.

COUNT NINE – Conduct while magistrate judge

It was alleged that Justice Johnson made inappropriate comments to federal court employees Isabel Martinez (count 9A) and Nicole Denow (counts 9B-9E) between 2004 and 2008, while he was a federal magistrate judge. The

masters found that the allegations in Count Nine are barred by the statute of limitations,[11] but they made the factual findings, summarized below, because they are relevant to support other allegations.

1. Findings of Fact

Count 9A: Clerk Martinez

The masters found that then-Magistrate Judge Johnson asked Isabel Martinez, another judge's courtroom clerk who had had a breast augmentation, "out of the blue" if she had had her "boobs done," and held up his hands with his fingers spread apart and asked if he could touch them. She said, "No." The comments made her feel uncomfortable and embarrassed. Martinez testified that, even before he made the comments about her breasts, she did not feel comfortable with him because he would often make inappropriate comments to her, such as asking why she did not "date Black guys."

Martinez's testimony was corroborated by Currie, who worked at the federal court at that time. Currie testified that Martinez told her about the breast incident and that Martinez thought it was "very creepy." Martinez also told Chief Magistrate Judge Patrick Walsh about the incident in 2018. Judge Walsh, who supervised Martinez for 18 years, testified that it was difficult for Martinez to talk about the incident and that he has never questioned her honesty.

Justice Johnson denied asking to touch Martinez's breasts, but admitted asking if she had a breast augmentation. He said he commented on her breasts because he was under the mistaken impression that she had asked his opinion about them. The masters did not find this explanation to be credible.

Neither party objected to these factual findings, other than on statute of limitations grounds, and we adopt them.

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[11] The commission can censure or remove a judge for conduct occurring within six years of the start of the judge's current term. (Cal. Const., art. IV, § 18, subd. (d).) Justice Johnson's current term began in January 2015. Conduct that occurred before January 2009 is, therefore, barred by the statute of limitations.

Count 9B-9E: Denow

The masters found that, from August 2006 to May 2008, then-Magistrate Judge Johnson made various comments to his law clerk, Nicole Denow, that she found offensive and that made her uncomfortable. These comments included remarks about her physical appearance, questions about an extern's boyfriend, negative comments about his wife, and remarks about other women's "boob jobs." The remarks were offensive to her at the time. He once asked her whether it was her "time of the month," which she found uncomfortable, demeaning, and sexist. Once, after Denow went to a farmer's market with another law clerk, then-Magistrate Judge Johnson made a "face of disgust" and said, "I just pictured you having sex with [the law clerk]."

The masters found that Denow was a very honest person and the remarks were consistent with some of Justice Johnson's conduct toward other women. The masters also found that Justice Johnson's denials about making negative comments about his wife, the "sex with [the law clerk] remark," and the "time of the month" remark reflected his "attempts to misrepresent the true facts and the context of the remarks."

Justice Johnson admitted some, but not all, of the remarks.

Neither party objected to these factual findings, other than on statute of limitations grounds, and we adopt them.

2. Conclusions of Law

We agree with the masters that the allegations are barred by the statute of limitations, and, therefore, reach no conclusion as to the level of misconduct and do not consider these allegations when determining discipline. We do, however, consider the conduct to the extent that it supports factual findings in other charges and as evidence of Justice Johnson's honesty, or lack thereof, during these proceedings.

COUNT TEN—Comments about Justices Chaney and Rothschild

Justice Johnson allegedly referred to Justices Chaney and Rothschild as "nasty ass bitches" when speaking to certain CHP officers.

1. Findings of Fact

The masters found that, between September 2015 and October 2016, during a conversation with CHP Officer Barnachia, who was driving him in an official capacity, Justice Johnson referred to Justices Chaney and Rothschild as "nasty ass bitches." They found it corroborating that Officer Barnachia sent Officer Sauquillo a text in October 2016 stating that Justice Johnson would "talk shit" about Justices Chaney and Rothschild, and called them "nasty ass bitches." Officer Sauquillo replied to Officer Barnachia with a text that Justice Johnson called them that to her as well. The masters also found Officer Sauquillo's testimony that Justice Johnson referred to Justices Chaney and Rothschild in the same way to be credible. They further found that such a remark is consistent with Justice Johnson's admission that he used profanity in the workplace in another context, such as giving his externs T-shirts with the initials "BAMF" on them, which he said stands for "bad ass motherfucker."

Justice Johnson testified that he did not recall using the phrase "nasty ass bitches" and that it is not a phrase he uses, but he was "not going to call [Officer] Barnachia a liar." He also testified that the phrase is a "sideways" compliment for a tough or strong-willed woman who is hard to get along with. He said that, if he used it, he is sorry, but he does not believe it violates the canons because it was a private comment that had no improper purpose, and he did not expect the comment would be made public.

Neither party objected to these factual findings, and we adopt them.

2. Conclusions of Law

The masters concluded that the conduct violated canons 1, 2, 2A, and 3B(4), and stated that, "Making personal remarks using profanity about a fellow judicial officer to a subordinate state employee places the judiciary in a negative

light and undermines respect for the judiciary." Nevertheless, they found that the conduct was improper action because they did not think an objective observer would conclude that a few comments made in private to security officers about judicial colleagues would erode public esteem for the judiciary or bring the judicial office into disrepute.

Justice Johnson objected to the legal conclusion that the remark was improper action on the ground that a private comment to another person "in a casual setting where profanity is often used" is not a violation of the canons. He argued that there is no claim that he was actually demeaning another person when he used profanity to underscore a comment about a "strong willed woman." We disagree and find, based in part on the corroborating texts between Officer Barnachia and Officer Sauquillo, that the comment was pejorative and disparaging about his fellow justices, and that it violated the canons.

The examiner objected to the masters' legal conclusion that the remark was improper action, and not prejudicial misconduct, on the ground that the test for prejudicial misconduct is not whether the remarks were made in private, but whether they would, if known to an objective observer, appear to be prejudicial to public esteem for the judicial office, citing *Geiler v. Commission on Judicial Qualifications* (1973) 10 Cal.3d 270, 275. The examiner also cites *Gonzalez v. Commission on Judicial Performance* (1983) 33 Cal.3d 359, 377 for the proposition that, regardless of the speaker's intent, derogatory remarks may become public knowledge and thereby diminish the hearer's esteem for the judiciary, and the "reputation in the community of an individual judge necessarily reflects on that community's regard for the judicial system." The examiner argued that the justice's use of the phrase should be grouped in with comments to Wohn, Currie, and Justice Grimes for a finding of prejudicial misconduct.

We agree with the examiner that disparaging one's colleagues on the bench to individuals who also work for those colleagues (providing judicial security), and using profanity to do so, would, to an objective observer, be

prejudicial to public respect for the judiciary. The masters agree that the remarks undermine respect for the judiciary. And the remarks have, in fact, become public. We conclude that this conduct constitutes prejudicial misconduct.

Rebuttal and Sur-rebuttal Testimony

The examiner called 11 rebuttal witnesses. Justice Johnson called one witness, and testified himself, in sur-rebuttal. Justice Johnson objected to all but three of the rebuttal witnesses. The masters overruled his objections. In their report, the masters stated that their conclusions would have been the same had the rebuttal witnesses not testified, and they only reference the witnesses' testimony to emphasize prior conduct similar to conduct charged in the notice. The masters declined to provide detailed accounts of these witnesses' testimony.

In his post-masters' report briefing, Justice Johnson argued that the testimony of the rebuttal witnesses was improperly admitted and was a "shocking breach of due process and equal protection under the law." We disagree and find that the masters' exercise of their discretion in allowing the testimony was not improper. We refer to this testimony only to the extent that it supports the masters' findings regarding conduct charged in the notice.

IV. DISCIPLINE

In determining the appropriate level of discipline, we consider that our mandate is not to punish, but rather is to protect the public, enforce rigorous standards of judicial conduct, and maintain public confidence in the integrity and impartiality of the judiciary. (See *Broadman, supra,* 18 Cal.4th at pp. 1111-1112.)

The commission has identified several factors it considers in determining the appropriate sanction, including the number of acts and the seriousness of the misconduct, the judge's honesty and integrity, whether the judge appreciates the impropriety of the conduct, the likelihood of future misconduct, the impact of the misconduct on the judicial system, and the existence of prior discipline. (*Inquiry Concerning Saucedo* (2015) 62 Cal.4th CJP Supp. 1, 50.)

The commission may also consider the effect of the misconduct on others and whether the judge has cooperated fully and honestly in the commission proceeding. (Policy Declarations of Com. on Jud. Performance, policies 7.1(1)(f) and 7.1(2)(b).)

The commission also considers any mitigating factors that a judge may advance. (*Inquiry Concerning Van Voorhis* (2003) 48 Cal.4th CJP Supp. 257, 295.)

A. Number of Acts and Seriousness of Misconduct

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

Justice Johnson committed 18 acts of prejudicial misconduct (based on 42 separate instances of proven misconduct). This is a substantial amount of misconduct, and some of it is quite egregious. The masters found the "particularly flagrant" nature of some of the misconduct and the "large number of victims" to be factors in aggravation. Eleven women were victims of Justice Johnson's sexual misconduct (Justice Chaney, Officer Sauquillo, court staff attorneys Butterick, Blatchford, and Wohn; judicial assistants Velez and Currie; and private attorneys Palmer, Schulman, Kent, and Burnette). Seven women were victims of conduct that would reasonably be perceived as sexual harassment in their workplace (Justice Chaney, Officer Sauquillo, Butterick, Blatchford, Velez, Currie and Wohn). Justice Johnson also touched four women's bodies without their consent. He touched Justice Chaney's breasts and patted her buttocks on a number of occasions; he stroked Butterick's arm twice; he grabbed Schulman repeatedly around the waist and at her wrist, and kissed her; and he ran his hand up Kent's thigh. The incidents involving Justice Chaney and Butterick occurred at the courthouse, during business hours. The incidents

involving Schulman and Kent occurred at law-related functions. Unwanted touching is especially serious misconduct.

Justice Johnson also engaged in patterns of making comments to women that were unseemly and particularly inappropriate coming from an appellate justice. Seven women testified that his behavior toward them at court made them uncomfortable (Justice Chaney, Officer Sauquillo, Butterick, Blatchford, Velez, Wohn, and Currie).

Four additional women, who encountered Justice Johnson at professional functions and were aware of his judicial position, testified that his inappropriate behavior toward them shocked them or made them uncomfortable (Palmer, Schulman, Kent, and Burnette).

Justice Johnson also displayed inappropriate demeanor toward three attorneys with whom he worked and his peer on the bench, Justice Chaney.

Justice Johnson further displayed undignified behavior by becoming intoxicated on multiple occasions, and, as the masters stated, he had a pattern of acting "highly inappropriately with female attorneys when he is intoxicated."

Justice Johnson's patterns of improper conduct demonstrate that he lacks the temperament and judgment required for his position.

Justice Johnson argued that he should not be removed for prejudicial misconduct alone because judges have only been removed in matters that include willful misconduct. Justice Johnson appears to believe that prejudicial misconduct is, by definition, less serious than willful misconduct. As noted above, the Supreme Court has defined prejudicial misconduct as "willful misconduct out of office," with the same characteristics as willful misconduct (i.e., unjudicial conduct committed in bad faith), but which takes place when the judge is not acting in a judicial capacity. (*Broadman, supra,* 18 Cal.4th at pp. 1092-1093.) The California Constitution (art. VI, § 18, subd. (d)(2)) states that the commission may remove a judge for prejudicial misconduct. (See, e.g., *McCullough v. Commission on Judicial Performance* (1989) 49 Cal.3d 186, 191

[prejudicial conduct may "by itself, justify removal"]; *Saucedo, supra,* 62 Cal.4th CJP Supp. at p. 46 ["judge may be removed for prejudicial misconduct"]; *Van Voorhis, supra,* 48 Cal.4th CJP Supp. at p. 314 [judge can be removed for "conduct prejudicial to the administration of justice that brings the judicial office into disrepute"].) A judge can even be removed for only one act of prejudicial misconduct. (*Inquiry Concerning Willoughby* (2000) 48 Cal.4th CJP Supp. 145, 165 ["The commission's reluctance to remove Judge Willoughby from office should not be construed to suggest that the commission will not in the future remove a judge from office, even for a single act of prejudicial conduct, where warranted"].) And, last year, the commission imposed a censure and bar—the maximum penalty available for former judges—based solely on prejudicial misconduct. (*Inquiry Concerning Bailey* (2019) 6 Cal.5th CJP Supp. 24.)

The number and nature of the 18 acts of prejudicial misconduct, and the several acts of unwanted physical touching in particular, support our determination that removal is the appropriate sanction.

B. Honesty and Integrity

The commission has stated that foremost in its consideration of factors relevant to discipline is honesty and integrity. (*Saucedo, supra*, 62 Cal.4th CJP Supp. at p. 50.) Honesty is a minimum qualification expected of every judge. (*Kloepfer v. Commission on Judicial Performance* (1989) 49 Cal.3d 826, 865.) A judge's dishonesty has often been a factor when removing judges from the bench. (See, e.g., *Inquiry Concerning Hall* (2006) 49 Cal.4th CJP Supp. 146; *Inquiry Concerning MacEachern* (2008) 49 Cal.4th CJP Supp. 289, 309; *Ross, supra,* 49 Cal.4th CJP Supp. at pp. 87, 141-143; *Inquiry Concerning Spitzer* (2007) 49 Cal.4th CJP Supp. 254, 286; *Saucedo, supra,* 62 Cal.4th CJP Supp. at p. 52.) "If the essential quality of veracity is lacking, other positive qualities of the person cannot redeem or compensate for the missing fundamental." (*Ross, supra,* 49 Cal.4th CJP Supp. at p. 90.) "The public will not, and should not, respect a judicial officer who has been shown to have repeatedly lied for his own

benefit." (*Inquiry Concerning Murphy* (2001) 48 Cal.4th CJP Supp. 179, 202.) "A judge who does not honor the oath to tell the truth cannot be entrusted with judging the credibility of others." (*MacEachern, supra,* 49 Cal.4th CJP Supp. at p. 309.)

The masters found, as the first aggravating factor, that "Justice Johnson was not truthful in several aspects of his testimony and made affirmative misrepresentations about his behavior and the conduct of others." They specifically pointed out his lack of honesty in connection with five of the ten counts (Counts One, Five, Seven, Eight, Nine),[12] including the following:

- He was "not always truthful" in his testimony about Justice Chaney.
- His "lack of candor" was illustrated by his denial of his telephone call with Justice Chaney.
- His denials that he entered Justice Chaney's hotel room the first night of the Reno trip were "untrue," reflects his "intentional misrepresentations," and were "untruthful."
- His denials that he asked Justice Chaney to have an affair reflect "his failure to tell the truth" and were not credible.
- His testimony about his conversation with judicial assistant Velez, in which he denied making a comment about never leaving her bed, was "not credible" and reflects his "intentional fabrication of the relevant facts."
- His denials that he told attorney Palmer that he knows Los Angeles County DA Jackie Lacey and walks his dogs with her, and that he said

[12] The judge's testimony regarding the allegations in Count Nine, which are barred by the statute of limitation for purposes of evaluating the level of discipline, can be considered for purposes of evaluating his truthfulness during the proceeding. (Policy Declarations of Com. on Jud. Performance, policy 7.1(2)((b).)

or implied he could help Palmer get a job with the DA's office, were "not credible."

- His denials of certain comments he made to former federal law clerk Denow about his wife, visualizing Denow having sex with another law clerk, and Denow's time of the month reflect "attempts to misrepresent the true facts and the context of the remarks."
- His claim that he does not use sexually inappropriate language was found "not credible" by the masters.
- His argument that his intoxication symptoms should be blamed on his diabetes "reflects a lack of candor on his part."

The Supreme Court has said there are few actions that "provide greater justification for removal from office than . . . deliberately providing false information to the Commission in the course of its investigation." (*Saucedo, supra,* 62 Cal.4th CJP Supp. at p. 50). The commission takes "particularly seriously a judge's willingness to lie under oath to the three special masters appointed by the Supreme Court to make factual findings critical to [its] decision." (*Saucedo, supra*, 62 Cal.4th CJP Supp. at p. 51.) "Lack of candor toward the commission is uniquely and exceptionally egregious." (*Ross, supra*, Cal.4th CJP Supp. at p. 90.)

We find that Justice Johnson's intentional fabrication and misrepresentation of facts during the evidentiary hearing, while he was under oath, is exceptionally egregious and demonstrates that he lacks the essential qualities of honesty and integrity that are required of a judge.

C. Appreciation of the Misconduct and Likelihood of Future Misconduct

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

"It is very difficult for a judge to avoid repeating an ethical violation unless he or she recognizes the act as misconduct." (*Van Voorhis, supra,* 48 Cal.4th CJP Supp. at p. 308.)

- Justice Johnson denied the following allegations, which the masters found were proven by clear and convincing evidence:
- Justice Chaney's testimony that he became intoxicated in Reno and entered her hotel room uninvited, solicited an affair with her, offered to "squeeze [her] titties" to make her "feel better," touched her breasts and made "mmm-mmm" sounds when he hugged her, patted her on the buttocks, made comments while staring at her chest, and squeezed her and said, "It can't be sexual harassment because we are both on the same level." He said the "titties" comment was an "absolute fabrication" and Justice Chaney was "using stereotypes to blame" him, and that the allegations about touching her breasts and making sounds were "lies" and "racial stereotyping."
- Butterick's testimony that he stroked her arm between her elbow and shoulder.
- Velez's testimony that he said if he were married to her, he would "never leave her bed," and that he would blow her kisses and call her his "favorite."
- Palmer's testimony that he made negative remarks about his wife, sent Palmer sexually suggestive texts, and told her that he was friends with DA Lacey.
- Schulman's testimony that he grabbed her stomach and wrist, kissed her, said the attorney with whom she was leaving an event was going to rape her, and tried to get her to sit next to him on a couch at a law function by telling her he could refer a case to her.

- Kent's testimony that he put his hand on her thigh under the table during a dinner, which he called "pure fabrication."
- Burnette's testimony about his repugnant comments about the viola, which he said was false and "malicious," and based on stereotypes of a Black man.
- All seven instances of being intoxicated, claiming that every witness who testified about seeing him intoxicated at the courthouse was testifying "falsely" as a result of a racial stereotype.

The masters found it to be an additional aggravating factor that "Justice Johnson showed only limited insight into his misconduct as evidenced by his focus on blaming others for the more serious incidents." They specifically rejected his assertion that he has accepted responsibility for his conduct and stated that, with respect to his most serious misconduct, "there is no evidence he has accepted responsibility for this behavior." To the contrary, he has "attempted to shift the blame to the victims, suggesting they were lying, improperly influenced by third parties, or advancing racial stereotypes."

Justice Johnson has, in fact, gone beyond "suggesting" certain victims were lying and has outright accused them of doing so. He accused Justice Chaney of "telling lies" for "the entire nine-year period" that they were colleagues on the bench, Velez of telling a "false lie" about what he said to her, Kent of "lying" about him touching her thigh, and Burnette of making claims that were "false" and "malicious." He accused Justice Chaney, Officer Sauquillo, and Burnette of racism, asserting that they were "invoking images" of him that were "racist and stereotypical because they thought it would make their story more believable." He also claimed the witnesses who observed him to be intoxicated at the courthouse were resorting to racist stereotypes of him "being a shiftless, drunk, lazy [B]lack man."

The masters found that the claims of stereotyping and racism were not supported by the evidence. We agree that there is no evidence to support

Justice Johnson's claims of stereotyping or racism. In *Spitzer, supra,* 49 Cal.4th CJP Supp. at page 287, the commission stated that it was "troubled" by the judge's willingness to impugn the credibility of witnesses, and noted that the judge's lack of candor was "fundamentally at odds with the role of a judge who is sworn to uphold the law."

We, too, are troubled by Justice Johnson's assertions that certain witnesses, whom the masters found credible, were lying or invoking racist stereotypes. These unfounded accusations compound the injury these witnesses have suffered as a result of Justice Johnson's actions.

As to the limited conduct Justice Johnson does admit (primarily the comments to Officer Sauquillo about her appearance, and various comments to Blatchford, Velez, Currie, and Wohn), the masters state that, while they believe he has gained insight and now understands that he overstepped boundaries, he continues to attempt to justify his behavior by arguing that he did not intend to offend, that he was "curious," that he was attempting to create a positive relationship with others, and that he thought the woman was "more sophisticated and would understand." To the extent that Justice Johnson admitted some of the less serious misconduct, he has, for the most part, either minimized it or argued that it does not violate the canons, as exemplified by the following:

- He characterized the masters' finding that he stroked Butterick's arm twice as a "contested view of [a] handshake or touching forearm in greeting."
- He said his overly personal questions to Blatchford, jokes, and references to sex ("pedestrian sex," "arousal," "Well, I guess you went back then") are "not significant misconduct at all."
- He asserted that blowing kisses, and saying, "You're my favorite" and "I love you," to Velez are comments "praising work performance."
- He argued that the phrase "nasty ass bitches" is "complimentary" and did not violate the canons.

Justice Johnson contended that it is mitigating that much of his proven past conduct was "within the bounds of tolerated or acceptable conduct in the not-so-distant past." The masters found that this contention is unsupported as it concerns judicial officers. They stated:

> It has long been the rule that in all aspects of a judge's life, "a judge must be acutely and constantly aware that everything he or she does or says must be managed through the filter of identity with this high office," and with the awareness a judge is a "public figure who is seen as a symbol of justice." (Rothman [et al., Cal. Judicial Conduct Handbook (4th ed. 2017)] § 1:31 at 21-22.)
>
> Many of the misconduct incidents at issue in these proceedings were clearly wrong today and were clearly wrong from the time he was appointed in 2009. This is true even with respect to his inappropriate compliments and personal questions to female court staff. For well over 10 years, judicial officers have been required to attend mandatory ethics courses where they have been cautioned to avoid engaging in overly familiar conduct with staff and commenting on their appearance. (See Rothman, *supra*, § 2:11 at 74-75.)

At Justice Johnson's appearance before the commission, he stated that classes on gender in the workplace that he has taken since the investigation began have made him "more aware of the changing mores in our society and the rights of women in the workplace." While it is true that social mores have evolved, it has never been acceptable for a judge to engage in unwelcome physical contact with women, or to engage in conduct that would reasonably be perceived as sexual harassment, especially at court. Since 2009, when Justice Johnson was appointed to the Court of Appeal, the Code of Judicial Ethics has required judges to be patient, dignified, and courteous to those with whom they deal in an official capacity; to avoid impropriety and the appearance of impropriety; to refrain from conduct that would reasonably be perceived to be sexual

harassment; and to not demean the judicial office. Since 1999, when the second edition of the California Judicial Conduct Handbook was published, judges have been warned to avoid sexual harassment: "Judges, as administrators of the judicial system, have an obligation to know what constitutes sexual harassment in the work place, and to not only avoid it themselves, but to deal with it in their supervisorial capacity over staff." (Rothman, Cal. Judicial Conduct Handbook (2d ed. 1999) § 6.29, pp. 174-175). Moreover, judges, including Justice Johnson, have been receiving training in avoiding sexual harassment for years.

It is implausible that Justice Johnson did not know the appropriate standards of behavior for a person in his position. Indeed, this is evidenced by his proven comments to Justice Chaney: "It can't be sexual harassment because we're both on the same level" and, "You would never report me [for sexual harassment], would you?" Justice Johnson disregarded those standards for years, creating discomfort for multiple women. And being intoxicated at the courthouse late at night in the presence of those working there has never been proper. We are not persuaded by the argument that much of his proven conduct was within the bounds of acceptable conduct in the "not-so-distant" past.

Justice Johnson also argued that he had no notice that his conduct was improper, and stated, in his post-masters' report briefing that, "While a judicial officer, [he] was never afforded the opportunity to demonstrate his ability to reform in the face of discipline or allegations." The masters rejected this claim, and so do we.

First, the masters stated that he "was, or should have been, aware his misconduct violated the judicial canons" because "some of his conduct was so flagrant that a warning was unnecessary," and "[h]is conduct in becoming highly intoxicated and then engaging in grossly inappropriate behavior with female attorneys did not require advance notice [that] the conduct violated judicial canons of ethics."

Second, he "was on notice that he needed to change his behavior," at least with respect to his alcohol intoxication at the courthouse and his conduct toward women. In late 1994, then-AUSA Richard Drooyan warned then-AUSA Johnson about comments Johnson had made to a young female AUSA about her looks and her dress on several occasions, and told Johnson that he could not do that in a professional setting in an office. Further, Eric George, an attorney whom the masters found "highly reliable on this topic," testified that in approximately late 2009, he learned that the Daily Journal was planning to publish a story about Justice Johnson being ejected from a bar after grabbing the posterior of a waitress while intoxicated. George told Justice Johnson that he had to be careful about being in a situation where he "could be compromised by having these sorts of things said about him." And Justice Johnson admitted that former Justice Joan Dempsey Klein told him in 2014 that there were rumors about him bringing women back to the courthouse, which, if true, would put him in "deep trouble." The masters found that the evidence establishes that some of the rumors were true (i.e., that he was highly intoxicated at the courthouse and brought women guests who were intoxicated into the building).

The evidence establishes that Justice Johnson was on notice about the impropriety of his behavior, yet continued to engage in such behavior for years. Even without the warnings, he should have known his behavior was improper.

Justice Johnson also seems to fault some of the women for not reporting him sooner, arguing that he was denied the opportunity to effect change and modify his behavior. This reflects a lack of awareness that most of the women involved, especially at court, were in a subordinate position to him and did not want to risk potential retaliation if they reported his misconduct. Even some of the women outside of court were reluctant to report his behavior due to possible adverse consequences to their careers. Burnette experienced such a consequence when, after she reported his conduct to her law firm, she was not asked to represent her firm on the ABTL board. Palmer testified that she did not

initially report Justice Johnson because she was concerned that he would badmouth her, and she did not want to put herself in a position where a justice did not like her. Schulman testified that she did not initially report Justice Johnson because she was concerned about retaliation and the consequences of reporting a judicial officer. These concerns are understandable, and the failure to immediately report the misconduct does not mean that it did not happen.

At his appearance before the commission, Justice Johnson asserted that he has undergone therapy and taken various classes, that he has stopped drinking alcohol, and that he has learned to be more cognizant of how his behavior affects others. But he only undertook education and abstinence since the inception of this proceeding. What he did not say at his appearance is that he admits the most serious sexual misconduct. This fact strongly supports our determination that he lacks the capacity to reform.

Justice Johnson further argued that his "excellent" and "exemplary" conduct over the last two years is "the only evidence/predictor" of his "future self-discipline and sensitivity" that the masters had before them. This argument lacks merit because Justice Johnson has been away from the court and its female employees, other than for oral argument, since July 2018, and there is no evidence in the record of his conduct toward women during the past two years.

We find that the extent of Justice Johnson's lack of recognition of his misconduct creates a significant risk that he will reoffend.

D. Impact on Judicial System and Others

"In determining the appropriate level of discipline, the impact of the misconduct on the integrity of and respect for the judiciary must be considered." (Rothman et al., Cal. Judicial Conduct Handbook (4th ed. 2017) § 12:91 at p. 849, citing *Inquiry Concerning Hyde* (2003) 48 Cal.4th CJP Supp. 329, 370.) The nature and extent to which the misconduct has been injurious to others is also relevant in this matter. (Policy Declarations of Com. on Jud. Performance, policy 7.1(1)(f).)

In his post-masters' report briefing, Justice Johnson asserted that, "No person was harmed in their position or treated unfairly by Justice Johnson." This statement reflects a remarkable lack of recognition of the impact of his behavior on others. Although none of Justice Johnson's prejudicial misconduct occurred while he was on the bench, certain instances occurred in the courthouse during court hours, and other instances occurred while he was holding himself out as an appellate justice at professional functions. Further, much of Justice Johnson's misconduct affected the working lives of women at the court, as exemplified by the following:

- Justice Chaney testified that his conduct toward her made her uncomfortable, and she was, and is, afraid of him. Some of his sexual harassment of her made her feel "shocked" and "upset," and she discussed his behavior toward her with others working at the court.
- Butterick, a court research attorney, testified that her interactions with Justice Johnson made her uncomfortable, she told her colleagues she would not take a particular office that was close to Justice Johnson's chambers, and she avoided the South Tower because she did not want to encounter Justice Johnson there.
- Blatchford, a court research attorney, said Justice Johnson's questions about her tattoos and her boyfriend made her "a little uncomfortable," his comments about "pedestrian sex" and "arousal" made her "uncomfortable," and his comment about "not going back" made her "really uncomfortable." She said his references to personal topics caused her to be "on guard."
- Velez, Justice Chaney's judicial assistant, testified that Justice Johnson's remark about never leaving her bed had a "big impact" on her and made her "very uncomfortable." She also said she felt "panicked" when he called her and asked her to come to his chambers, which caused her to leave work early. She felt "embarrassed and

horrified" by his discussing her personal life with other justices. She would attempt to avoid interactions with him, pretending to be on a call, ducking behind her monitor, or leaving the courthouse.

- Wohn, his former research attorney, said that Justice Johnson's comments about her appearance and smell, and that he would have been in love with her in high school, made her feel uncomfortable. She was so uncomfortable about him looking at her that she brought in large flower arrangements to obscure his view of her at her desk.
- Currie, his judicial assistant, testified that Justice Johnson's comments about her appearance and smell made her uncomfortable and embarrassed her.
- Officer Sauquillo said Justice Johnson's comments about her appearance when she was at court made her uncomfortable.

Justice Johnson's conduct also had an adverse impact on female attorneys who did not work at the court, but who encountered him at various law-related functions that he attended by virtue of his position as an appellate justice. For example:

- Palmer said Justice Johnson's comments during her visit to the courthouse made her uncomfortable, and his subsequent sexually suggestive texts made her "feel gross."
- Schulman was "shocked" and "very upset" by his grabbing of her stomach and wrist, kissing her, and commenting that she was going to be raped.
- Kent felt uncomfortable when he paid too much attention to her and was "shocked" and "very upset" when he ran his hand up her thigh under the table.

- Burnette was "quite upset" and "creeped out" by Justice Johnson's vulgar comments related to her playing the viola, and left the event immediately after he made them.

Justice Johnson's displays of anger toward those with whom he worked also had an adverse impact on them. For example:

- Justice Chaney felt "shocked" and "frightened" by his angry outburst toward her.
- Currie would go to the restroom and cry after Justice Johnson became angry with her.
- Alexander testified that Justice Johnson's yelling and calling him "stupid" felt humiliating.

Justice Johnson's appearances at the courthouse late at night when he was intoxicated, and often in the company of others, affected the custodians who were working there. For example:

- Custodian Hermosillo testified that he told his supervisor about Justice Johnson's behavior involving women at the courthouse late at night because he did not think such behavior was "normal," and his supervisor told him to mind his own business.
- Custodian Benton testified that, when she observed him intoxicated out on the street at around 1:00 a.m. one night, she was so concerned about his safety that she called her supervisor, who told her Justice Johnson could handle himself.
- Custodian Gutierrez once encountered Justice Johnson walking slowly and stumbling in the courthouse hallway around 10:00 p.m. and believed he was drunk, so he asked Justice Johnson if he needed assistance.

We consider the adverse effects of Justice Johnson's misconduct on the individuals who were subjected to his actions, and the negative impact of his

misconduct on public perception of the judiciary, to be a substantial aggravating factor.

E. Prior Discipline

Justice Johnson has no prior discipline. The masters found that, while mitigating, this is of "limited weight" given their serious reservations about his ability to reform. Mitigating circumstances have only limited appeal because the aim of commission proceedings in the more serious cases is protection of the public and not punishment. (Rothman, *supra*, § 12:92, p. 856-857.) The commission has removed other judges from the bench who had no prior misconduct, particularly where dishonesty was involved (e.g., *MacEachern, supra,* 49 Cal.4th CJP Supp. at p. 311; *Saucedo*, *supra,* 62 Cal.4th CJP Supp. at p. 53.)

With 18 findings of prejudicial misconduct, some of which would reasonably be perceived as sexual harassment and involves unwelcome touching, and others of which involve misuse of the prestige of office in an effort to cultivate personal relationships with young women, and still others involve intoxication at the courthouse, this matter falls within the "more serious cases" category, and Justice Johnson's lack of prior discipline is of little weight in mitigation.

F. Contributions to Others

There is substantial evidence about Justice Johnson's contributions to the judiciary and to his community. The masters found Justice Johnson's community service to be mitigating, as follows. He has had a positive impact on many lives and devoted time and effort to giving back to the community. His community service includes teaching, tutoring, assisting students in an underserved elementary school, and helping establish a toy drive for underprivileged children. He has taught at local law schools and served as an important mentor to young men and women, many of whom attribute their success in the legal field and their personal lives to Justice Johnson's encouragement and guidance. He assisted others in difficult times. Justice Johnson has also performed important work for,

and made exemplary contributions to, the judicial branch as a member of the Court Facilities Advisory Committee and as chair of the Courthouse Cost Reduction subcommittee, for which he received a Judicial Council award in 2017.

In his post-masters' report briefing, Justice Johnson claimed that his work is "exceptional" and that he was lauded by Justice Rothschild and "all staff attorneys" for his intellect and ability to keenly examine legal issues, without anyone noting any issue that affected his work performance. This claim is undercut by the testimony of Justice Rothschild and Justice Lui.

Justice Rothschild, Justice Johnson's presiding justice since 2014, testified that, while she respected his intellect, she did not respect his work ethic or his work product. She also testified that she counseled Justice Johnson about his demeanor, and that she observed him being angry toward individuals and too aggressive toward attorneys. Justice Rothschild also testified that Justice Lui spoke with Justice Johnson about his demeanor. Justice Rothschild further testified that Justice Johnson's frequent absences from the courthouse and unavailability during work hours made it more difficult to get the division's work done.

Justice Lui, the administrative presiding justice, testified that Justice Johnson had an inappropriate demeanor in court and raised his voice in an angry manner at Justice Rothschild during a case conference.

Justice Johnson also claimed that colleagues testified enthusiastically about his work ethic and intensive preparation for difficult hearings. But that testimony pertains solely to his work on the Court Facilities Advisory Committee, not his work on the bench.

It is undisputed that Justice Johnson has made significant contributions to the judiciary as well as to his community. But even a good reputation for legal knowledge and administrative skills does not mitigate prejudicial misconduct. (*Kloepfer, supra,* 49 Cal.3d at p. 865.)

G. "Social Contagion"

Justice Johnson argued, as another mitigating factor, that he is the victim of "social contagion," whereby witnesses' testimony was tainted because they talked to each other about him. According to Justice Johnson, the following occurred: "Rumors and unsubstantiated gossip" about him began to circulate at the Court of Appeal at least as early as 2016, which included the "exchange and propagation of recalled experiences among persons who would later become complaining witnesses." In the fall of 2017, a staff attorney at the appellate court, Merete Rietveld, began collecting stories about his rumored conduct and, in 2018, initiated circulation of a petition urging sexual harassment training at the court. It went to over 100 people in the judiciary. Rietveld also urged Administrative Presiding Justice Lui to conduct an investigation of allegations about Justice Johnson. Justice Lui initiated a workplace investigation that was conducted by outside counsel.

Around the same time, on July 2, 2018, Justice Lui asked Officer Barnachia whether he was aware of any inappropriate behavior by Justice Johnson toward a female CHP officer. Officer Barnachia mentioned Officer Sauquillo. Justice Lui interviewed Officer Sauquillo, who reported that Justice Johnson had propositioned her, using crude, graphic sexual language. Justice Lui prepared an email about her allegations that he sent to "hundreds and likely thousands" of court personnel throughout the state.[13] Justice Lui sent a subsequent email asking recipients to disregard and not redistribute his earlier

[13] Justice Lui testified that he intended to send a cc of the email to Kathleen Ewins, counsel for the court, but, by mistake, the recipient line autofilled "EXEC-appellate and Supreme Court Staff," which is the group for all appellate court justices and staff, and he did not notice the error. (He apparently typed "Ex" rather than "Ew.") Officer Sauquillo was later discovered to have made similar allegations against a former CHP supervisor, using the same crude language she attributed to Justice Johnson. As discussed above, the masters ultimately found her claim against Justice Johnson to be not credible.

email. The Daily Journal printed an account of Officer Sauquillo's allegations the next day. Justice Johnson asserts that the story "spread like wildfire" and influenced witnesses' thoughts about him.

After the Daily Journal article appeared, attorney Lisa Miller contacted various witnesses whom she knew had had encounters with Justice Johnson and sent an anonymous letter to the commission describing people who had information about Justice Johnson. Justice Johnson asserts that Miller has animosity toward him because he reported her to her boss after she sexually propositioned him, and she was let go by her law firm as a result. He says that a number of witnesses talked among themselves before they were interviewed by commission staff. Justice Johnson argued that there was the "contagion effect" of publicity and gossip that adversely affected witnesses' attitudes and recollections over time.

But Justice Johnson offers no proof that any witness fabricated a story about him based on conversations with other people. The masters concluded that, while there was evidence that Miller had been terminated after Justice Johnson's complaint to the partners in her law firm that she had contacted him about personal matters, the women identified by Miller told the truth and were not improperly influenced by her.

Justice Johnson also points to "admissions about Justice Chaney's private discussions with her staff before they went in for interviews." But this reference pertains to Velez's testimony that Justice Chaney briefly told her "a few things" about Justice Chaney's experience with Justice Johnson before Velez's interview with commission staff, but *after* Velez's interview with the attorney retained to conduct the court's investigation. Velez had, therefore, already been interviewed about her own experiences with Justice Johnson. Justice Johnson also points out that the masters found that Butterick embellished her description of his stroking of her arm while she was testifying, which he attributes to her having talked to other people. But there is no evidence this occurred as a result of her

talking to people, and the masters rejected her embellished description because it was inconsistent with her prior descriptions to friends and commission staff.

Justice Johnson argued that the "toxic nature of the allegations and virulent social metastatic oozing of the leaked email, gossip, Me Too's impact on social and political burdens of proof and objectivity, media propagation of salacious claims, coupled with confirmation bias—rendered fair and objective decision-making more difficult and more politically risky." The masters found that the evidence did not support Justice Johnson's "social contagion" argument.

We agree. Not only is there no evidence to support this highly speculative theory, but there is clear and convincing evidence to support the masters' factual findings, many of which are undergirded by contemporaneous corroborating evidence that preceded any discussions witnesses may have had with one another.

Furthermore, the masters were apparently not swayed against Justice Johnson by any outside factors when they determined to discredit Officer Sauquillo's allegations about Justice Johnson propositioning her for sex in graphic, vulgar language. This was a significant charge in this matter, and their decision to reject it, and some of Justice Chaney's allegations, demonstrates their neutrality. We acknowledge that Officer Sauquillo's allegations were widely disseminated via Justice Lui's email and were publicized in the media, but this does not support Justice Johnson's claim that the victims of his more serious sexual misconduct, or the custodians who observed him intoxicated at the courthouse late at night, fabricated their testimony.

Justice Johnson also argued that the witnesses benefitted from making claims against him, asserting: "Once the word is out that the administration, back channel conversations, colleagues and coworkers are promoting a negative view of a judicial officer, the benefits to career and social approval become irresistible. . . . Simply stated: *when your boss asks you to join the team, you join the team.*" (Italics in original.) There is no support for this assertion.

First, there is no evidence that anyone's "boss" asked anyone to do anything, especially with respect to an investigation of Justice Johnson.

Second, a number of witnesses do not work for the court and stand to gain nothing from their testimony (e.g., Burnette, Kent, Schulman, and Palmer). Indeed, it is difficult to understand how testifying publicly about being the victim of sexual misconduct could result in any career benefit.

Third, some witnesses were reluctant and required subpoenas before they would testify (e.g., Butterick, Lin, Kent, Pettie, Denow, and Melissa Miller [rebuttal witness whose testimony was not used for findings]).

We reject Justice Johnson's argument that "social contagion" is a mitigating factor.

H. Comparable Discipline

Justice Johnson claimed that he does not fall within the realm of other removal decisions by the commission because his conduct does not include the certain "disqualifying characteristics" or "critical elements generally common to those decisions."

First, he argued that there is no willful misconduct. As previously discussed, willful conduct is not required for removal.

Second, he has no "prior discipline which was not heeded." Of the 12 judges removed by the commission, five (or nearly half) had no prior discipline (Judges Couwenberg, Spitzer, MacEachern, Saucedo, and Laettner). The existence of prior discipline is not a prerequisite for removal.

Third, he said that "a failure to take steps to modify behavior" "after notice of the investigation" is another "critical element." This is also not required. Several judges were removed for conduct they could have not subsequently modified (e.g., Saucedo, MacEachern, and Stanford).

Fourth, Justice Johnson listed the "occurrence of improper efforts to influence witnesses and/or non-cooperation with the commission" as another

required element for removal. That is also not required, and Justice Johnson does not cite any authority identifying that as a requirement.

Justice Johnson also argued that he should receive lesser discipline than removal based on Supreme Court and commission precedent in the following cases.

Judge Gary Kreep, who was censured in 2017, engaged in 29 individual acts of misconduct (grouped into one instance of willful misconduct and 17 instances of prejudicial misconduct) over a three-year period, with the majority occurring within his first year on the bench. (*Inquiry Concerning Kreep* (2017) 3 Cal.5th CJP Supp. 1.) Justice Johnson drew various similarities and differences between his matter and that of Judge Kreep, arguing that he, too, should receive a censure. He said that Judge Kreep's misconduct included sexual comments, among other things, and the commission found that, in addition to constituting a pattern, his behavior evidenced his "failure to recognize that his comments could offend people or make them feel uncomfortable."

There are significant differences between this matter and that of Judge Kreep. Judge Kreep's conduct toward women was much less serious; it did not involve the unwanted touching of multiple women. It also did not involve undignified conduct while intoxicated on multiple occasions. Judge Kreep's conduct occurred mostly during his first year on the bench, but Justice Johnson's misconduct upon which our decision is based spanned nine years on the bench. Judge Kreep modified his behavior while at court, after being counseled. Justice Johnson received several warnings, but did not modify his behavior.

Judge John Fitch was censured in 1995 for inappropriate comments to court staff attorneys, and others, as well as for nonconsensual touching of women working under his supervision. (*Fitch v. Commission on Judicial Performance* (1995) 9 Cal.4th 552.) Judge Fitch made the remarks "on several occasions," and "on a few isolated occasions" touched, or attempted to touch, women working under his supervision (e.g., slapping or patting their buttocks).

(*Id.* at p. 557.) The commission found that the touching was episodic, relatively infrequent, and did not constitute a pattern of misconduct. (*Id.* at p. 554.) In contrast, Justice Johnson's improper touching of Justice Chaney was found to constitute a pattern, and his touching of Kent and Schulman was more extreme than Judge Fitch's conduct. Also, Judge Fitch had ceased his conduct for the three years before the commission issued its decision, whereas Justice Johnson has been away from the court since the investigation began, and has not been able to demonstrate that he has ceased the conduct toward court employees. Significantly, 25 years have elapsed since the decision involving Judge Fitch, and behavioral standards for judges, particularly with respect to sexual harassment, have changed.

Judge John Gibson received a public admonishment in 2010 for inappropriate gestures and comments to court staff, many of which were sexually suggestive. (*Inquiry Concerning Gibson* (2000) 48 Cal.4th CJP Supp. 112.) Judge Gibson's case is distinguishable because he had a "unique" joking relationship with the woman involved in seven of the eight incidents of prejudicial misconduct, and several circumstances mitigated the risk of future violations, including that the events had occurred six years earlier, when he was new to the bench, and no subsequent incidents had been reported.

Judge John Harris received a public admonishment in 2005 for, among other things, making comments to women at court, and, in one instance, putting his hands on an attorney's face and saying, "You're so cute." (*Inquiry Concerning Harris* (2005) 49 Cal.4th CJP Supp. 61.) Judge Harris was a former judge when the discipline was issued and did not intend to return to the bench; therefore, the capacity to reform was not a relevant consideration. (*Ibid.*) Here, the conduct is far worse, and a critical issue is Justice Johnson's capacity to reform.

Judge Scott Steiner stipulated to a censure in 2014 for, among other things, engaging in sexual activity in chambers with two women with whom he had personal relationships. (*Censure of Judge Steiner* (2014).) Justice Johnson

argued his conduct "does not begin to approach the level or nature of misconduct found in Judge Steiner's matter." The difference is that, as Justice Johnson notes, the commission agreed to a censure, rather than removal, because Judge Steiner fully acknowledged his wrongdoing, which involved consensual conduct, and expressed remorse and contrition. Justice Johnson does not admit most of the misconduct proven in this matter, particularly the most serious misconduct, and it was not consensual.

Similarly, Judge Cory Woodward received a censure in 2014 for engaging in sexual activity in the courthouse with his clerk and misleading court administration about their relationship. (*Censure of Judge Woodward* (2014).) Like Judge Steiner, he admitted all of his misconduct, which involved consensual behavior, and expressed remorse and contrition.

V. CONCLUSION

"Certain misconduct is so completely at odds with the core qualities and role of a judge that no amount of mitigation can redeem the seriousness of the wrongdoing or obviate the need for removal in order to fulfill our mandate to protect the public, enforce high standards of judicial conduct, and maintain public confidence in the integrity of the judiciary." (*Saucedo*, *supra,* 62 Cal.4th CJP Supp. at p. 53.) The "ultimate standard for judicial conduct must be conduct which constantly reaffirms fitness for the high responsibility of judicial office." (*Geiler, supra,* 10 Cal.3d at p. 281.)

Judges are expected to be honest, have integrity, uphold high personal standards, and treat everyone with dignity and respect, on or off the bench. Justice Johnson's conduct before, and during, this proceeding demonstrates that he does not meet these fundamental expectations. He committed 18 acts of prejudicial misconduct and was found to have engaged in the unwanted touching of four women, to have engaged in conduct that would reasonably be perceived as sexual harassment of seven women at his court, to have misused the prestige

of his position and demeaned his judicial office by attempting to develop personal relationships with three other young women, and to have further demeaned his office by his offensive conduct toward a fourth woman, as well as by multiple incidents of undignified conduct while intoxicated.

Justice Johnson's refusal to admit to serious misconduct, and his intoxication, coupled with his failure to be truthful during the proceedings, compels us to conclude that he cannot meet the fundamental expectations of his position as a judge. Fulfilling the commission's mandate—particularly with respect to maintaining public confidence in the integrity of the judiciary—can only be achieved by removing him from the bench.

ORDER

Pursuant to the provisions of article VI, section 18 of the California Constitution, and rules 120(a) and 136 of the Rules of the Commission on Judicial Performance, we hereby remove Justice Jeffrey W. Johnson from office and disqualify him from acting as a judge.

Commission members Hon. Michael B. Harper; Dr. Michael A. Moodian; Hon. William S. Dato; Mr. Eduardo De La Riva; Ms. Kay Cooperman Jue; Nanci E. Nishimura, Esq.; Victor E. Salazar, Esq., Mr. Richard Simpson; and Mr. Adam N. Torres voted in favor of all the findings and conclusions expressed herein and in this order of removal. Commission members Ms. Sarah Kruer Jager and Hon. Lisa B. Lench were recused from this matter.

Dated: June 2, 2020

Nanci E. Nishimura, Esq.
Former chairperson of the commission

Dated: June 2, 2020

Honorable Michael B. Harper
Current chairperson of the commission

Filed 5/6/16 Ellis v. Toshiba America Information Systems CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

JEFFERY L. ELLIS et al., Plaintiffs, v. TOSHIBA AMERICA INFORMATION SYSTEMS, INC., Defendant and Respondent; LORI J. SKLAR, Objector and Appellant.	B257966 (Los Angeles County Super. Ct. No. BC328556)

APPEAL from an order of the Superior Court of Los Angeles County, Anthony J. Mohr, Judge. Affirmed.

Lori Sklar, in pro. per., for Objector and Appellant.

Umberg Zipser, Dean J. Zipser, Adina W. Stowell; Manatt, Phelps & Phillips and Benjamin G. Shatz for Defendant and Respondent.

APPENDIX C

Lori Sklar (Sklar) appeals from a trial court order on remand from this court, awarding her costs of $3,200. We affirm.

Sklar requested millions of dollars in attorney fees for her representation of the plaintiffs in a class action filed in 2005 against Toshiba America Information Systems, Inc. (Toshiba) and resolved by a settlement agreement. In *Ellis v. Toshiba America Information Systems, Inc.* (2013) 218 Cal.App.4th 853, 890–891 (*Ellis I*), we affirmed the trial court's order awarding monetary sanctions against Sklar for refusing to comply with a court order to allow Toshiba to inspect her original electronic billing records, and we affirmed in part the order awarding her no attorney fees. We described Sklar's prolonged litigation regarding her attorney fees requests (which varied from $7,847,362.50 to $12,079,534.69 to $24,743,965.50). We concluded that the trial court did not abuse its discretion in denying fees, as it applied the correct legal standard and found Sklar not credible and her records unusable to calculate a lodestar amount. (*Id.* at pp. 856–857, 881.) We granted in part Toshiba's motion to strike and awarded monetary sanctions against Sklar for altering the trial court record as it appeared in her appellant's appendix. (*Id.* at pp. 875–877.) We remanded to the trial court to correct the amount due for the work of one of Sklar's staff members. As the trial court had not ruled on Sklar's request for $905,572 in costs, we also remanded "for a determination by the trial court of the amount, if any, of costs to be awarded to Sklar Law Offices, with a maximum cost award of $114,900," to be based on the evidence in the record. (*Id.* at pp. 887, 890.) We directed the clerk of court to send a certified copy of our opinion to the State Bar, pursuant to Business and Professions Code section 6086.7, subdivision (a)(3). (*Id.* at pp. 890-891.)

On remand and after hearing, the trial court filed an order on May 27, 2014 awarding Sklar costs of $3,200. The court declined to consider supplemental records filed by Sklar; found that the class action settlement agreement capped her costs at $114,000; rejected many of Sklar's claimed costs as not recoverable under the law; pointed out that most of Sklar's claimed costs did not relate to the merits of the class action, but to the protracted attorney fee litigation; and described her evidence of costs as

suspect and confusing. Faced by "a lack of credible evidence of valid costs," the court estimated costs during the merits phase (between October 2004 and April 2006) to be $3,200, which was "generous in view of Ms. Sklar's behavior during the pendency of this action," and awarded costs in that amount to Sklar. Sklar filed a timely appeal.

We review the award of costs for abuse of discretion, and may reverse only when there is no substantial evidence to support the trial court's findings or when there has been a miscarriage of justice. (*Finney v. Gomez* (2003) 111 Cal.App.4th 527, 545.)

While Sklar's brief is difficult to decipher, we will attempt to identify her specific arguments and address each in turn. We will not, however, address her attacks on our opinion in *Ellis I.* Sklar petitioned for rehearing and we denied her petition. She petitioned for review and the California Supreme Court denied her petition. She filed a petition for certiorari and the United States Supreme Court denied her petition. (*Ellis I, supra*, 218 Cal.App.4th 853, rehg. den. Sept. 10, 2013, review den. Nov. 26, 2013, cert. denied (2014) 134 S.Ct. 2692.) Our opinion is final.

Sklar first contends that the trial judge should have recused himself, because before he issued the cost order, the State Bar interviewed him in connection with its investigation of Sklar. We earlier denied Sklar's request for judicial notice of documents supporting this argument, and we therefore do not address it. We note that California Code of Judicial Ethics, canon 2B(2)(c) allows a judge to "provide factual information in State Bar disciplinary proceedings."

Sklar argues that she was entitled to seek costs of more than $114,900. As we stated in *Ellis I, supra*, 218 Cal.App.4th 853, the settlement agreement provided that Sklar would be entitled to seek fees up to a maximum amount to be set forth in the class notice, and the class notice stated that she would seek costs of $114,900. (*Id.* at p. 887.) The trial court was correct in limiting Sklar to no more than $114,900 in costs. We also conclude the trial court did not abuse its discretion in refusing to award costs to Sklar for her unsuccessful attempt to recover millions of dollars in attorney fees. The class notice (in compliance with the settlement agreement) stated that Sklar would request a maximum of $114,900 in costs, and no reasonable reading of the notice would

contemplate that Sklar could recover a much larger amount for the future costs of her scorched-earth fee litigation.

Sklar charges Toshiba with violations of discovery statutes in the underlying litigation, but on this appeal we determine only whether the court's award of costs on remand is an abuse of discretion. Sklar argues the trial court should have awarded her costs related to her deposition as a nonparty witness pursuant to Evidence Code section 1563, subdivision (b). Sklar was not a nonparty witness.

Finally, we disagree with Sklar that "the trial court abused its discretion by failing to even address the reasonableness and necessity of [her] costs." To the contrary, the court carefully excluded claimed costs not authorized by Code of Civil Procedure section 1033.5 and explained that Sklar did not provide sufficient detail for the court to evaluate other costs. The trial court called Sklar's evidence of costs "suspect," noted that Sklar gave wildly varying numbers for categories of costs, and concluded: "[W]hat we have before us is a lack of credible evidence of valid costs incurred by Sklar in connection with the underlying case." Nevertheless, assuming that Sklar incurred some costs during the merits phase, the court awarded $3,200 for filing fees, service of process, and depositions.

The trial court did not abuse its discretion. Sklar requested costs nearly eight times greater than the maximum she was entitled to under the settlement agreement and class notice, and submitted confusing and contradictory evidence of those costs. The trial court reasonably concluded that it could not separate the wheat from the chaff. Further, the court found that Sklar's evidence of costs was not credible, and "a credibility determination is uniquely the province of the trial court." (*Ellis I*, *supra*, 218 Cal.App.4th at p. 884.) Rather than attempting to show how $3,200 for the merits phase constitutes an abuse of discretion, Sklar continues to assert that she is entitled to the outsized cost amount she requested. The amount the court awarded was not a miscarriage of justice.

We deny Sklar's motion to strike Toshiba's brief and portions of its appendix.

DISPOSITION

The order is affirmed. Toshiba America Information Systems, Inc., shall recover its costs on appeal.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

ROTHSCHILD, P. J.

CHANEY, J.

Filed 9/10/13 Second mod for this opinion; first mod. and unmodified opn. attached
CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

JEFFERY L. ELLIS et al., Plaintiffs, v. TOSHIBA AMERICA INFORMATION SYSTEMS, INC., Defendant and Respondent; LORI J. SKLAR, Objector and Appellant.	B220286, B227078 (Los Angeles County Super. Ct. No. BC328556) ORDER MODIFYING OPINION AND DENYING PETITION FOR REHEARING [CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the opinion filed herein on August 7, 2013, be modified as follows:

1. On page 4, the first sentence of the first paragraph, the amount "$11,000" is changed to "$11,900."

2. On page 39, the second sentence of the second full paragraph, the word "Toyota" is changed to "Toshiba."

3. On page 45, the second sentence of the disposition, the amount "$179,600" is changed to "$176,900."

The modification changes the judgment.

Appellant's petition for rehearing is denied.

CERTIFIED FOR PUBLICATION.

ROTHSCHILD, Acting P. J. CHANEY, J. JOHNSON, J.

Filed 8/14/13 (unmodified opn. attached)

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

JEFFERY L. ELLIS et al., Plaintiffs, v. TOSHIBA AMERICA INFORMATION SYSTEMS, INC., Defendant and Respondent; LORI J. SKLAR, Objector and Appellant.	B220286, B227078 (Los Angeles County Super. Ct. No. BC328556) ORDER MODIFYING OPINION [CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the opinion filed herein on August 7, 2013, be modified as follows:

1. On page 45, the last sentence of the disposition, "section 6087" is changed to "section 6086.7".

The modification changes the judgment.

CERTIFIED FOR PUBLICATION.

ROTHSCHILD, Acting P. J. CHANEY, J. JOHNSON, J.

Filed 8/7/13 (unmodified version)

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

JEFFERY L. ELLIS et al., Plaintiffs, v. TOSHIBA AMERICA INFORMATION SYSTEMS, INC., Defendant and Respondent; LORI J. SKLAR, Objector and Appellant.	B220286, B227078 (Los Angeles County Super. Ct. No. BC328556)

APPEAL from orders of the Superior Court of Los Angeles County, Anthony J. Mohr, Judge. Affirmed in part and reversed in part with directions.

Lori J. Sklar, in pro. per.; Murphy, Pearson, Bradley & Feeney, Harlan B. Watkins and John P. Girarde for Objector and Appellant.

Manatt, Phelps & Phillips, Dean J. Zipser, Benjamin G. Shatz, Carole E. Reagan and Adina L. Witzling for Defendant and Respondent.

Lori J. Sklar represented the plaintiffs in a class action against Toshiba America Information Systems (Toshiba). Sklar appeals from the trial court's orders awarding monetary sanctions against her and the court's order awarding her no attorney fees. Toshiba cross-appeals the order awarding staff fees to Sklar Law Offices. We affirm the order awarding monetary sanctions against Sklar, and affirm in part and reverse in part the order regarding attorney fees.

SUMMARY

In February 2005, Caddell & Chapman, a Texas law firm with experience litigating class actions, and Sklar, a sole practitioner and a member of the California bar doing business as Sklar Law Offices (SLO) out of her home office in Minnesota,[1] filed a class action against Toshiba,[2] on behalf of a class of purchasers of a Toshiba laptop computer which had an electrostatic discharge problem with the top cover. After a two-day mediation, in November 2005 Sklar and all other counsel signed a settlement term sheet, giving each class member a 12-month repair warranty extension (or, if the class member already had the extended warranty, a $35 credit voucher), and either $25 in cash or a $50 voucher for the repair to replace the defective top cover. Conflicts ensued between counsel regarding the drafting of a settlement agreement. Sklar later objected to the settlement, including an objection to the inclusion of the amount of her fees in the class notice, and the proposed settlement initially was submitted to the court without her signature in May 2006.

After further negotiations, Sklar filed a motion for preliminary approval of the settlement in August 2006. In an attached declaration, Sklar stated that she would seek legal fees of more than $24,700,000 (represented as 25 percent of a settlement value

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[1] For ease of reference, we will use Sklar's name throughout, using SLO when we refer to time billed by her law office staff (or other issues involving her office staff and not Sklar alone).

[2] Sklar was listed as "of counsel."

placed at $98,975,862),[3] to be apportioned between Sklar and Caddell & Chapman, plus expenses of $99,750. Toshiba filed a declaration by counsel stating that it had agreed not to oppose the application by Caddell & Chapman for $1,125,000 in fees, but Toshiba intended to take discovery into the basis of Sklar's "exorbitant" fee request, and would seek the production of documents and the depositions of Sklar and others, including Sklar's expert.

The trial court granted preliminary approval of the settlement in October 2006. The class notice, disseminated in October and November 2006, stated: "Sklar Law Offices will ask the Court for attorneys' fees in the amount of $24,743,965.50, less whatever the Court awards Caddell & Chapman for its attorneys' fees. Sklar Law Offices will ask for litigation expenses in the amount of $114,900. Toshiba will oppose these requests." In May 2007, the court granted final approval and entered judgment.

In January 2008 the trial court awarded Caddell & Chapman $1,050,000 in attorney fees and $75,000 in costs, for a total of $1,125,000. Sklar's initial fee petition, filed later in January 2008, requested fees of either $7,847,362.50 under a lodestar/multiplier approach, or $24,743,965.50 as a percentage of the settlement value, and $410,383.53 in expenses (this time for Sklar alone). Sklar's subsequent fee application in October 2009 requested fees of $12,079,534.69, plus expenses for SLO of $905,752.72.

As promised, Toshiba opposed Sklar's fee request, and protracted litigation and many discovery disputes followed Sklar's initial fee estimate in 2006. On August 31, 2009, the trial court granted Toshiba's motion for monetary sanctions against Sklar in the amount of $165,000 for fees and costs Toshiba incurred related to Sklar's failure to comply with court discovery orders, and her failure to meet and confer in good faith. Sklar appealed, and the sanctions order is the subject of appeal No. B220286.

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[3] As explained below, Sklar later withdrew the expert declaration of Harvey Rosen upon which this valuation was based.

On June 30, 2010, the trial court issued a 27-page ruling awarding SLO $176,900 in fees (for work during the merits phase of the class action by the staff of SLO), and awarding nothing for Sklar's work; subtracting the $165,000 sanctions award, the net award to SLO was $11,000. Sklar appealed the order denying attorney fees, Toshiba cross-appealed from the award of fees for work by SLO staff, and the fee award is the subject of appeal No. B227078.

We consolidated the two appeals. For the reasons detailed below, we affirm the order awarding monetary sanctions against Sklar, and affirm in part and reverse in part the order regarding attorney fees.

BACKGROUND

I. Sklar disobeyed the court order to allow forensic computer inspections, and the trial court imposed monetary sanctions.

We describe in some detail the arduous procedural history of Toshiba's attempt to obtain discovery of electronically stored information regarding Sklar's request for attorney fees.

A. Toshiba sought Sklar's electronic billing records.

After the preliminary approval of the settlement in October 2006, Toshiba began to seek discovery, including document production and Sklar's deposition, related to Sklar's August 2006 statement that she would make a fee request of over $24 million. Among other items, Toshiba sought an electronic, searchable, copy of time records Sklar had produced in hard copy. Toshiba characterized those records as showing that Sklar worked on the class action "nearly all day (sometimes as much as 16.75 hours), every day, seven days a week, including holidays, for some 22 months." Toshiba served subpoenas in October 2006 and January 2007, each of which sought computer data and files related to time billed by Sklar or SLO in the class action. In response, Sklar produced a compact disc (CD) containing Portable Document Format (PDF) copies of the time records, which on appeal she characterizes as "redacted to protect attorney-client and work product privileges." Toshiba continued to request a searchable electronic copy of Sklar's time records.

The trial court held a hearing on January 26, 2007 on Sklar's objections to Toshiba's discovery requests, asking Sklar's counsel and Sklar: "[D]o you really think that I'm going to allow this to proceed and give Ms. Sklar the benefit of $24 million in fees without having her be deposed, without having her produce any documents?" Given that Sklar's fee request included time records showing she worked "up to 16-hour days seven days a week for a number of weeks," the court stated that Sklar would have to produce time records which were not redacted. Sklar's counsel argued that the records were complete; counsel for Toshiba rejoined that Sklar had represented that the time records were redacted, and Toshiba was unable to tell what had been excised. The court responded: "I'm not going to take your [Sklar's] word for it, I must tell you. . . . [N]ot with this kind of a request. The amount of money you want is staggering, and I think it has to be . . . scrutinized . . . before I approve this kind of an award." Allowing that "[a]t the end of the day I may award [Sklar] every penny," the court emphasized that Toshiba had the right to verify both that the time records showed what Sklar actually did, and that the claimed attorney time did not represent something that could have been done by a secretary or paralegal.

Counsel for Toshiba requested that the electronic version of the time records be produced "in its native format in the program it was used or at least something . . . searchable." The trial court ordered Sklar to appear for deposition and to produce the electronic time records in "native format,"[4] and told Sklar's counsel to hire an "I.T. expert" or consultant to redact any privileged information.

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[4] A file that is in native format has been saved in the format designated by the original application used to create it. "Native format is the 'default format of a file,' access to which is 'typically provided through the software program on which it was created.' [Citation.]" (*Aguilar v. Immigration and Customs Enforcement* (S.D.N.Y. 2008) 255 F.R.D. 350, 353, fn. 4.) Documents are often converted to other formats, for example, PDF, for purposes of production in litigation.

At the hearing, Sklar's counsel stated, "I don't even know what 'native format' means." The court responded: "You'll have to find out. I know. Apparently [Toshiba's counsel] knows. You're going to have to get educated in the world of . . . electronic

Toshiba's counsel subsequently wrote to Sklar's counsel to clarify that "[n]ative format is the format[s] in which the documents were originally created and maintained, including all metadata[5] associated with those files." Sklar then produced a CD-Rom containing a set of Microsoft Word files of Sklar's time records which were searchable versions of the time records produced in hard copy, with none of the metadata associated with the original files. Sklar's counsel explained that at the time of the October subpoena the time records only existed in Adobe Acrobat form and had no associated metadata, and the Microsoft Word files were the time records as they existed at the time of the subpoena.

At Sklar's deposition in March 2007, she testified that before she produced the time records (including around the end of 2006), she had converted the records into Adobe format, deleting the original Word files using a program called "Wipe and Delete." Sklar had used this program daily to eliminate metadata. As a result, it was not possible to tell when or how often Sklar created time records, among other things.

After Sklar's deposition, Toshiba requested that Sklar allow Toshiba's expert to inspect Sklar's computers (at Sklar's expense) to determine whether it was possible to recover any of the deleted files and metadata. Sklar refused.

B. Toshiba filed a motion for sanctions regarding Sklar's destruction of her original electronic billing records.

Toshiba then filed a motion for sanctions in June 2007. The motion argued that Sklar had destroyed (deleted) files and records that were responsive to the trial court's

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discovery. E.S.I. [electronically stored information] is here to stay, and these are terms you're just going to have to learn."

[5] "Metadata," or "data about data," is data that provides information about other data, "hidden" or "embedded" information that is stored in electronically generated materials, but which is not visible when a document or other materials are printed. In the context used in this case, metadata includes "data concerning 'the author, date and time of creation, and the date a document was modified.' [Citation.] . . . System metadata is relevant . . . if the authenticity of a document is questioned . . . . [¶] . . . [¶] Metadata thus is discoverable if it is relevant to the claim or defense of any party and is not privileged." (*Aguilar v. Immigration and Customs Enforcement, supra*, 255 F.R.D. at pp. 354, 355.)

January 26, 2007 order requiring that Sklar produce her time records in their native format. Toshiba requested that its forensic computer expert be allowed to inspect Sklar's computers to determine whether the original time record files could be recovered. If Toshiba could not recover the original time record files, Sklar would have "purposely destroyed the evidence of how and when her time records were created and edited," warranting terminating sanctions or, alternatively, an order prohibiting Sklar from introducing her time records to support her fee request. Toshiba argued that at a minimum, the trial court should impose issue sanctions, and should determine conclusively that Sklar did not prepare her time records contemporaneously with her work on the case, that Sklar's time records did not accurately reflect the time she claimed to have billed, and that Sklar had not been precluded from taking on other work during the pendency of the class action. Toshiba also requested monetary sanctions of $25,000, less than half the attorney fees Toshiba had incurred in its efforts to obtain Sklar's electronic files.

In a declaration attached to her opposition, Sklar stated that she had no obligation to produce metadata and that backups of the original Word time record files on this case were maintained. She also claimed that her testimony at the deposition (that she had deleted the original files altogether) was limited to a computer she had to return and replace. Sklar understood "native format" to mean "the software program and version used to create the document," which "usually does not include metadata." After the court's January 16, 2007 order Sklar converted her time records (which by then existed in hard copies and PDF format) *back* into Word format, with redactions for privileged information and "little or no metadata." Sklar believed that producing those redacted Word files (not the originals) complied with the court's order. Because Toshiba's requests did not specifically ask for metadata, Sklar argued in her opposition brief that it was sufficient to produce a searchable version of her time records, and added: "In any event, SLO could not have produced what did not exist, and thus, could not have produced metadata that had been removed pursuant to ordinary business practice long before [Toshiba] sought electronic records of any sort."

In reply, Toshiba argued that Sklar's claim that she possessed backup files of her time records contradicted her deposition testimony, and that she had an obligation to preserve the original files (including the metadata showing when and how often Sklar entered her time).

C. The court ordered Sklar to allow forensic inspection of her computers.

At the August 15, 2007 hearing on Toshiba's motion for sanctions, the trial court stated: "When I said produce native format, I wasn't thinking about metadata one way or the other," and noted that Toshiba's subpoena said nothing about metadata. Counsel for Toshiba pointed out that the metadata no longer existed at the time of the order in January 2007, because Sklar had already removed the metadata from the time files. The court agreed: "So it's not a question of her violating my order with respect to metadata. . . . What I'm concerned about is this is a person who wants $22 million and some change in legal fees, knows when she starts preparing . . . timesheets, . . . knows that this will be the heart and soul of her claim for attorney fees and does not preserve the early drafts." The court declined to say that "metadata is included in native format."

Nevertheless, the court stated that in the context of a request for class action attorney fees, "it is extremely poor judgment to wipe and delete an original file of your timesheets." When Sklar's counsel protested that Sklar had not deleted any time records, the court stated: "Well, we're going to find out because I'm going to appoint an expert to search her hard drives." The expert would be of Toshiba's choosing and at Toshiba's expense, although if the expert determined that the time records were not contemporaneous with the work claimed, the cost would be shifted to Sklar which "will only be my first step." Sklar's counsel claimed that the backup of the original Word file was in Minnesota, but contained privileged information. The trial court responded that Sklar had testified that she had wiped and deleted the original Word file, and "I think she's really misleading me. I'm beginning to get very upset with this." The court believed "the backup has metadata on it. I'll bet you anything."

The trial court ordered that the parties select a neutral expert to search the backup file and produce anything that was not privileged, reserving a ruling whether any relevant

privileges were waived. The court also reserved the issue of monetary sanctions: "I tend to think that you [Toshiba] are going to be entitled to something, but I want to see what happens with the metadata, with the backup file. But I will tell you that the testimony in the deposition coupled with the briefs coupled with the behavior here is such that I probably could conclude by a preponderance of the evidence that this has constituted a discovery abuse under [section] 2023[.010][6] of the Code of Civil Procedure, and I think that Toshiba is going to be entitled to a monetary sanction. . . . [¶] . . . [¶] There just seems to be kind of a shifting series of explanations which concerns me deeply." "[R]ight now I want to get on to the table what Ms. Sklar has that comes as close as possible to being an original file of these timesheets . . . . Everything else I'm reserving."

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[6] Unless otherwise indicated, subsequent statutory references are to the Code of Civil Procedure as currently numbered following the reorganization and renumbering of the Civil Discovery Act effective July 1, 2005.

The Electronic Discovery Act, effective June 29, 2009, after Sklar refused to allow the inspections ordered by the court, added to the Code of Civil Procedure provisions regarding electronic discovery, including section 2031.060, subdivision (i), which states: "The court shall not impose sanctions on a party or any attorney of a party for failure to provide electronically stored information that has been lost, damaged, altered, or overwritten as the result of the routine, good faith operation of an electronic information system," adding "[t]his subdivision shall not be construed to alter any obligation to preserve discoverable information."

There is little California case law regarding discovery of electronically stored information under the Act. "Because of the similarity of California and federal discovery law, federal decisions have historically been considered persuasive absent contrary California decisions." (*Liberty Mutual Ins. Co. v. Superior Court* (1992) 10 Cal.App.4th 1282, 1288.) Federal decisions hold that production of electronically stored information in PDF format may not be sufficient if the requesting party can show that the format "'is not "reasonably usable" and that the native format, with accompanying metadata, meet the criteria of "reasonably usable" whereas the PDF . . . format[] do[es] not.'" [Citation.]" (*City of Colton v. American Promotional Events, Inc.* (2011) 277 F.R.D. 578, 583.) Federal case law also provides that parties are subject to a general duty to preserve such things as deleted data, backup tapes, and metadata that constitute "'unique, relevant evidence that might be useful to an adversary.' [Citation.]" (*Victor Stanley, Inc. v. Creative Pipe, Inc.* (2010) 269 F.R.D. 497, 523–524.)

The notice of ruling and August 15, 2007 minute order required Sklar to agree on a neutral expert with Toshiba, splitting the cost. Within 30 days of the expert's selection, the neutral expert was to search the back-up files. During the same time period, Sklar was to permit an expert selected and paid by Toshiba to search Sklar's hard drives to recover time record files, including metadata, related to the class action. Sklar objected to the notice of ruling.

Sklar brought a motion for reconsideration of the August 15, 2007 order, which Toshiba opposed. At a hearing on October 2, 2007, Sklar's counsel argued that "metadata for time records in a Word document that is supplemented over time . . . by a lawyer in a class counsel case is not reliable and is never going to be relevant. And because it's not reliable, its discovery couldn't possibly lead to the discovery of admissible evidence." Counsel for Toshiba countered that if any metadata were recovered, its relevance would then be determined: "this is the kind of thing we don't know until we get there." The court agreed. The court denied the motion on the ground that it did not meet the standard for reconsideration; in addition, the court reaffirmed its August 15, 2007 ruling on the merits.

Sklar also brought an ex parte application to stay the order, which the court denied.

D. The parties could not agree on a neutral expert or establish a protocol for inspection by Toshiba's expert.

In an email to Sklar's counsel late in September 2007, Toshiba's counsel mentioned Kroll OnTrack, Inc. (Kroll) as a possible neutral expert to examine the backup files. Sklar's counsel sent Toshiba a suggested protocol for Toshiba's inspection in October 2007, after Sklar's motions for reconsideration and for stay were denied, but Toshiba declined in part because the protocol limited the inspection to one hard drive and restricted communications between Toshiba and its own expert.[7] Further exchanges

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[7] The protocol was attached to an email dated October 19, 2007 from Sklar's counsel. Sklar attached a *different* protocol as an exhibit to her August 29, 2008 declaration in support of her opposition to the order to show cause, referring to it (as she

followed. Before any specifics were established, on January 31, 2008, Sklar filed a voluminous fee petition, seeking a fee hearing on February 29, 2008, without completion of the court-ordered inspections. Sklar's petition requested $24,743,965.50 plus expenses if fees were calculated as 25 percent of the settlement value, or $7,847,362.50 plus $410,383.53 in expenses under the lodestar approach. The trial court continued the hearing and eventually took it off calendar.

On March 12, 2008, Toshiba sent a letter to Sklar stating that in spite of numerous follow-up inquiries, Sklar had yet to accept or reject Kroll or propose another neutral expert. Toshiba planned to submit Kroll's name to the court on March 14 as a proposed neutral expert, unless it heard back from Sklar. Sklar then told Toshiba's counsel (also in March 2008) that she would not agree to Kroll because Kroll had done work for Toshiba's former counsel. Toshiba attempted to schedule an inspection, but Sklar conditioned the inspection on the entering of a protective order. Subsequently, in a status conference statement filed on March 28, 2008, Sklar stated that she had retained Kroll as her consultant.

The court entered a formal stipulated protective order on April 24, 2008, providing that the party to whom any electronic information was produced could not argue that the production waived any claims of privacy, confidentiality, or privilege by the producing party.

At a status conference on May 8, 2008, Toshiba explained that after it suggested Kroll as the neutral expert to examine the backup files, Sklar had retained Kroll. Sklar admitted that she retained Kroll as a consultant, but denied that she consulted Kroll after Toshiba proposed Kroll as an expert. Sklar's counsel represented that Kroll was retained before the September 2007 letter from Toshiba, and the court stated: "I'm afraid you're

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does in her appellate brief) as the protocol she proposed on October 19, 2007. Both protocols begin with the imaging of Sklar's hard drive. A significant difference between the two is that the protocol attached to Sklar's declaration—which was *not* (contrary to Sklar's representation) the protocol she proposed on October 19, 2007—excluded counsel for Toshiba from being present at the inspection.

going to have to give me some records to establish that." As for Toshiba's expert inspecting Sklar's hard drive for the deleted files, Sklar's counsel suggested that the court did not have jurisdiction over Sklar as a Minnesota resident to make its August 15, 2007 order, and the court reacted angrily: "You're telling me you're not going to obey. You're telling me I don't have jurisdiction. You're telling me the order is wrong. You're telling me all sorts of things, everything other than you intend to comply." Sklar's counsel expressed concern about protecting privileged information. The court stated that Toshiba's expert was to pull only Sklar's time record files associated with the class action. The court warned Sklar that if the electronic time records were not disclosed, the court would consider the time records that Sklar had produced earlier as weaker evidence produced when stronger evidence was available. The court urged the parties to agree on a protocol for Toshiba's inspection, follow the court's suggestion, or contact the court for assistance.

E. The court ordered the inspections by Toshiba's expert to occur on July 22 and 23, 2008.

At a status conference on June 24, 2008, the trial court expressed exasperation with the "morass of charge and countercharge" regarding the fee request and the lack of progress with discovery. The inspections had not been done and Sklar's deposition had not been completed. The court warned that if it decided that Sklar had violated its order regarding her deposition, "I'm just going to deny her all her fees, and that will be the end of this." The court ordered the completion of Sklar's deposition in Minnesota on July 24 and 25, and again stated, "I will award you zero for this class action" if Sklar interposed "a string of objections and speech-making during the deposition."

Turning to the inspections, the court ordered Toshiba's inspection to take place on July 22 and 23, also in Minnesota. As to the selection of a neutral expert, Sklar's counsel admitted that he could not pinpoint when Sklar contacted Kroll. Toshiba's counsel disputed Sklar's assertion that she had contacted Kroll and provided Kroll with privileged information, before Toshiba suggested in September 2007 that Kroll serve as the neutral. The court declined to "assign[] blame on either side" and concluded "we just need

another neutral," directing the parties each to submit a few neutrals for the court to select one. "I'll find a neutral, but I do want at least Toshiba's expert to be able to run this inspection during the week you're all back in Minneapolis. So that inspection I want to happen."

The June 24, 2008 minute order stated that Toshiba's expert's inspection of Sklar's computers would take place on July 22 and 23.

F. Sklar refused to allow the ordered inspection to proceed.

Sklar sought writ relief from the court-ordered inspection and from her deposition. The court of appeal summarily denied the writ on July 17, 2008. The next day, July 18, Toshiba sent an e-mail regarding the procedure for the inspection by Toshiba's expert on July 22 and 23, proposing: "As we have discussed in the past, the first step is to make an image of the hard drive(s)" for off-site inspection by the expert at his offices with Sklar present, if she desired. Sklar responded three days later on July 21, the day before the ordered inspection, stating: "[K]nowing that it is now your expert's intention to image my hard drives, the inspection will not proceed. Contrary to your false assertion, we have never discussed or contemplated that my hard drives would be imaged, let alone removed off site by any expert," and the court had not ruled that an image of the hard drive could be taken. (As explained above, Sklar's own initial protocol for the inspection sent to Toshiba's counsel on October 19, 2007, had included imaging by SLO of the Hewlett Packard hard drive used by SLO to create the time records produced by Sklar in February 2007, although inspection of the image was to be at SLO's offices.) Toshiba replied that it would address the last-minute cancellation with the court and intended to proceed with Sklar's deposition.

At a hearing on July 28, 2008, Toshiba's counsel stated that Sklar cancelled the inspection hours before one counsel was on a plane and when Toshiba's experts were about to head to the airport. Counsel explained that the imaging of Sklar's hard drive would make the inspection less disruptive, allowing inspection of the image without having to view the hard drive itself. The parties disputed whether the parties had agreed Toshiba could image Sklar's hard drive. Sklar's counsel stated that imaging "was totally

contrary to any protocol that has been discussed," and the previous order gave Toshiba's expert two days to go through the hard drive and look for metadata. The court then stated that Toshiba's expert could go to Minnesota and work on the hard drive itself with "free and unfettered access to the hard drive," and added that as far as an order for inspection goes "I'm beginning to conclude [the problem] lies with [Sklar]. [¶] . . . [¶] I'm going to issue an order to show cause as to why I should not draw a negative inference from the failure of your office to permit any inspection whatsoever of your computer drives by any expert, be it a neutral or Toshiba's expert. [¶] And the negative inference I would draw is that the hard copy time records . . . are not accurate and that conflicting information and perhaps contradictory information is available on the hard drive of your computer. And I will consider that negative inference in connection with your fee petition." The court set the order to show cause (OSC) hearing for September 10, and stated that Sklar could discharge the OSC by providing a "real opportunity" for inspection by the experts. In the court's view, "it appears that the plaintiffs have really done everything they can to frustrate the purpose. And even after the writ was denied, it seems at the last minute they came in with more subterfuges."

In opposition to the OSC, Sklar stated: "[T]here is substantial justification and good cause for Sklar's refusal to permit the inspection to proceed," based on Toshiba's rejection of Sklar's "attempt to propose a reasonable protocol" and insistence on imaging her hard drive for inspection elsewhere. "If this is to be the Court's order, then Sklar again requests a written order so that she may seek appellate review of the Court's decision."

At the OSC hearing on September 10, 2008, the court stated that "despite all of the statements I made regarding the metadata, and having an expert image Ms. Sklar's hard drive, it just hasn't happened. I made orders to that effect and it hasn't happened." Acknowledging Sklar's privacy and privilege concerns, the court noted that given the "extraordinarily high amount of money" requested, "Ms. Sklar, it's understood that any supporting evidence should have been preserved and it wasn't." Rather than draw any conclusions, the court informed the parties that because Sklar failed to produce better

evidence, the court as the finder of fact would draw a negative inference as to the reliability of the time records produced by Sklar, applying CACI No. 203 and CACI No. 204 when reviewing Sklar's fee application.[8] Toshiba reiterated that it planned to file a motion for monetary sanctions. The court ruled that the OSC had not been discharged.

G. Toshiba filed a motion for monetary sanctions against Sklar, and the court awarded Toshiba $165,000.

Toshiba filed its motion for monetary sanctions in March 2009, arguing that Sklar's destruction of the electronic time files and her subsequent conduct had resulted in a year of motions, discovery, briefings, argument, and attempts to agree to a neutral inspector and proceed with the court-ordered inspection, "all of which Sklar resisted." Toshiba requested monetary sanctions of "at least $217,317." In opposition, Sklar argued that her opposition to the inspection was reasonable, and that the inspection would have violated privileges and privacy. Sklar also argued that Toshiba had never requested metadata, so that its absence could not be a basis for the imposition of sanctions.

At the hearing on the sanctions motion on April 24, 2009, the court asked whether there had been an inspection of Sklar's hard drive by Toshiba's expert and whether there had been an inspection by a neutral expert to produce the alleged backup files, as required by its two prior orders. Sklar's counsel responded that neither inspection had occurred, and the court rejoined, "It sounds to me at this point as though my orders have been violated." The court reiterated that it would take into account CACI No. 203 and CACI No. 204, and that "it looks as though by a preponderance of the evidence that evidence has been withheld or suppressed." Turning to the question of how much Toshiba should be reimbursed "because the orders just weren't complied with," the court indicated that it would not consider time Toshiba spent dealing with the metadata. "To the extent you are

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[8] CACI No. 203 provides: "You may consider the ability of each party to provide evidence. If a party provided weaker evidence when it could have provided stronger evidence, you may distrust the weaker evidence." CACI No. 204 provides: "You may consider whether one party intentionally concealed or destroyed evidence. If you decide that a party did so, you may decide that the evidence would have been unfavorable to that party."

making motions because Ms. Sklar violated my orders for inspection by the [Toshiba] expert and by a neutral expert, you are entitled to your costs and attorney's fees. [¶] To the extent money fees were expended regarding her failure to preserve meta data, I [am] not going to sanction her. . . . [¶] But if I order an expert to go look at the file, even if all that person is going to find is meta data, that order should be complied with. It should have been observed. I made the order and . . . it was violated. . . ." The court clarified that the sanction would be imposed under section 2023.010.

Counsel for Sklar objected that there had been no order imposing a protocol for the inspections, so that Sklar was substantially justified in disobeying the court's orders. The court rejoined: "Let me tell you something, the record in this case is one of obfuscation and delay by the plaintiff. [¶] And it constitutes a violation of at least two of my orders." The court advised Toshiba that the revised sanctions request could be submitted by way of a revised declaration.

At the final hearing on Toshiba's sanctions request on July 9, 2009, the court repeated, "I'm not going to sanction Ms. Sklar for anything involving the meta data, but the rest of it is on the table." Sklar's counsel admitted that Sklar knew about the August 15, 2007 minute order, but argued that the minute order was not sufficiently clear. The court rejoined, "The minute order suffices." Sklar's counsel then challenged the revised declaration from Toshiba's counsel regarding time spent, because Toshiba did not attach the attorneys' time records; the court responded that he would order Toshiba to produce the time records, redacted for privilege, if Sklar would pay Toshiba's costs for the redaction.

The court granted the motion for monetary sanctions, citing in support section 2023.010, subdivisions (d), (e), (f), and (g). The court indicated that it would impose sanctions of $165,000, deductible from any amount that Sklar received when the court determined her application for attorney fees.

In an order filed August 31, 2009, the court imposed monetary sanctions of $165,000 against Sklar and in favor of Toshiba for "misuse of the discovery process, including under . . . sections 2023.010[, subdivision] (d), 2023.010[, subdivision] (e),

2023.010[, subdivision] (f), and 2023.010[, subdivision] (g)," [9] including, among other things: "[f]ailing, without substantial justification, to comply with this Court's August 15, 2007 and June 24, 2008 Orders on the forensic inspection of Sklar's computers"; and "[f]ailing to meet-and-confer in good faith regarding both of the Court-ordered inspections." Sklar's appeal in No. B220286 followed. The sanctions order is directly appealable, as it exceeds $5,000. (§ 904.1, subd. (a)(12).) The interim order awarding sanctions is also appealable because a final judgment has been rendered in the fee litigation, in which the sanctioned behavior occurred. (See *In re Marriage of Niklas* (1989) 211 Cal.App.3d 28, 36, fn. 4.)

II. After continued litigation, the trial court awarded fees to Sklar's staff only.

A. Depositions, hearings, and motions to enforce the settlement agreement followed while the fee petition was pending.

At the April 24, 2009 hearing, counsel for Toshiba requested that the court allow two more days of Sklar's deposition to address "specific time entries" regarding Sklar's fee requests. The court granted Toshiba two more days, with the deposition to be completed by June 30, 2009.

Sklar's deposition continued in Minnesota on June 23 and 24, 2009. On each of the two days, Sklar produced a box of documents for the first time, containing what she represented were handwritten time records and other documents in support of her fee petition. Toshiba returned to court to argue that it had sought those documents by subpoena since 2006. On July 9, 2009, the trial court set an OSC, ordering Sklar to show

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[9] Section 2023.010 provides: "Misuses of the discovery process include, but are not limited to, the following: [¶] . . . [¶] (d) Failing to respond or to submit to an authorized method of discovery. (e) Making, without substantial justification, an unmeritorious objection to discovery. (f) Making an evasive response to discovery. (g) Disobeying a court order to provide discovery." Section 2023.010, subdivision (i), adds as conduct subject to sanctions "[f]ailing to confer in person, by telephone, or by letter with an opposing party or attorney in a reasonable and good faith attempt to resolve informally any dispute concerning discovery, if the section governing a particular discovery motion requires the filing of a declaration stating facts showing that an attempt at informal resolution has been made."

cause why she should not be barred from using the documents to support her fee petition. After a hearing on August 24, 2009, the court ordered that Sklar's deposition would resume in September 2009, with the first day at Sklar's expense. Sklar was ordered to bring the originals of the documents to the deposition for inspection by Toshiba's expert, and if Sklar did not go forward with the deposition and document inspection, Sklar would be barred from using the documents in support of her fee petition. Sklar did not appear for the deposition or produce the original documents.

Toshiba also sought to depose Susan Goldstein, Sklar's sister and a member of SLO's staff, who had purportedly billed more than 6,000 hours. These efforts, including subpoenas, eventually resulted in Goldstein's deposition in May 2009. Toshiba was able to take the deposition of Barry Voss, a Minnesota lawyer who submitted a declaration stating that Sklar's involvement in the class action prevented her from working on other cases, only after moving to compel Voss's deposition after Sklar and Voss filed written objections the day before the deposition was originally scheduled, stating that Voss would not appear.

Sklar's August 2006 fee request included a declaration from attorney Harvey Rosen regarding the value of the settlement (Rosen estimated the value to be $98,975,862) and an affidavit from Professor Arthur Miller supporting the amount of fees requested (and using Rosen's estimate of the settlement value). Toshiba encountered difficulties in scheduling the depositions of Sklar's experts. A month before Rosen's deposition in August 2009, Sklar withdrew him as an expert in the fee matter, and her counsel represented in an email that Sklar did not intend to cite his declaration in support of the fee petition.[10] At Professor Miller's deposition in August 2009, he produced what Sklar herself described as "7000+ Pages of Documents," most of which were responsive

[10] In spite of her withdrawal of Rosen as an expert, Sklar cites his declaration and his valuation of the settlement value more than once in her opening brief on appeal as support for the reasonableness of her fee request, and (although Toshiba's respondent's brief points out Sklar's citation of Rosen's withdrawn declaration) Sklar again cites to Rosen's declaration in her reply brief.

to a request Toshiba had made in April 2008 for material related to communications between Sklar and Professor Miller.

While the litigation and discovery disputes related to Sklar's attorney fees request continued, Sklar also filed multiple motions to enforce the settlement agreement, all of which alleged that Toshiba had breached the agreement and all of which were denied. Sklar wanted to communicate with the class without proceeding through the claims administrator and at Toshiba's expense; on June 24, 2008, the court deferred a ruling ("Ms. Sklar, unless and until you show a breach of the agreement, I'm not ordering them to pay for communication between you and the class"). As the court said to Sklar in a hearing on July 28, 2008 before denying the motion without prejudice, "You want me to enforce a settlement agreement involving hundreds of thousands of people, and you don't give me the evidence. It may be that [Toshiba's counsel] know about [issues that class members had with the settlement]. But I don't know that they know. You have given me no evidence to that regard." On December 18, 2008, the court commented "[y]ou've essentially put the same evidence in front of me and I see no difference this time around. I still don't see evidence of a breach," and ruled that Sklar would have to pay the cost and proceed through the class administrator. When Sklar once again filed a motion for a second class notice in November 2009, this time to notify the class that Sklar sought almost a million dollars more in costs than the maximum amount represented in the first class notice, the court stated at the hearing in April 2010 that the agreement was very clear that no extra costs were allowed, and denied Sklar's motion.

B. The court held a hearing on Sklar's fee petition.

Sklar's motion for attorney fees, filed October 28, 2009, requested "fees of up to $12,079,534.69 and expenses in an amount of $905,752.72," and reserved the right to make a future application for additional fees and expenses. Sklar based the requested fee award on her lodestar with a multiplier of two before the effective date of the settlement agreement (May 5, 2008) plus "reasonable incurred costs" and a 1.75 enhancement on fees thereafter.

The court heard the fee motion on April 5, 2010. Sklar began by stating "there's never been a claim for 20 some-million dollars" in fees, and "I have never asked for more than what is set forth in my fee petition [¶] . . . [¶] roughly $12 million." Asked by the court why the class notice gave the higher amount of $24 million, Sklar answered that she had calculated that number using Rosen's valuation (since withdrawn) and an "alternative methodology": "I don't think there was any intent at the time other than being able to provide that the maximum value that could be sought as a methodology for the court's determination as set forth in the settlement agreement." Her current request was lodestar-based rather than based on a valuation of the class settlement. The court responded: "[Toshiba] is saying that . . . your original request[s] were so grossly inflated as to justify an award of nothing now. And I must tell you, Ms. Sklar, that argument is finding a responsive chord with me. I'm not even sure $12 million is appropriate in this case. That too may be very excessive."

The court denied Sklar's request for an updated notice to the class specifying additional costs beyond the maximum of $114,900 in the original class notice. Turning to Sklar's fee request, the court stated: "I think there's a basis to deny all fees altogether."[11] Sklar's time records seemed "grossly exaggerated," much of what she did appeared to be work more suited for paralegals, and "the case law justifies a complete denial of fees if a fee request is overinflated." The case had not been complicated when it settled and the parties quickly reached an agreement, at which time Sklar initially sought more than $24 million (as a percentage of the value of the settlement); then Sklar settled on a lodestar approach, generating time sheets that had her working around the clock, which the court "ha[d] trouble believing." Toshiba's counsel stated that Caddell & Chapman had taken the lead on the litigation, not Sklar. The court noted that Sklar had billed 900 hours for investigation by the time the case was filed, and pointed out discrepancies between her written time slips and her summary table submitted with the

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[11] Overruling Sklar's objection, the court stated that it relied on a declaration by Toshiba expert Professor William Rubenstein.

fee request. Toshiba's counsel then represented to the court that Sklar had lodged those handwritten records contrary to a court order excluding them unless Toshiba could have them forensically examined.

The court read from Sklar's exhibits to the petition for fees and cited her claims that Sklar worked on the case from December 21–27, 2004 and New Year's Eve, 2004, and New Year's Day, 2005, every day, for eight, nine, or ten hours a day, stating "at some point it goes over the top," and suggesting that the claimed hours were not reasonable. The court found the declaration of Toshiba's expert, William Rubenstein, much more convincing than that of Sklar's expert, Professor Arthur Miller, "who apparently only looked at one side of the story." The court gave Sklar 10 days to submit Professor Miller's deposition transcript and other briefing, after which the fee matter would be submitted. Two days later, Sklar elected not to file further evidence and requested that the matter be submitted for decision.

C. The court denied Sklar's petition for attorney fees and awarded $176,900 for the work of SLO staff.

The court issued its meticulous 27-page opinion on June 30, 2010, and we summarize its detailed reasoning.

1. The merits phase

First, the court cited Sklar's original fee request of over $24,740,000, made at the conclusion of the merits phase of the class action (preceding the motion for preliminary approval of the settlement) and again in her first fee petition in January 2008 (including a multiplied lodestar of $1,269,012 for work related to the fee request). Noting that Sklar's January 2008 petition therefore requested a fee amount of approximately $23,470,000 for the merits phase of the case, the court compared that amount to the fee request before the court at the April 2010 hearing, in which petition Sklar requested $12,079,534.69 for all phases of the case. Sklar had repeatedly denied having asked for $24 million in fees, and her "dissembling and outright distortions" "ha[ve] seriously damaged her credibility with this Court." The court therefore doubted her word on her purported lodestar, and her "reduction by over half of the fees SLO originally requested calls into serious question

the legitimacy of her numbers. One raises an eyebrow upon learning that work she once said was worth over $23 million now deserves a lodestar of only $3.3 million.[12] Indeed a court would be justified in denying outright SLO's fee request for this reason alone," citing *Serrano v. Unruh* (1982) 32 Cal.3d 621, 635.

The court also described Sklar's behavior during the pendency of her fee applications, concluding that she improperly resisted Toshiba's efforts to inspect and verify her time records, and violated two discovery orders (the subject of the sanctions). Applying the negative inferences in CACI No. 203, the court concluded that SLO's "confusing, suspect summaries and disorganized, incomplete handwritten notes" were weaker evidence of her time records where stronger evidence was available. CACI No. 204 allowed the court to consider whether a party intentionally concealed or destroyed evidence, and "Sklar concealed and destroyed evidence. . . . The Court concludes that the records Ms. Sklar never produced would have shown that she devoted less time to this matter than she claims to have spent." Sklar's numerous accusations of unethical behavior against other participants (including the trial court) were inappropriate and unprofessional behavior, which also justified a denial of fees.

The court addressed Sklar's claimed time and fees during the merits phase (3,600 hours, or 27 percent of the total), from Sklar's discovery of the laptop defect when she purchased one for personal use in October 2004, through her investigation of the defect, her association with Caddell & Chapman, the filing of the class action in February 2005, and up until the agreement to settle with Toshiba, reached in April 2006. Noting that "[t]he facts of this class action are not difficult," the court acknowledged that Sklar helped to identify the defect and collected evidence and associated cocounsel, "activities [which] undoubtedly created value for the class and may have constituted the *sine qua non* for this class action." Nevertheless, the court found that "Sklar's billing records are, for purposes of calculating the lodestar, unusable. They contain troubling inconsistencies

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[12] Sklar's petition requested $6,643,157.50 for the merits phase, after application of a multiplier of two.

and omissions. There are numerous instances of what appear to be inaccurate and even contradictory billing entries. Moreover, the total number of hours claimed is excessive. The only conclusion that this court can reach is that the attorney's records of the time actually spent cannot be fairly relied upon." Sklar's time estimate for the time she spent over five years (from October 2005 to October 2009) showed her working almost 11 hours a day, including weekends and holidays; even shared with her staff, "the numbers are hard to accept."[13] Although the court did not believe Sklar's proffered hours, they also included activities as a member of the class rather than as counsel, and activities that should have been handled by an expert witness, a fact investigator, or a paralegal; the litigation was almost exclusively aimed at settlement, with modest monetary relief; and Caddell & Chapman's slightly more than $1 million fee request was persuasive evidence that Sklar's claim was excessive. The court inferred that Sklar destroyed some or all of her original time records.

The court noted that awarding a percentage of the recovery (as Sklar initially requested) is "only a cross check against the lodestar method," and as Sklar now relied on the lodestar, the court would use that measure. Sklar's time records were "disorganized, contradictory, and ultimately untrustworthy," and were not usable to calculate a lodestar.[14] Even without the negative inferences in CACI Nos. 203 and 204, "the Court is forced to engage in speculation and guesswork in trying to figure out her lodestar for the merits phase," and contradictory, multiple billing "destroys Ms. Sklar's credibility."

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[13] Sklar's appellate brief puts the number of attorney and paralegal hours expended by SLO at "over 20,054.50 hours expended over more than 5 years," which yields a similar number of daily hours purportedly spent on the class action.

[14] Sklar's "handwritten pages do not corroborate her summaries" of "six different table summaries . . . . Many cover the same specific dates multiple times. Four of the six summaries overlap. Only two of the six summaries cover the merits phase, and both of them overlap." Because the records were disorganized and not supported by handwritten or original "time slips, computer records, or other corroborating evidence of Ms. Sklar's personal time, there is no way for the Court to know whether Ms. Sklar was repeatedly double billing her time." The court cited numerous examples of specific double billing.

Although it was difficult to separate the time Sklar claimed to have spent on the merits of the class action from the time she spent litigating her fee request, "it appears that she spent twice the amount of time litigating for fees as she did handling the merits." Her "jumble" of time records and supporting materials "deserve no weight," and she had not met her evidentiary burden to establish the hours she spent litigating the class action.[15]

Nevertheless, "The Court does accept the hours performed by Ms. Sklar's staff. They have submitted records that appear to be in order." The staff billed a total of 1,769 hours at $100 an hour. The court declined to apply a multiplier. The total fee award for SLO staff was $176,900.

2. The preliminary approval/objector phase

The court described how after the mediation in November 2005, as the parties sought to draft a settlement agreement based on the term sheet, Sklar and Caddell & Chapman disagreed regarding attorney fees. Caddell & Chapman filed a motion for preliminary approval of the settlement. Sklar attempted to remove Caddell & Chapman as cocounsel and objected to the settlement on grounds including one that "would have hidden the amount of her requested attorney's fees from the class by omitting it from the class notice. . . . The Court refused to approve such chicanery." The notice included the exact dollar amount of Sklar's fee request.

A detailed discussion of Sklar's objections to the preliminary settlement followed, including her arguments that she should be paid for representing class members during the settlement's dispute resolution process (the final settlement allowed her to petition for

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[15] The court also concluded that Sklar's stated rate of $400 an hour was too high, and based on the court's observations of Sklar over five years and the problems discussed in the order, Sklar's appropriate hourly rate was $210. "But again, the court cannot calculate a lodestar for Ms. Sklar's work because it does not trust her time records." Further, even if a lodestar could be calculated, "the questions presented by this matter were neither difficult nor novel," the quality of Sklar's representation "was average at best" (and at the settlement phase, "her skills and judgment proved to be less than average"), and the court did not believe Sklar was precluded from accepting other significant employment. Therefore, no multiplier was appropriate.

such fees); that her exact fee amount did not need to be included in the notice (as explained above, this was an unsuccessful objection); that the proposed settlement did not include a provision awarding her fees (Sklar was not a signatory to the proposed settlement, and the final settlement acknowledged that she had a right to request fees); and that Caddell & Chapman should not be appointed as class counsel, including opposition to the firm's fee request (the court overruled this "frivolous" objection). "The objections demonstrate that the vast majority of Ms. Sklar's efforts were not calculated to benefit the class, but to protect or inflate her fee claim," and Sklar had achieved only "de minimis" success. The court did not believe Sklar's claim of 1,060 hours during this part of the litigation. Further, Sklar "accomplished next to nothing" and put her interests before those of her client, delaying the preliminary approval of the settlement, and therefore "deserves no portion of her lodestar. The Court in its discretion declines to award SLO anything for its efforts in objecting to the settlement terms."

3. The attorney fees application phase

The litigation over Sklar's fees began with her declaration filed in August 2006, seeking $24,743,965 in fees, and Sklar reported spending more hours on this phase of the litigation than on the other two combined. Sklar then resisted the taking of her deposition and the inspection of her time records, resulting in hearings and orders regarding discovery motions. The trial court explained that Sklar's deletion of her electronic records and periodic "scrubbing" of the underlying metadata justified an inspection of her computers, but Sklar's "furious effort to resist this procedure" led to her violation of two court orders. Sklar's final fee petition in October 2009 (the petition before the court) requested a lodestar amount of $12,079,543.69, and she also filed a motion for an order directing service of a second class notice to allow her additional costs related to the fee litigation, which the court denied.

The court then compared Sklar's request with Caddell & Chapman's fee amount of $1,125,000 (including expenses). Although the firm did not have to engage in the discovery battle that Sklar experienced, "Ms Sklar brought the firestorm on herself by (1) demanding an initial sum that can be charitably described as unrealistic, (2) refusing

to produce information that Toshiba was entitled to have, and (3) failing to preserve—and perhaps willfully destroying—underlying time records." (Fn. omitted.) The court had "great difficulty" accepting Sklar's reported hours as accurate, and declined to award a multiplier for "'fees on fees.'" "[T]he class realized no benefit at all from the fee litigation of this case."

Sklar had also "relinquished her entitlement to a fee" by her unprofessional misconduct, including: refusal to provide straight answers to the court's questions; refusal to cooperate in discovery; fighting legitimate efforts by Toshiba to confirm her time; making unfounded accusations against Toshiba and its counsel; and providing a "moving target that constitutes Ms. Sklar's fee request," eventually asking Toshiba to pay her $5.4 million for the fee litigation, during which period she *reduced* her initial request for her work on the merits of the class action by almost three-fourths, from $23.5 million to $6.6 million. "Based on the foregoing, as well as the authority in *Serrano v. Unruh*, *supra*, 32 Cal.3d 621, the Court declines to award any fees to SLO for this third phase of the litigation."

The court awarded SLO $176,900 as "the total fees to which it is entitled in this action." Sklar's appeal in No. B227078 followed.

DISCUSSION

I. We grant in part Toshiba's motion to strike and award monetary sanctions against Sklar in the amount of Toshiba's attorney fees related to the motion.

Sklar's challenges to the court's detailed order are many and varied. Before we address her arguments, we turn to Toshiba's motion to strike portions of Sklar's appellant's appendix and for sanctions against SLO.

Toshiba's motion contends that Sklar has altered the record on appeal in an attempt to "'unjumble'" the time records that the trial court described as unusable, inconsistent and contradictory, incomplete, and unreliable. According to Toshiba, Sklar has reorganized items, omitted items filed in the trial court, and added items not filed in

the trial court, all in violation of California Rules of Court, rule 8.124(g). Toshiba discovered these discrepancies while preparing its respondent's brief.[16]

A declaration by Toshiba's counsel attached to the motion explains that the discrepancies appear in exhibit 121 to Sklar's October 2009 fee petition. The petition states that exhibit 121 consists of true and correct copies of the time records for all attorneys and staff at SLO. Exhibit 121, as it appears in Sklar's appellant's appendix, spans more than 2000 pages.[17] Toshiba found discrepancies between the exhibit 121 Toshiba received with service of the fee petition and the version contained in the appendix. To ensure that these discrepancies also appeared in the version of exhibit 121 in the trial court's file, Toshiba's counsel traveled to the trial court and reviewed the record on file. Toshiba's counsel verified that as exhibit 121 appeared in the court file, Sklar's time records and those of her staff were not organized by person or chronology; in Sklar's appendix, the exhibit is organized chronologically and by timekeeper. The exhibit 121 in the appendix deleted some overlapping time records, and added nearly 100 pages of handwritten time records which did not appear in the court file, all apparently for Sklar's assistant Richard Goldstein. Toshiba requests that we strike the inconsistent portions of exhibit 121from Sklar's appendix, and that we impose monetary or other sanctions, up to dismissal of Sklar's appeal. Counsel's declaration includes the amount of attorney fees incurred in reviewing the record in the trial court and preparing the motion.

Sklar responds, "there is no issue with Exhibit 121," and argues that the time records were not jumbled or disorganized as presented to the trial court. She claims that her paralegal Susan Goldstein prepared a copied exhibit 121 without changing, altering or deleting anything, but "inadvertently" included 96 pages of handwritten time records for Richard Goldstein (Sklar states she will not cite to those records). She points out that

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[16] Toshiba notes the discrepancies in a footnote in its brief.

[17] Sklar's appellant's appendix in her appeal of the fee order is 103 volumes and 25,189 pages. The purported exhibit 121 runs from volume 76, page 19020 to volume 83, page 21179, for a total of 2,159 pages.

some of the records Toshiba states were not included in exhibit 121 as it appears in the appendix appear elsewhere, with different captions, and two others "are not pertinent to the issues raised by [Sklar] on appeal." She argues that Toshiba should have submitted a certified copy of the multiple volumes of exhibit 121 as contained in the court file, and should have provided a listing by Bates numbers as they appear in the court file. Toshiba's response includes, attached to a declaration by counsel, a table comparing exhibit 121 as it appears in the court file and as it appears in Sklar's appendix. Many parts of the exhibit do not have Bates numbers.

California Rules of Court, rule 8.124(g) is entitled "Inaccurate or noncomplying appendix," and states: "Filing an appendix constitutes a representation that the appendix consists of accurate copies of documents in the superior court file. The reviewing court may impose monetary or other sanctions for filing an appendix that contains inaccurate copies or otherwise violates this rule." For all its bluster and obfuscation, Sklar's response acknowledges that there are differences between exhibit 121 as it appears in the court file and the version before us. It is Sklar's responsibility to provide an accurate appellant's appendix, and she has failed to do so *at least* to the extent identified in Toshiba's motion.

We therefore strike the 96 pages of Richard Goldstein's handwritten records, as they were not included in the court file. (*The Termo Co. v. Luther* (2008) 169 Cal.App.4th 394, 404.) The other inconsistencies in the appearance of exhibit 121 (reorganization, deletion of overlapping records), while extremely troubling, do not require that we strike the over 2000 pages of the appellant's appendix. In resolving this appeal, as explained below, we conclude that the trial court did not abuse its discretion in denying Sklar's fee request. We reach that conclusion after reviewing exhibit 121 and agreeing with the trial court that it is a disorganized jumble, even as it appears in the record on appeal, so that any reorganization attempted by Sklar was fruitless. We conclude that Toshiba is entitled to monetary sanctions on appeal in the amount of its attorney fees related to the motion to strike and Toshiba's reply in support of the motion, as determined by the trial court on remand. (See *Keitel v. Heubel* (2002) 103

Cal.App.4th 324, 342 [courts may consider the amount of attorney fees on appeal in determining monetary sanctions].)

II. The trial court acted within its discretion in awarding sanctions.

"The court may impose a monetary sanction ordering that one engaging in the misuse of the discovery process, or any attorney advising that conduct, or both pay the reasonable expenses, including attorney's fees, incurred by anyone as a result of that conduct . . . . If a monetary sanction is authorized by any provision of this title, the court shall impose that 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." (§ 2023.030, subd. (a).) Misuse of the discovery process includes disobeying a court order to provide discovery, and failing to meet and confer in good faith to resolve a discovery dispute when required by statute to do so. (*In re Marriage of Michaely* (2007) 150 Cal.App.4th 802, 809; § 2023.010, subds. (g), (i).)

We review the order imposing the sanction for an abuse of discretion, and we resolve any evidentiary conflicts most favorably to the trial court's ruling, reversing "only if the trial court's action was '"'arbitrary, capricious, or whimsical.'"' [Citations.]" (*Sinaiko Healthcare Consulting, Inc. v. Pacific Healthcare Consultants* (2007) 148 Cal.App.4th 390, 401.) Sklar has the burden to demonstrate that the trial court erred, and where the evidence is in conflict we will not disturb the trial court's factual findings. (*Ibid.*) Sklar's intent is not relevant to the propriety of the monetary sanctions. "'There is no requirement that misuse of the discovery process must be willful for a monetary sanction to be imposed.' [Citations.]" (*Clement v. Alegre* (2009) 177 Cal.App.4th 1277, 1286.) "'Whenever one party's improper actions—even if not "willful"—in seeking or resisting discovery necessitate the court's intervention in a dispute, the losing party presumptively should pay a sanction to the prevailing party. . . .'" (*Id.* at pp. 1286–1287.)

Sklar's conduct, as detailed above, amply supports the sanctions award. There is no question that she disobeyed the court's August 15, 2007 order that she allow Toshiba's expert to search her hard drive, and its further order on June 24, 2008 setting the inspection for July 22 and 23, 2008. On the day before the court-ordered inspection

was to begin, Sklar indicated she would not allow it to proceed. While the record is rife with evidence supporting a conclusion that Sklar's disobedience and her misuse of the discovery process were willful, her intent is irrelevant to our conclusion that she defied the court's order and "'presumptively should pay a sanction to the prevailing party.'" (*Clement v. Alegre*, *supra*, 177 Cal.App.4th at pp. 1286–1287.)

Sklar admits that she refused to allow the ordered inspection to occur, but argues that her refusal was substantially justified as her hard drive contained privileged material. The trial court, however, entered a stipulated protective order providing that the production of any electronic information did not waive any of the producing party's claims of privacy, confidentiality, or privilege, and the court made it clear that no privileges were waived. Sklar also argues that the court had no authority under section 2023.030 to order a forensic inspection. The court did not order the inspection as a sanction under section 2023.030. Sklar next argues that she learned only two days before the inspection in July 2008 that Toshiba's expert would image her hard drive. This ignores that Sklar's initial protocol, attached to an email from her counsel on October 19, 2007, began with the creation of a forensic image of Sklar's hard drive (albeit performed by SLO and subject to examination at Sklar's home office).[18] The protocol also provided for the presence of Toshiba's counsel at the inspection of the imaged hard drive by Toshiba's expert, as well as Sklar, SLO's counsel, and an SLO expert.[19] Sklar's protocol provided that the imaged hard drive would be an exact duplicate of her hard drive, so the image would be the same regardless of which party took the image. None of Sklar's

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[18] The imaging of a hard drive is a first step in attempting to retrieve discoverable data that has reportedly been removed or destroyed. (See, e.g., *Electronic Funds Solutions, LLC v. Murphy* (2005) 134 Cal.App.4th 1161, 1169–1170 [describing plaintiffs' imaging and inspection of hard drives for data after defendants intentionally destroyed emails using "wiping" software].)

[19] As we noted above, the protocol attached to Sklar's August 2008 declaration (and which she incorrectly described as her original protocol proposed on October 19, 2007) *excluded* Toshiba's counsel from being present at the inspection.

arguments constitutes substantial justification for her disobedience of the court order that Sklar allow Toshiba's expert to inspect her hard drive.

As the trial court said with some exasperation at the April 24, 2009 hearing on Toshiba's motion for sanctions, after Sklar argued that the lack of an ordered protocol substantially justified her disobedience of the court order requiring inspection, "the record in this case is one of obfuscation and delay by [Sklar]." We agree. The record as we have described it above shows that Sklar did not cooperate in creating a protocol, and "strongly indicates that the purpose [of Sklar's behavior] was . . . to generally obstruct the self-executing process of discovery." (*Clement v. Alegre*, *supra*, 177 Cal.App.4th at p. 1292.) That she disputed details of the protocol (while failing to negotiate with Toshiba) does not provide substantial justification for her open defiance of a court order requiring inspection. "The trial court could look at the whole picture of the discovery dispute and was well within its discretion in rejecting [Sklar's] claim of substantial justification." (*Ibid.*) We conclude the court acted within its considerable discretion in imposing sanctions based on Sklar's "[m]isuse[] of the discovery process." (§ 2023.010, subd. (a).)

This brings us to the second basis for the sanctions. While Sklar's refusal to obey the court's order to allow inspection by Toshiba's expert is sufficient to support the sanctions award, we also conclude that the court did not abuse its discretion when it based its sanction order in part on Sklar's failure to meet and confer with Toshiba regarding both of the court-ordered inspections. Section 2023.020 requires the court to "impose a monetary sanction ordering any party or attorney who fails to confer as required pay the reasonable expenses, including attorney's fees, incurred by anyone as a result of that conduct." Although the discovery statutes expressly require that a party "meet and confer" before filing certain discovery motions (§§ 2030.300, subd. (b), 2031.310, subd. (b)(2)), there is no statutory requirement at issue in this case. Instead, the trial court repeatedly directed the parties to cooperate in creating an acceptable protocol for the inspection of Sklar's electronic records. The record shows that while Toshiba repeatedly attempted to discuss a protocol for the inspections, Sklar did not

reciprocate in a constructive fashion. This failure to engage in cooperative discussion regarding a protocol resulted in the lack of any agreed-upon procedure for the July 2008 inspection by Toshiba's expert. "'[A] reasonable and good faith effort at informal resolution entails something more than bickering with [opposing] counsel . . . . Rather, the law requires that counsel attempt to talk the matter over, compare their views, consult, and deliberate.' [Citation.]" (*Clement v. Alegre*, *supra*, 177 Cal.App.4th at p. 1294.) Sklar cannot rely on the absence of a detailed protocol—an absence to which she contributed by failing to meet and confer with Toshiba—as substantial justification for disobeying the court order to allow the inspection.

"A court's decision to impose a particular sanction is 'subject to reversal only for manifest abuse exceeding the bounds of reason.' [Citation.]" (*Electronic Funds Solutions v. Murphy*, *supra*, 134 Cal.App.4th at p. 1183.) The trial court's decision to sanction Sklar in the amount of $165,000 was not outside the bounds of reason.[20]

III. The trial court did not act in excess of its jurisdiction in making the inspection orders.

Sklar also argues that the trial court abused its discretion in entering the inspection orders of August 15, 2007 and June 24, 2008, so that the award of sanctions for disobedience was also an abuse of discretion. Even if the court's orders were an abuse of discretion that does not excuse Sklar's disobedience of the orders. "In contrast to orders entered '"in excess of the jurisdiction of the issuing court"' [citation], which may be challenged collaterally, a party may not defend against enforcement of a court order by contending merely that the order is legally erroneous. [Citation]." (*Wanke, Industrial, Commercial, Residential, Inc. v. Keck* (2012) 209 Cal.App.4th 1151, 1172 (*Wanke*); see *In re Marriage of Niklas*, *supra*, 211 Cal.App.3d at p. 35.) Sklar was bound to obey the order to allow the inspection of her hard drive '"'"however erroneous the action of the court may be,"'" as "'[a]n erroneous order . . . is not necessarily an order in excess of the

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[20] We note that the court scrupulously avoided awarding sanctions related to metadata.

issuing court's jurisdiction, as an order that is unconstitutional on its face would be.'" (*Wanke*, at pp. 1172–1173, italics omitted.)

Sklar also argues that the court had no statutory authority to make the order as she was a "non-party attorney" (despite her express acknowledgment in 2008 that Judge Mohr had already issued some discovery orders and had jurisdiction over all disputes),[21] and that the court similarly lacked authority as the order would have forced her to disclose privileged information (despite the stipulated protective order). These arguments do not challenge the court's jurisdiction but restate Sklar's contention that the court erred, and even if her arguments had some validity, "demonstrating that the trial court *erred* in issuing the [order] would not be sufficient to demonstrate that the court acted in 'excess of its jurisdiction' in doing so. [Citations.]" (*Wanke*, *supra*, 209 Cal.App.4th at p. 1178–1179.)

Further, the sizeable nature of Sklar's fee request and her resistance to the court's inquiries regarding her seemingly excessive rates made the court's inspection orders reasonable and necessary. Sklar requested over $24 million in attorney fees. In support, she provided hard copies of her billing records purporting to show that she worked at a superhuman rate, followed by a CD with PDF copies of those time records (which she acknowledges had been redacted). Sklar later represented that she had deleted all the original electronic billing records that arguably might have cast doubt on the accuracy of her billing. We therefore reject Sklar's complaint that the court exceeded its jurisdiction when it authorized Toshiba's inspection of her hard drive to determine whether any of that electronically stored information survived her destruction of the files.

IV. The trial court acted within its discretion in denying Sklar attorney fees.

"Except as provided for by statute, compensation for attorney fees is left to the agreement of the parties. (Code Civ. Proc., § 1021.) Civil Code section 1717 . . . provides that reasonable attorney fees authorized by contract shall be awarded

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[21] Section 1985.8, effective in 2009, provides for the use of subpoenas in obtaining electronically stored information from nonparties.

to the prevailing party as 'fixed by the court.' The trial court has broad discretion to determine the amount of a reasonable fee, and the award of such fees is governed by equitable principles. [Citation.] The first step involves the lodestar figure—a calculation based on the number of hours reasonably expended multiplied by the lawyer's hourly rate. 'The lodestar figure may then be adjusted, based on consideration of factors specific to the case, in order to fix the fee at the fair market value for the legal services provided.' [Citation.] In short, after determining the lodestar amount, the court shall then '"consider whether the total award so calculated under all of the circumstances of the case is more than a reasonable amount and, if so, shall reduce the [Civil Code] section 1717 award so that it is a reasonable figure."' [Citation.]" (*EnPalm, LLC v. Teitler* (2008) 162 Cal.App.4th 770, 774 (*EnPalm*), citing *PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1094–1096.) Although Sklar variously characterizes her fee request as under the Consumers Legal Remedies Act, Civil Code section 1780, and the private attorney general statute, Code of Civil Procedure section 1021.5, as well as a contingency fee, her entitlement to fees is contractual, grounded in the settlement agreement's provision that Toshiba will pay reasonable attorney fees and costs to class counsel.

"'"The standard of review on issues of attorney's fees and costs is abuse of discretion. The trial court' decision will only be disturbed when there is no substantial evidence to support the trial court's findings or when there has been a miscarriage of justice."'" (*Pellegrino v. Robert Half Internat., Inc.* (2010) 182 Cal.App.4th 278, 288–289.) As with all orders and judgments, this fee order "is presumed correct, all intendments and presumptions are indulged in its favor, and ambiguities are resolved in favor of affirmance." (*Hirshfield v. Schwartz* (2001) 91 Cal.App.4th 749, 765–766). "[A]scertaining the fee amount is left to the trial court's sound discretion. (*Ketchum* [*v. Moses* (2001) 24 Cal.4th] at p. 1132; *Maughan v. Google Technology, Inc.* (2006) 143 Cal.App.4th 1242, 1252. . . .) Trial judges are entrusted with this discretionary determination because they are in the best position to assess the value of the professional services rendered in their courts. (*Ketchum* [*v. Moses*, *supra*, 24 Cal.4th] at p. 1132; *PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095–1096); see *Melnyk v.*

Robledo (1976) 64 Cal.App.3d 618, 623 ['trial court has its own expertise' on the question of fees].)" (*Christian Research Institute v. Alnor* (2008) 165 Cal.App.4th 1315, 1321.) Thus, the court's fee award "'will not be disturbed unless the appellate court is convinced that it is clearly wrong.'" (*Serrano v. Priest* (1977) 20 Cal.3d 25, 49.)

"'The abuse of discretion standard is not a unified standard; the deference it calls for varies according to the aspect of a trial court's ruling under the review. The trial court's findings of fact are reviewed for substantial evidence, its conclusions of law are reviewed de novo, and its application of the law to the facts is reversible only if arbitrary and capricious.' [Citation.]" (*Cellphone Termination Fee Cases* (2009) 180 Cal.App.4th 1110, 1118.)

A. The trial court applied the correct legal standard, and decided that Sklar was not credible and her time records were not usable to calculate a lodestar.

Sklar argues that the trial court did not use the lodestar method in deciding what fees Sklar was due under the terms of the settlement agreement. The trial court's opinion, however, discusses the lodestar method in detail, but concluded that Sklar's billing records were "unusable" for the purpose of calculating the lodestar. The records were inconsistent, contained omissions, and billing entries were inaccurate and even contradictory. The number of hours claimed were excessive (over five years, about 11 hours a day every day for Sklar and SLO), and Sklar's hours included activities that should have been handled by an expert witness, fact investigator, or paralegal. The court applied the negative inferences in CACI No. 203 and 204, but even without those negative inferences, the court concluded that it would have to use "speculation and guesswork to figure out her lodestar for the merits phase."

"The value of legal services performed in a case is a matter in which the trial court has its own expertise," and although properly claimed costs and fees are prima facie evidence that they were necessarily incurred, "where the items are properly objected to, they are put in issue, and the burden of proof is upon the party claiming them as costs." (*Melnyk v. Robledo*, *supra*, 64 Cal.App.3d at pp. 623–624.) Toshiba objected to Sklar's fee request, putting her records in issue. The trial court resolved the conflict in the

evidence in favor of Toshiba, concluding that Sklar had not met her burden to produce accurate time records. Rather than ignoring the lodestar method, the court found that it had insufficient credible evidence of Sklar's time *even to apply* the lodestar method, which begins with the number of hours counsel reasonably expended on the litigation. (*EnPalm, supra*, 162 Cal.App.4th at p. 774.)[22] While Sklar vigorously disputes the trial court's conclusion, "we do not reweigh the evidence" in considering whether the trial court abused its discretion. (*Weber v. Langholz* (1995) 39 Cal.App.4th 1578, 1587.)

We also emphasize that the court found that the contradictory and multiple billing "destroys Ms. Sklar's credibility" as to the hours she claimed to have spent during the entire litigation: the merits phase preceding the settlement, the phase during which the parties sought preliminary approval, and the fees phase. The court concluded that it could not trust Sklar's time records during any of those periods. Further, Sklar had "concealed and destroyed evidence" of the time she actually spent on the case, leading the court to believe that the missing records would show a lesser amount of time. The trial court stated that Sklar had not been truthful about the amount of fees (approximately $24 million) she initially requested; engaged in "dissembling and outright distortions;" and concealed and destroyed evidence, so that the court was left with "lingering skepticism over the veracity of her testimony and her evidence." This constitutes a clear adverse credibility determination. The trial court decided against Sklar because it did not believe her evidence of time spent in the class action litigation.

Such a credibility determination is uniquely the province of the trial court. Just as we may not reweigh the evidence, we do not reassess credibility determinations, as "'[t]he Court of Appeal is not a second trier of fact . . . .' [Citation.]" (*In re Marriage of Balcof* (2006) 141 Cal.App.4th 1509, 1531; *Estate of Young* (2008) 160 Cal.App.4th 62, 76.)

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[22] Even a court that has been able to calculate a lodestar figure is entitled to reduce the sum under applicable equitable principles. (*EnPalm, supra*, 162 Cal.App.4th at p. 778 [trial court's use of equitable principles to reduce lodestar amount by 90 percent "because most of those fees were unnecessary was proper"].)

B. The trial court cited other reasons for denying the fee award.

The trial court also compared Sklar's initial request of over $24,740,000 to the less than half that amount ($12,079,534.69) she requested in the April 2010 fee petition, and stated: "[A] court would be justified in denying outright SLO's fee request for this reason alone." In *Serrano v. Unruh*, *supra*, 32 Cal.3d at p. 635, the California Supreme Court stated: "A fee request that appears unreasonably inflated is a special circumstance permitting the trial court to reduce the award or deny one altogether. 'If . . . the Court were required to award a reasonable fee when an outrageously unreasonable one has been asked for, claimants would be encouraged to make unreasonable demands, knowing that the only unfavorable consequence of such misconduct would be reduction of their fee to what they should have asked in the first place. To discourage such greed, a severe reaction is needful . . . .' [Citation.]" (Fn. omitted.) (See *Chavez v. City of Los Angeles* (2010) 47 Cal.4th 970, 990.)

Sklar's initial fee request for more than $24,740,000 was calculated based on a percentage of an expert's declaration estimating the value of the settlement. By the time she made her final fee request, Sklar had withdrawn the declaration, and her final request was based on the lodestar method. As the trial court recognized, a percentage of the recovery analysis may be used to "cross check" a lodestar amount, but it does not substitute for determining a lodestar. "'"Under certain circumstances, a lodestar calculation may be enhanced on the basis of a percentage-of-the-benefit analysis. [Citation.]" [Citation.]' [Citation.] This approach 'anchors the trial court's analysis to an objective determination of the value of the attorney's services, ensuring that the amount awarded is not arbitrary.' [Citation.]" (*Consumer Privacy Cases* (2009) 175 Cal.App.4th 545, 556–557.) When she withdrew her expert's declaration, the basis for Sklar's outsize initial request disappeared. As that initial request was based on a percentage of the recovery, we decline to compare it directly to the lodestar amount that Sklar eventually claimed.

While we agree with the trial court that Sklar's requested fee amount was a moving target, casting doubt on her entitlement to fees, the trial court cited Sklar's

inflated fee request as only one of several reasons for denying a fee award. We therefore need not consider whether this alternate ground for denying fees to Sklar would alone support the trial court's order.

The trial court also found that Sklar made numerous unfounded accusations of unethical behavior against other participants in the litigation, including Caddell & Chapman and Toshiba's counsel, among others, and cited to the record in support. We need not rely on this ground, but we note that Sklar continues this conduct on this appeal.[23]

C. Sklar's other contentions are without merit.

Sklar protests the court's refusal to apply a multiplier to her fee request for the litigation over attorney fees ("fees on fees"), but the court concluded that the litigation over her fee request provided no benefit to the class and that no multiplier was required. This was not an abuse of discretion (*Pellegrino v. Robert Half Internat., Inc., supra*, 182 Cal.App.4th at p. 295), and, at any rate, as the court concluded that there was not credible evidence supporting a lodestar amount, it is irrelevant whether a multiplier was appropriate. The same applies to Sklar's argument that the court improperly reduced her hourly billing rate; because no fees were awarded, the rate reduction is not in issue. Sklar contends that the trial court abused its discretion in considering the declaration of Toshiba expert William Rubenstein, citing to materials regarding his participation in

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[23] The court acknowledged that Sklar had also accused the court and its staff, but recognized that it could not consider those accusations, as "[i]t is improper to retaliate against an attorney who attempts to disqualify a judge." We note that in her opening brief on appeal, Sklar accuses Toshiba of entering into the fee agreement with Caddell & Chapman to exploit Sklar and limit her fee award, colluding with Caddell & Chapman ("turncoat co-counsel") to minimize the value of the settlement, and trying to cut Sklar and the named plaintiff out of the case altogether. In her 110-page reply brief, she repeatedly accuses Toshiba of misrepresenting the record on appeal, and accuses Caddell & Chapman of unprofessional conduct, including disregarding its fiduciary duty to the class. She also requests that we assign the case to a different trial court on remand, contending that the "court made no attempt to apply the scales of justice equally between the parties and due process required no less."

other cases. We denied Sklar's motion to take judicial notice of those materials and therefore do not address this claim.

Sklar also argues that the trial court abused its discretion in applying CACI Nos. 203 and 204 because there was no evidence that she willfully suppressed evidence. To the contrary, as described above, the record shows that Sklar repeatedly resisted discovery of her original time records, and we will not disturb the trial court's compliance with Evidence Code section 412, which states: "If weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with mistrust." "If stronger evidence is clearly available, the trial court may draw the inference offered by . . . section 412, and view the proffered evidence with distrust." (*Houghtaling v. Superior Court* (1993) 17 Cal.App.4th 1128, 1137.)

Sklar contends that the court abused its discretion in excluding the two boxes of handwritten time records that she produced during the two days of her deposition in June 2009. As we explained above, Toyota argued that it had sought those records since 2006, and after a hearing the court ordered Sklar to bring the originals to her resumed deposition in September 2009, warning that if she did not proceed with the deposition she would be barred from using those documents in support of her fee petition. Sklar did not appear for her deposition and did not produce the original documents. The court did not abuse its discretion.

Sklar argues that the trial court's denial of fees is a constructive sanction, motivated by "subjective reasons" including antipathy toward Sklar and a desire to punish, and the fee order is not based on the evidence. To the contrary, the fee order as described above shows the trial court's careful consideration of the evidence; it was not required to conclude that Sklar's evidence was reliable.

Sklar also challenges the trial court's order that Sklar's communication with the class go through the claims administrator. She does not support that claim with any reasoned argument, and we therefore do not address it. "We are not bound to develop appellants' arguments for them. [Citation.] The absence of cogent legal argument or

citation to authority allows this court to treat the contentions as waived. [Citations.]" (*In re Marriage of Falcone & Fyke* (2008) 164 Cal.App.4th 814, 830.)

Sklar argues that the trial court abused its discretion in failing to rule on her evidentiary objections. At the hearing on the fee petition, the trial court commented that Sklar's objections were "so prolix that I can't promise you I'm going to be able to get through them," and directed Sklar to identify the most important objections and schedule a hearing. The trial court was within its discretion to order Sklar to focus on those objections that were important to her case. (*Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 532–533.) Sklar never pruned her objections or requested a hearing, instead electing not to file any more evidence and requesting that the matter be submitted. She therefore waived her evidentiary objections.

V. The court did not rule on Sklar's request for costs.

The settlement agreement provided: "The maximum amount of fees and expenses to be sought by Sklar Law Offices shall be set forth in the Class Notice."[24] The class notice stated, "Sklar Law Offices will also ask for litigation expenses in the amount of $114,900." Sklar's January 2008 fee petition requested costs of $410,383.53, and her October 2009 fee petition sought costs of $905,572. The trial court ruled against Sklar's November 2009 motion for a second class notice to set forth the increased expense request.

At the February 10, 2010 hearing, the court stated: "I am very hard put to figure out how you could be awarded any more costs based on the agreement that limits you." At the hearing on April 5, 2012, the court referred to the settlement and the class notice as limiting Sklar's expense amount. The court's order denying fees states: "Ms. Sklar also filed a motion for an order directing service of a second class notice by email. She

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[24] The settlement agreement also states: "Sklar Law Offices agrees that it will not seek any additional fees or expenses from [Toshiba] in connection with the action and the settlement set forth herein that are not part of its Fee Application, including, without limitation, any fees or expenses incurred in connection with obtaining final approval of the settlement, in connection with any objection(s) or appeal(s), in connection with and throughout the claims administration process, expert fees, or other fees or expenses."

did so in order to recover additional costs that she claims to have incurred because of the intensity of the litigation surrounding her attorney's fee application. The Court denied the motion because Ms. Sklar's costs were limited by the settlement agreement, a contract she expressly agreed to." The trial court did not, however, address whether Sklar was entitled to recover all or any part of the $114,900 as set forth in the class notice.

Toshiba argues on appeal that the "disarray" of Sklar's documentation in support of her costs justified denying her request for costs, and the majority of Sklar's claimed costs were not recoverable. While the court denied her request to send a new class notice with the increased cost amount (therefore limiting her costs to the $114,900 appearing in the initial class notice), it did not rule on her cost request. The state of the supporting record, and whether that record supports an award of costs in any amount, is for the trial court to determine in the first instance. We therefore remand to the trial court to rule on Sklar's request for costs, in light of the settlement agreement, the class notice, and her subsequent fee petitions.

VI. The trial court acted within its discretion in awarding $176,900 in fees for work by SLO staff.

The trial court's June 20, 2010 order states: "The court can calculate a lodestar for SLO's staff because their time records appear to be in order. Susan Goldstein devoted 1,385 hours to the merits phase at a stated hourly rate of $100. Richard Goldstein devoted 354 hours to the merits phase at a stated hourly rate of $100.[25] Missy Mouser devoted 30 hours to the merits phase at a stated hourly rate of $100. The SLO staff claims to have billed 1,769 hours at $100 per hour for a total lodestar of $176,900. Declining to apply a multiplier to the services of SLO's staff produces a total fee for SLO's work during the merits phase [in] the sum of $176,900." Toshiba cross-appeals, arguing that no fees should have been awarded for the work of the SLO staff.

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[25] Of course, the trial court did not have before it Richard Goldstein's handwritten records, which as explained above we strike from the record on appeal.

First, Toshiba points out that 24 hours of Missy Mouser's time was incurred in May 2006, so that she devoted only 6 hours to the merits phase (October 2004 to April 2006) rather than 30, as the order states. This is a simple calculation error which the court can correct on remand by subtracting $2,400 from the fee award.

Second, Toshiba argues that SLO's staff are not qualified paralegals under California law, and therefore the trial court erred in awarding fees for their work. As in the trial court, Toshiba opposes the award of fees on the ground that Sklar's staff were not paralegals pursuant to Business and Professions Code section 6450. Sklar replies (as she did in the trial court) that her staff were paralegals under Minnesota requirements, complied with California's continuing education requirements, and their billing rate of $100 was less than one-half of the rate at which Toshiba's counsel billed its paralegal time.

Business and Professions Code section 6450, subdivision (c), sets forth the required qualifications for paralegals under California law.[26] Toshiba points out that none of Sklar's staff possessed a certificate of completion from a paralegal program; neither Susan nor Richard Goldstein had a baccalaureate degree; none obtained three years of law-related supervised work before December 31, 2003; and Sklar did not

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[26] As in effect during the merits phase, Business and Professions Code section 6450, subdivision (c) provides: "A paralegal shall possess at least one of the following: [¶] (1) A certificate of completion of a paralegal program approved by the American Bar Association. [¶] (2) A certificate of completion of a paralegal program at, or a degree from, a postsecondary institution that requires the successful completion of a minimum of 24 semester, or equivalent, units in law-related courses and that has been accredited . . . . [¶] (3) A baccalaureate degree or an advanced degree in any subject, a minimum of one year of law-related experience under the supervision of an attorney who has been an active member of the State Bar of California for at least the preceding three years . . . and a written declaration from this attorney stating that the person is qualified to perform paralegal tasks. [¶] (4) A high school diploma or general equivalency diploma, a minimum of three years of law-related experience under the supervision of an attorney who has been an active member of the State Bar of California for at least the preceding three years, and a written declaration from this attorney stating that the person is qualified to perform paralegal tasks. This experience and training shall be completed no later than December 31, 2003."

provide a written declaration that any was qualified to perform paralegal tasks. As authority for the proposition that no fees may be awarded for paralegal work unless the paralegal meets the requirements of the California statute, Toshiba cites two unpublished decisions from federal district courts in California.[27] These cases do not bind us, and in any event they do not hold, and we have found no California state cases holding, that compliance with the educational requirements of Business & Professions Code section 6540 is in every case a prerequisite to the recovery of paralegal fees.

In the face of Toshiba's argument that Sklar's Minnesota staff deserved no compensation on the basis of noncompliance with California's educational requirements for "paralegals," the court nevertheless awarded fees for the work of Sklar's "staff." Nowhere in the trial court's order awarding fees does the court state that Sklar's staff were paralegals, or that the $176,900 awarded was for the work of paralegals. "The trial court is in the best position to determine the reasonable value of professional services rendered in a case before it and has broad discretion to determine the reasonable amount of an attorney fees award." (*Collins v. City of Los Angeles* (2012) 205 Cal.App.4th 140, 159.) Further, on appeal we presume the trial court's order is correct, indulge all presumptions in favor of that correctness, and resolve all ambiguities in favor of affirmance. (*Hirshfield v. Schwartz*, *supra*, 91 Cal.App.4th at pp. 765–766.) In this case, the trial court concluded that reimbursement at a rate of $100 an hour was appropriate for Sklar's staff *without* either stating that they were paralegals or stating that $100 an hour was a paralegal rate. We presume (in favor of the order's correctness) that the trial court did not consider the staff to be "paralegals" and did not consider $100 an hour to be a

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[27] In *Sanford v. GMRI, Inc.* (E.D.Cal. Nov. 11, 2005, CIV-S-04-1535 DFL CMK) 2005 U.S.Dist. Lexis 27581, the plaintiff sought to recover paralegal rates for individuals who were previously categorized as legal assistants and who did not meet the requirements of the statute; the trial court required that those individuals be compensated as legal assistants. In *Velez v. Roche* (N.D.Cal. Sept. 22, 2004, No. C-02-0337 EMC) 2004 U.S.Dist. Lexis 29848, *33–*34, the court awarded fees for paralegals who met the requirements of the statute. In both cases, of course, the federal district court was making the decision in the first instance of the rate to be used, just as the trial court did in this case. Our appellate review, by contrast, is for abuse of discretion.

paralegal rate. We cannot say it was an abuse of discretion to award fees for the work of SLO's staff.

Third, Toshiba argues that the records for SLO staff time suffered from the same defects as Sklar's time records. The trial court, however, while it concluded that it could not calculate a lodestar from Sklar's time records, found that the staff's records were "in order."[28] Just as it was not an abuse of discretion for the trial court to conclude that Sklar's time records were so hopelessly duplicative, contradictory, and unreliable that it could not calculate a lodestar, it was not an abuse of discretion for the court to conclude that the records of staff time were sufficiently coherent to serve as a basis for calculating a fee award for staff time.

Sklar's reply brief argues that the court should have awarded fees for "paralegal services" for the entire litigation and erred in calculating Susan Goldstein's hourly rate. Those arguments are meritless in light of our conclusion above that the award was not for "paralegal services." Further, the court concluded that no fees were appropriate for the latter stages of the litigation, because the class received no benefit from Sklar's objections to the settlement or from the attorney fees litigation. The appellate record amply demonstrates that the court's conclusion was within its discretion.

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[28] We have reviewed the records and do not conclude that they are so in disarray as to preclude the trial court from relying on them to make the award of fees for the work of Sklar's staff.

DISPOSITION

The order awarding monetary sanctions is affirmed. The portion of the attorney fee order awarding $179,600 in fees for work by Sklar Law Offices staff is reversed, and is remanded to the trial court for correction of the amount of fees due for the work of Missy Mouser, and for a determination by the trial court of the amount, if any, of costs to be awarded to Sklar Law Offices, with a maximum cost award of $114,900. The trial court is also directed to award monetary sanctions to Toshiba America Information Systems in the amount of its attorney fees and costs related to Toshiba America Information Systems's motion to strike. In all other respects, the attorney fee award is affirmed. Costs on appeal are to be awarded to Toshiba America Information Systems. Pursuant to Business and Professions Code section 6087, subdivision (a)(3), the clerk of this court is directed to send a certified copy of this opinion to the State Bar.

CERTIFIED FOR PUBLICATION.

JOHNSON, J.

We concur:

ROTHSCHILD, Acting P. J.

CHANEY, J.