

STATE OF CALIFORNIA
BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

**IN THE MATTER CONCERNING
FORMER JUDGE PAUL E.
ZELLERBACH**

**DECISION AND ORDER IMPOSING
PUBLIC ADMONISHMENT**

This disciplinary matter concerns Judge Paul E. Zellerbach, a former judge of the Riverside County Superior Court. Judge Zellerbach and his attorney, Edith Matthai, appeared before the commission on October 19, 2011, to object to the imposition of a public admonishment, pursuant to rule 116 of the Rules of the Commission on Judicial Performance. Having considered the written and oral objections and argument submitted by Judge Zellerbach and his counsel, and good cause appearing, the Commission on Judicial Performance issues this public admonishment pursuant to article VI, section 18(d) of the California Constitution, based on the following statement of facts and conclusions.

STATEMENT OF FACTS AND CONCLUSIONS

Judge Zellerbach was a judge of the Riverside County Superior Court from 2000 until January 2011. His last term began in January 2007.

1. On March 18, 2009, Judge Zellerbach heard a discovery motion in the case of *People v. Holly Ann Gunnette*, No. RIF-136890, over which he had presided since July 2007. The defendant, who had served as treasurer for District Attorney Rod Pacheco's campaign for California State Assembly in 1996, was requesting that the district

attorney's office produce documents, including those from Mr. Pacheco's 1996 Assembly campaign, concerning his alleged conflict of interest in prosecuting the case. During the hearing on the discovery motion, Judge Zellerbach made statements that would reasonably be perceived as bias or prejudice against District Attorney Pacheco and his office, as follows.

Judge Zellerbach discussed how he, as a prosecutor, would have handled a particular discovery issue. Supervising Deputy District Attorney Michael Silverman stated that "what you may want to have done as a prosecutor isn't what is necessarily required of me." Judge Zellerbach responded: "*I know. I am faced with that issue all the time in the DA's office unfortunately these days.*" Mr. Silverman replied: "What do you mean by 'unfortunately,' Your Honor?" Judge Zellerbach responded: "*Not doing their job properly.*"

In his written objections to the notice of intended public admonishment and at his appearance, Judge Zellerbach acknowledged that these comments should not have been made, but asked the commission to consider that they were inspired by Mr. Silverman's failure to locate a box of documents which were required to be turned over to the defendant as part of the discovery process. The judge's comments, however, were not limited to the deputy district attorney's conduct in this case but were directed at the entire district attorney's office.

Judge Zellerbach later stated that he was not going to require the district attorney to interview all of his campaign workers from 1996, "*though a lot of them still work in the DA's office in his PR firm.*" (The judge was referring to the District Attorney's Executive Division.) Mr. Silverman responded: "We don't have a PR firm, Your Honor." Judge Zellerbach replied, "Oh, yeah, you do."

Judge Zellerbach states that the "PR firm" label was not his creation but had been used by a local newspaper in reference to the executive division of the district attorney's office under Mr. Pacheco's management. Even so, this does not justify the judge's use of the disparaging label in reference to a party appearing before the judge.

Judge Zellerbach urges the commission to consider all his comments in light of the critical backlog facing Riverside County Superior Court at the time, which he attributes to Mr. Pacheco's policies as district attorney. He notes that there was much public discussion and criticism of Mr. Pacheco's policies within the legal community. The commission does not question the judge's concerns and frustrations over problems facing the courts in his county. Nevertheless, a judge must stay above the fray of political discord in the performance of judicial duties.

The judge's comments about the district attorney's office created an appearance of bias and were disparaging, undignified, and discourteous. The judge's conduct violated canons 1, 2A, 3B(4), and 3B(5). Canon 1 requires judges to observe high standards of conduct so that the integrity and independence of the judiciary is preserved. Canon 2A requires judges to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. Canon 3B(4) requires judges to be patient, dignified, and courteous to lawyers and others with whom they deal in an official capacity. Canon 3B(5) prohibits judges, in the performance of judicial duties, from engaging in speech or other conduct that would reasonably be perceived as bias or prejudice.

2. While presiding over the March 18, 2009 discovery hearing in *People v. Gunnette, supra*, Judge Zellerbach failed to disclose on the record the fact that he was actively considering running for district attorney against Mr. Pacheco. Six days before the hearing, the judge asked a representative of the Riverside City Firefighters' Association political action committee whom the association was going to endorse, and said that he might run for district attorney. This information was reasonably relevant to the question of the judge's disqualification under Code of Civil Procedure section 170.1, subdivision (a)(6)(A)(iii), which provides that a judge is disqualified if, for any reason, "[a] person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial."

The judge's failure to disclose violated canons 1, 2A, and 3E(2). Canon 3E(2) provides that "[i]n all trial court proceedings, a judge shall disclose on the record

information that is reasonably relevant to the question of disqualification under Code of Civil Procedure section 170.1, even if the judge believes there is no actual basis for disqualification.”

Although Judge Zellerbach was not necessarily required to disclose the above information in all criminal cases, disclosure was required in *Gunnette* because it involved issues concerning Mr. Pacheco. The defense alleged that Mr. Pacheco had a conflict of interest in prosecuting the case based on disputes between Mr. Pacheco and Ms. Gunnette in connection with Mr. Pacheco’s 1996 campaign for State Assembly during which Ms. Gunnette served as campaign treasurer. Under these circumstances, a person knowing that Judge Zellerbach was actively considering a run against Mr. Pacheco might reasonably entertain a doubt concerning the judge’s ability to remain impartial.

3. On March 26, 2009, Judge Zellerbach addressed a gathering of the Riverside County Deputy District Attorneys Association (RCDDAA) on the subject of its endorsement of a candidate for district attorney in the June 2010 election. During his presentation, Judge Zellerbach recommended that the members of the association wait to see who, besides Rod Pacheco, might run for district attorney before deciding whom to endorse. The judge referred to recent public criticism of the district attorney’s office due to certain policies allegedly adopted by Mr. Pacheco and the policies’ impact on the court. Judge Zellerbach repeatedly referenced what had been written about the district attorney’s office in the local press, discussed his time with the district attorney’s office, and described how the office used to run when he worked there as compared to how the office was reportedly being run at that time.

By recommending that the RCDDAA delay its endorsement decision, Judge Zellerbach engaged in political activity that may have created the appearance of political bias or impropriety, and gave the appearance that he was opposing a candidate for nonjudicial office. The judge’s conduct violated canons 1, 2A, 5, and 5A(2). Canon 5 requires judges to avoid political activity that may create the appearance of political bias

or impropriety. Canon 5A(2) prevents judges from publicly opposing candidates for nonjudicial office.

4. On January 30, 2010, Judge Zellerbach told Thomas Hunt, Vice-President of the Riverside Unified School District Board of Education, that he had decided to run for district attorney and would “love” Mr. Hunt’s endorsement, or words to that effect. Judge Zellerbach continued to preside over criminal cases being handled by the district attorney’s office until at least February 11, 2010, without disclosing on the record that he had decided to run or was seeking endorsements or other support for a campaign. Such information was reasonably relevant to the question of the judge’s disqualification because a person aware of the judge’s intention to run for district attorney might reasonably entertain a doubt that he would be impartial in criminal cases. (Code of Civ. Proc. § 170.1, subdivision (a)(6)(A)(iii).)

Judge Zellerbach maintains that he continued to be open-minded in all criminal cases after seeking Mr. Hunt’s endorsement and after he decided to run. However, disclosure of information is required if “reasonably relevant to the question of disqualification under Code of Civil Procedure section 170.1, even if the judge believes there is no actual basis for disqualification.” (Canon 3E(2).)

The judge’s failure to disclose violated canons 1, 2A, and 3E(2).

5. Judge Zellerbach was on leave of absence from judicial office from February 25, 2010 until June 9, 2010. On June 8, 2010, Judge Zellerbach was elected Riverside County District Attorney. At the time he ended his leave of absence, the judge’s campaign had an outstanding debt of over \$200,000, including \$50,000 in loans from Judge Zellerbach. After his leave of absence ended, and while he was still a judge, Judge Zellerbach allowed his judicial title to be used to solicit money from individuals to advance his interests in retiring the debt from his campaign for district attorney, as follows.

On August 3, 2010, the campaign solicited contributions in an e-mail sent to employees of the Riverside County District Attorney’s Office. The e-mail, from news@judgezellerbach4da.com, had a picture of Judge Zellerbach in a black robe and

invited the recipient to “join Judge Paul Zellerbach our District Attorney Elect for the Retire the Debt Fundraiser” on August 4, 2010. The e-mail contained five other references to “Judge Zellerbach” or “Judge Paul Zellerbach” and displayed a judge’s gavel in the logo.

Between August 4 and October 28, 2010, Judge Zellerbach attended and spoke at four fundraisers to raise money to retire his campaign debt. The invitations to each fundraiser instructed potential donors who wished to pay by credit card to contribute online at www.judgezellerbach4da.com. A contribution form enclosed with the invitation to at least one fundraiser had the heading “Judge Paul Zellerbach for District Attorney” with a judge’s gavel in the logo. The invitations to at least two fundraisers were accompanied by return envelopes addressed to “Judge Zellerbach for District Attorney” or “Judge Paul Zellerbach for District Attorney.” At least three of the fundraising events were advertised on Facebook by “Judge Paul Zellerbach for District Attorney.” The Facebook entries referred persons to the campaign website, www.judgezellerbach4da.com, which advertised each of the fundraising events and invited individuals to donate to the judge’s campaign, while listing Judge Zellerbach’s judicial title multiple times and maintaining a judge’s gavel in the logo.

Judge Zellerbach was allowed to use his judicial title in his campaign while he was on a leave of absence. (Canon 6H.) However, once Judge Zellerbach returned to the bench, he was bound by the provisions of canon 2B(2) which prevent a judge from using the judicial title to advance the pecuniary or personal interests of the judge or others. By allowing his judicial title to be used to raise money to retire his debt from a campaign for nonjudicial office, Judge Zellerbach violated canons 1, 2A, and 2B(2).

Judge Zellerbach explains that his campaign organization did not consult with him before utilizing his judicial title in connection with the fundraising events. However, as the judge acknowledges, ensuring that his campaign activities complied with this ethical obligations under the canons was ultimately his responsibility.

Judge Zellerbach's conduct described above was, at a minimum, improper action pursuant to article VI, section 18, subdivision (d)(3) of the California Constitution.

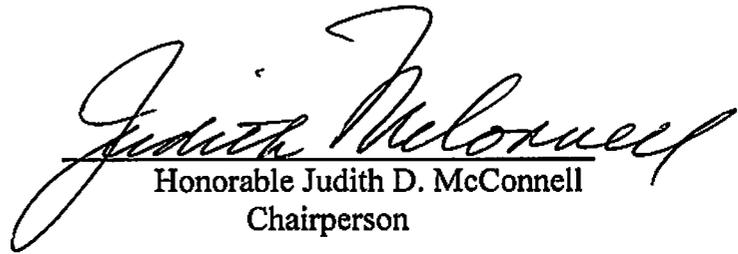
DISCIPLINE

In deciding to impose a public admonishment, the commission took into account the number of incidents of misconduct and Judge Zellerbach's history of discipline. In 2006, the judge received a public admonishment for attending a baseball game while a jury was deliberating in a murder case, without having arranged for another judge to take the verdict. When informed that the jury had reached a verdict, Judge Zellerbach was unwilling to allow another judge to take the verdict and did not return from the game to take the verdict himself. The commission found that this was a serious dereliction of judicial duty, and that the judge failed to give his judicial duties precedence over all other activities as required by the Code of Judicial Ethics. In 2003, Judge Zellerbach received an advisory letter for making harsh comments to a doctor who was late to court, and threatening to hold him in contempt. In the present case, the judge also made harsh remarks to a person appearing before him. In addition, the judge engaged in a pattern of misconduct involving his failure to properly consider his ethical obligations while actively considering a run for nonjudicial office and in connection with his campaign for nonjudicial office.

For the foregoing reasons, and to preserve public confidence in the integrity and impartiality of the judiciary, the commission has determined to issue this public admonishment.

The vote of the commission to impose a public admonishment was 9 ayes and one no. Commission members Hon. Judith D. McConnell, Ms. Mary Lou Aranguren, Anthony P. Capozzi, Esq., Hon. Frederick P. Horn, Nanci E. Nishimura, Esq., Mr. Lawrence Simi, Ms. Maya Dillard Smith, Mr. Nathaniel Trives, and Hon. Erica R. Yew voted for a public admonishment. Commission member Ms. Sandra Talcott would have issued a private admonishment. Commission member Adam N. Torres was recused.

Dated: Nov. 2, 2011


Honorable Judith D. McConnell
Chairperson