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STATE OF CALIFORNIA
BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

INQUIRY CONCERNING JUDGE
EDMUND W. CLARKE, JR.

NO. 197

**BRIEF OF AMICUS CURIAE THE
ALLIANCE OF CALIFORNIA JUDGES
IN SUPPORT OF JUDGE EDMUND
WILLCOX CLARKE
(Rule 131(a))**

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The Alliance of California Judges, an organization of approximately 500 judicial officers, files this brief as a friend of the court pursuant to Rules of Commission on Judicial Performance, rule 131.

INTRODUCTION

“[A]ny evaluation of a judge’s conduct should consider the context in which the conduct took place. . . .” (*Inquiry Concerning Van Voorhis* (2003) 48 Cal.4th CJP Supp. 257, 274.)

This is the context in which Judge Clarke—a judge with “an excellent reputation” who “is highly esteemed by many fellow judges and lawyers who practice before him and have practiced with him” (Findings of Fact and Conclusions of Law of the Special Masters (hereinafter referred to as SMF), pp. 35-36)—committed the single improper action found by the special masters:

With little advance warning, Judge Clarke had just been sent a four-defendant gang murder trial with a time estimate of over four weeks. He was presiding over what promised to be a lengthy jury selection process—the five parties before him had the right to exercise up to 80 peremptory challenges. (SMF 11.) Judge Clarke was facing a room full of over 80 jurors, all of whom were seeking to be released. (SMF 12.) The scene in the hallway, where the judicial assistant, Michele Sussman, was distributing hardship request forms, was “chaotic.” (SMF 18.) Ms. Sussman was trying to manage a “large pool of jurors clamoring for her attention and crowding her physically.” (SMF 22.)

One juror, after having been released, complained that the judicial assistant had treated her rudely in the corridor. Judge Clarke, “in trying to fulfill his judicial duties under challenging circumstances” (SMF 21), reacted with exasperation, required the juror to remain until the end of the court day—by her account, no more than “an hour or two” (SMF 15)—gave her a brief lecture, then allowed her to go on her way.

The Alliance of California Judges, many of whose members preside regularly over jury selection, maintains that the imposition of any discipline for such a relatively minor lapse of judgment is unwarranted. While Judge Clarke himself concedes that he should have acted differently, neither he nor any trial judge facing a similarly challenging situation should be second-guessed for a momentary expression of frustration prompted by a desire to support a judicial assistant in the performance of her duties.

I. THE COMMISSION SHOULD NOT PUNISH JUDGE CLARKE FOR CHALLENGING THE CHARGES LEVELED BY THE EXAMINER BY REJECTING THE FINDINGS OF THE SPECIAL MASTERS

While the Commission is free to disregard the report of the special masters and may make its own legal conclusions (see, e.g., *Inquiry Concerning Stanford* (2012) 53 Cal.4th CJP Supp. 1), it generally “‘give[s] great weight to the action of the special masters,’ who, having heard the presentation of the evidence were ‘in a better position than the [Commission] to pass upon the truthfulness of the testimony.’” (*Geiler v. Commission on Judicial Qualifications* (1973) 10 Cal.3d 270, 275-276,

citing *McKinney v. State Bar* (1964) 62 Cal.2d 194, 196); see also *Inquiry Concerning Freedman* (2007) 49 Cal.4th CJP Supp. 223, 232.)

The examiner charged Judge Clarke with five counts of misconduct and alleged “a pattern of discourteous, undignified, and inappropriate treatment of members of the public.” The special masters heard from dozens of witnesses over the course of three days, then rejected these allegations almost in their entirety and found only one instance of improper action.

The Alliance urges the Commission to defer to the findings of fact and conclusions of law of the special masters. There is no reason to do otherwise. In contrast to *Stanford, supra*, which involved undisputed conduct that went to “the core of our system of impartial equal justice” (53 Cal.4th CJP Supp. 1, 24 [citation omitted]), Judge Clarke’s case required the special masters to weigh the credibility of the witnesses as they described the judge’s conduct and demeanor, his motives, and, most important, the effect of his words. The special masters had to evaluate sometimes contradictory opinions; for example, the masters noted that “[a]mong the courtroom observers, there were mixed opinions about whether Clarke acted unjudicially.” (SMF 23.) If it were to set aside the work of the special masters in this case, the Commission would be serving notice on every judge that the exercise of the right to seek a hearing under Rules of the Commission on Judicial Performance, Rule 116, subdivision (c) is essentially an empty formality.

Academic critics have noted that the Commission “integrates investigative, prosecutorial, and recommendatory functions within one

body.” (See, e.g., Sankar, *Disciplining the Professional Judge* (2000) 88 Cal. L.Rev. 1233, 1280, fn. 273.) To allow the special masters’ findings and conclusions to stand would demonstrate that there is indeed a meaningful separation of functions within the Commission.

II. JUDGE CLARKE SHOULD NOT BE PUNISHED FOR ACTIONS HE TOOK IN RISING TO THE DEFENSE OF HIS STAFF.

The special masters found specifically that Judge Clarke’s sole violation “arose from the defense of his clerk.” (SMF 23.) In defending his judicial assistant from criticism, Judge Clarke may have violated the letter of Code of Judicial Ethics, Canon 3(B)(4) requiring that judges be “patient, dignified, and courteous.” But his actions were in keeping with the spirit of Canon 3(C)(1): “A judge shall diligently discharge the judge’s administrative responsibilities without bias or prejudice and maintain professional competence in judicial administration, and shall cooperate with other judges and court officials in the administration of court business.” Canon 3(C)(1) applies here because the management of hardship claims and the evaluation of juror qualifications is an aspect of a judge’s administrative responsibilities, and a judicial assistant is a court official.

Judge Clarke’s longtime judicial assistant, Ms. Sussman, was trying to deal with a chaotic situation. She was the court official charged with organizing and distributing materials to more than 80 jurors who did not want to be in that courtroom. Juror No. 7122 challenged her competence in

front of the other prospective jurors. Not to support Ms. Sussman in that moment could have undermined her ability to perform her job. While Judge Clarke's comments may have been intemperate, they are certainly understandable.

The special masters found that in dealing with Juror No. 7122, Judge Clarke had engaged in "conduct that reflected embroilment." (SMF 22.) It is ironic that the main case cited by the special masters on the issue of embroilment, *Van Voorhis,, supra*, is one in which the Commission faulted a judge for acting disrespectfully toward his staff. In the instant case, by contrast, Judge Clarke is faulted for respecting his staff too much.

III. TRIAL COURT JUDGES HAVE AN INTEREST IN CONSISTENT AND PROPORTIONATE DISCIPLINE.

The Commission initially proposed a public admonishment in Judge Clarke's case based upon its assessment that the judge had exhibited a pattern of misbehavior. Recent proceedings before the Commission, however, demonstrate that public admonishments are reserved for conduct far more egregious than the single improper action committed by Judge Clarke. Earlier this month, for example, the Commission publicly admonished a judge who jailed a person for contempt without following correct contempt procedures and awarded tens of thousands of dollars in attorney fees, costs, and sanctions without notice or an opportunity to respond. (*Public Admonishment of Judge Jaime R. Román*, May 16, 2016.)

The special masters found that Judge Clarke committed a single improper act of rudeness in the heat of the moment while rising to the defense of his staff. Any form of public discipline would be wildly disproportionate to the nature of the misconduct.

IV. THE SUPERIOR COURT, NOT THE COMMISSION, IS IN THE BEST POSITION TO TAKE STEPS TO CORRECT MINOR MISSTEPS.

Government Code, § 77001 mandates “a decentralized system of trial court management” and provides for “local authority and responsibility of trial courts to manage day-to-day operations.” Code of Judicial Ethics, Canon 3(C)(3) requires that a supervising judge take “reasonable measures to ensure . . . the proper performance” of the judicial responsibilities of all judges under his or her authority.

The Commission’s procedures as described in its 2015 Annual Report do not allow for the referral of a complaint to a supervising judge. The correction of the minor misconduct found by the special masters, however, is a matter best left to the trial judge’s supervisors. A few words from a supervising judge would have handled this matter adequately without involving the disciplinary machinery of the Commission. By imposing no discipline, the Commission will simply be allowing a local matter to be handled locally.

CONCLUSION

This case began with a complaint from a single juror who contended that she had been treated in a rude fashion by a judge who was contending with a highly stressful situation. That single complaint snowballed into a wide-ranging investigation and five serious charges of misconduct involving four other prospective jurors. After three days of testimony involving four prospective jurors, three lawyers, court staff, and several judges, the special masters found nothing more than a single act of improper conduct stemming from the original juror's complaint. Something has gone terribly wrong in the course of this investigation.

Judge Clarke—a conscientious judge held in high regard by his peers—has seen his reputation permanently tarnished. This Commission should do and need do nothing more to him.

DATED: May 24, 2016

Respectfully submitted,

DONALD H. HELLER,
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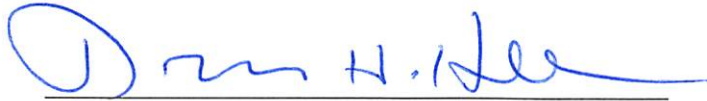


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CERTIFICATE OF COMPLIANCE

Pursuant to *California Rules of Court*, Rule 8.204(c), I certify that the Amicus brief filed by the Alliance of California Judges is double spaced, proportionately spaced, has a type face of 13 points and contains no more than 2061 words, according to the word count on my office's Word computer program.

DATED: May 24, 2016



DONALD H. HELLER

PROOF OF SERVICE

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LETTER BRIEF SEEKING PERMISSION TO FILE AMICUS IN SUPPORT OF JUDGE EDMUND WILLCOX CLARKE BY THE ALLIANCE OF CALIFORNIA JUDGES

AMICUS BRIEF IN SUPPORT OF JUDGE EDMUND WILLCOX CLARKE BY THE ALLIANCE OF CALIFORNIA JUDGES on the interested parties in this action by placing a true copy thereof enclosed in sealed envelopes addressed as follows:

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DONALD H. HELLER