

STATE OF CALIFORNIA
BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

**IN THE MATTER CONCERNING JUDGE
CAROL WILLIAMS ELSWICK**

**DECISION AND ORDER IMPOSING
PUBLIC ADMONISHMENT**

This disciplinary matter concerns Judge Carol Williams Elswick, a judge of the Los Angeles County Superior Court. Judge Elswick and her attorney, Randall Miller, appeared before the commission on December 5, 2018, 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 Elswick and her 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 reasons.

STATEMENT OF FACTS AND REASONS

Judge Elswick has been a judge of the Los Angeles County Superior Court since 2000. She previously served on the municipal court from 1997 until 2000, and was a court commissioner from 1991 to 1997.

The commission found that in three separate misdemeanor probation cases, Judge Elswick improperly remanded the defendant and delayed setting a revocation hearing until after the defendant served a predetermined sentence of jail time, which conveyed the appearance that the judge was circumventing the Los Angeles County Sheriff's Department's early release program. In other matters, the judge improperly responded to a peremptory challenge filed pursuant to section 170.6 of the Code of Civil Procedure, was discourteous to several criminal defendants, and improperly referenced her personal life when discussing the ability of some defendants to pay fines. The commission concluded that Judge Elswick disregarded the fundamental rights of defendants, abused her authority, conveyed the appearance of bias and prejudice, and violated the Code of Judicial Ethics, as set forth below.

I. PROBATION VIOLATION MATTERS

A. People v. Josh Chia Juin Hsu

Mr. Hsu was convicted of a driving under the influence (DUI) offense in 2011, placed on court probation, and ordered to pay a fine of \$1,812, or complete 12 days of community labor.

On March 22, 2013, Mr. Hsu appeared before Judge Elswick and requested an extension of time to pay the fine, his third such request. The following exchange occurred:

[DEFENSE ATTORNEY]: Your Honor, Mr. Hsu is asking for an extension to pay the fine. He realizes he's not going to be able to do the community service. He's asking for two months.

THE DEFENDANT: What can you offer me, Your Honor?

THE COURT: Excuse me? I don't accept that. 'What can you offer me?'. [sic] [¶] You were placed on probation two years ago. What were you ordered to do? That's the second question. So it might be out there in the internet, okay, let's not make a deal. It's, you are the defendant on a criminal case. You were placed on probation two years ago and you have yet to live up to your responsibilities. [¶] What can you offer me?

(R.T. 1:17-2:3.)

Judge Elswick remanded Mr. Hsu, and set bail in the amount of \$30,000. Prior to the bailiff removing Mr. Hsu, Judge Elswick stated:

Mr. Hsu, this matter goes over for probation violation hearing setting to the date of March 27, 2013. [¶] *Listen very carefully. It's the Court's intent to keep you in custody until March 27, 2013. On that day I'll see you back in this department, sentence you credit time served, wipe out your fine of \$1812. So with the option, remaining community labor, reinstate your probation. [¶] You can bail out. If you bail out, you're still going to owe the court the jail time. Okay. So there you go.*

(R.T. 4:3-14, italics added.)

On March 27, 2013, Mr. Hsu appeared in Judge Elswick's courtroom, out of custody. At that time, Mr. Hsu's fine of \$1,812 had been paid in full, he had served two days in custody, and he had no outstanding conditions of probation. A receipt was provided to Judge Elswick. After the deputy district attorney noted that the court had requested the defendant to not post bail, and the defendant's attorney explained that the defendant's father had posted bail, the following exchange occurred:

THE COURT: Well, Mr. Hsu, *I was serious when I made that statement. It's not a matter of you just --*

THE DEFENDANT: I understand.

THE COURT: -- *buying your way out of jail.* [¶] Returning your receipt to you at this time. [¶] *I indicated to you on March 22,*

2013 that I was setting bail at 30,000 and if you bailed out, understand that you still, it's this Court's intention to have you do the jail time, have you do that time on 22nd of the [sic] March through March 27. [¶] I arrived at that timeframe because of, as I previously put on the record, March 25, 2011 you were placed on probation by Commissioner McTaggart for DUI; fines and fees or 12 days of community labor; fines and fees weren't paid, community labor wasn't done. . . . [¶] . . . [¶] Did you bail out on March 24?

[DEFENSE ATTORNEY]: Yes, Your Honor.

THE COURT: *The Court, he owes the Court three more days. I wasn't playing. I just don't think that the defendant gets to run the show.*

THE DEFENDANT: May I speak, Your Honor?

THE COURT: *The tail does not wag the dog, okay. You are the criminal defendant, and when Commissioner McTaggart made his order, which you agreed to and accepted two years ago, you had an option to pay it or do 12 days of community labor and you just -- what would be the appropriate word would be on the record -- you messed around and didn't get it done because it's okay to buy your way out, or family buys your way out and that's not the way this court work [sic]. [¶] So at this time you are remanded, and it's late in the day, but you are remanded. And I'll set it out for March the 29th, so that comes to, not a full day today, and bail is set at --*

[DEFENSE ATTORNEY]: Would the Court consider allowing him to stay on his bond that his family posted and surrender himself?

THE DEFENDANT: Your Honor, may I --

THE COURT: *It's very hard for the Court -- let any criminal defendant who's on probation gets to call the shots. [sic] That's the difficulty I have. [¶] Mr. Hsu, you are the one who was, [sic] not done what you were supposed to do. So bail is set at \$35,000. [¶] The matter is set for probation violation hearing setting on March the 29th, and you're going to get some phone calls and tell Dad, "Don't bail you out."*

(R.T. 2:10-4:5, italics added.)

Mr. Hsu stated he had learned his lesson, that his father had bailed him out, and that he was concerned about losing his job, when the following exchange occurred:

THE COURT: Mr. Hsu, that is between you and your employer. I made it very clear. Very clear. [¶] So March 29 you're going to be making some phone calls, or you want [your defense attorney] to make some phone calls. *Do not have Dad, Mom, your great uncle, your rich aunt, don't have them bail you out.* [¶] *I'll see you on the 29th of March.* Okay.

THE DEFENDANT: I did not request to bail out.

THE COURT: I understand that.

THE DEFENDANT: That's why I stayed it [*sic*] until Sunday.

THE COURT: I understand that. *Make sure they don't bail you out.* Okay.

(R.T. 4:27-5:11, italics added.)

On March 29, 2013, Mr. Hsu was advised of his rights and he admitted "the violation." Judge Elswick did not describe what the probation violation was, given that Mr. Hsu had both paid the fine and served days in custody at the time of his admission. Judge Elswick sentenced Mr. Hsu to 12 days of jail (six actual and six good time/work time credits), and released him from custody for time served.

B. *People v. Riley Glover*

Ms. Glover was convicted of a DUI in 2013, but did not complete 45 days of community labor, a condition of her probation.

On October 28, 2015, Ms. Glover appeared out of custody on a bench warrant, which was recalled. Judge Elswick asked Ms. Glover why she had not completed 45 days of community labor. Ms. Glover stated that on March 12, 2015, another judge told her that she did not have to complete the community labor. Judge Elswick asked how much community labor had been completed when the following exchange occurred:

THE DEFENDANT: None, Your Honor. I was -- I don't know. Maybe I misheard or something, but I was under the impression that I did not have to do it anymore.

THE COURT: *You didn't mishear* because this is what I do. I'd say, the Court is reminding you or letting you know or reminding you that you still have community labor, or this or that, to do by a certain date. I also say, "That was previously put in writing for you. Do you need that information?" or something to that effect, or "Are you on target?" or "Do you have any questions regarding

that?” [¶] Typically, that’s how I do that. I did it at least twice, myself. I didn’t place you on probation, but I did it at least twice. If you had requested that document again for community labor, we would have given it to you. So it was not deleted. Okay?

(R.T. 6:20-7:9, italics added.)

Judge Elswick said, “*So there was no misunderstanding*, counsel, with respect to the things that she needed to do.” (R.T. 8:4-6.) Judge Elswick remanded Ms. Glover, set bail at \$30,000, and set a date for a probation violation hearing *setting* on November 18, 2015. Judge Elswick denied the public defender’s request for an earlier date and vacated an interim appearance that had previously been set for November 10, 2015. Judge Elswick then assigned the case to herself for all purposes and stated:

[I]t’s this Court’s intent that if she remains in custody until that date and she admits a violation of probation on that date that I will then wipe out all 45 days of community labor because she will have been in custody for about 20 days, give or take. That’s if she remains in custody, doesn’t bail out. [¶] The Court has set the date, pursuant to appellate case law, within a reasonable time and, therefore, that date will remain, November 18, 2015. Thank you.

(R.T. 11:16-26, italics added.)

On November 18, 2015, when Ms. Glover returned to court after serving 22 days in custody, Judge Elswick asked if Ms. Glover wanted “to admit the violation of probation regarding the 45 days of community labor that was ordered,” or have a hearing. (R.T. 1:18-20.) Judge Elswick then advised Ms. Glover of her rights, and she admitted a violation of probation. The probation condition requiring 45 days of community labor was deleted “in light of the jail time served.” (R.T. 6:5.)

C. *People v. Cecilia Zavala*

In 2014, Ms. Zavala was placed on probation for a DUI conviction. On February 3, 2016, Ms. Zavala, who was self-represented appeared before Judge Elswick to request an extension to pay her fines. The following exchange occurred:

THE DEFENDANT: And I overlooked it.

THE COURT: *Yeah. You really overlooked it.* [¶] . . . [¶] So are you paying it today?

THE DEFENDANT: I would like to ask for an extension.

THE COURT: No. *Listen to my question. Listen to my question.*
[¶] Are you paying it today? . . . [¶] So can you pay that 471
today?

(R.T. 1:22-2:11, italics added.)

Judge Elswick described the procedural history of Ms. Zavala's two cases. In the 2014 case, Ms. Zavala had been ordered to pay fines and fees totaling \$1,888, or complete 12 days of community labor, and she had been given several extensions to February 3, 2016. Ms. Zavala stated that she worked six days a week and that she was trying to pay the \$1,888, when the following exchange occurred:

THE COURT: There won't be any further extensions. Your one case is 19 years old.

THE DEFENDANT: I was unaware of that case.

THE COURT: *You were aware of it, Ma'am.* You signed the terms and conditions of probation.

THE DEFENDANT: No. But that case came up with this matter.

(R.T. 3:19-25, italics added.)

Judge Elswick then remanded Ms. Zavala into custody and set bail at \$35,000 on each matter. Judge Elswick did not advise Ms. Zavala of any rights, or ask if she wished to be represented by counsel, prior to incarceration. The following exchange occurred when the public defender was appointed:

[PUBLIC DEFENDER]: If I could just talk to her before she's taken into custody, Your Honor.

THE COURT: Well, she's indicated she can't pay.

[PUBLIC DEFENDER]: I would just like to get more of the back story.

THE COURT: No. At this time, she's remanded into the custody of the Sheriff's Department and bail is set at \$35,000 on each and the matter will be set for probation violation hearing *setting* in short order

(R.T. 4:8-16, italics added.)

The public defender filed a peremptory challenge against Judge Elswick and the case was heard by another judge the next day, on February 4, 2016, at which time probation in the 1998 case was terminated, and Ms. Zavala was released.

The commission found that in each of these matters Judge Elswick intentionally delayed setting a hearing until after her predetermined jail sentence had been served, which conveyed the appearance that she was circumventing the sheriff's department's early release program. Judge Elswick remanded the defendants into custody, set bail, and continued the matters for probation violation hearing *setting* dates, without advising the defendants of their right to a revocation hearing. At her appearance, Judge Elswick stated that she wanted the defendants to know they were not satisfying their probation obligations by posting bail. This, however, is not what she told the defendants. She specifically stated that her "intent" was to keep Mr. Hsu in custody until March 27, 2013, at which time she would sentence him to time served and delete the fine. She went further and said if he bailed out, he would still owe jail time, and she told him not to post bail. Judge Elswick also specifically stated that her "intent" was to keep Ms. Glover in custody until November 18, 2015, at which time she would sentence Ms. Glover to time served and delete the community labor. Judge Elswick explicitly stated that her intent was to keep Ms. Glover in custody for 22 days, and added, "That's if she remains in custody, doesn't bail out." After being remanded, Ms. Zavala did not appear again before Judge Elswick because the public defender filed a peremptory challenge, and the matter was assigned to a different judge. If the defendants had been offered the opportunity to admit the probation violation and be sentenced before being remanded on bail, it is likely they would have served only a fraction of the sentence, given the sheriff's department's early release program.

In her response to the commission, Judge Elswick denied remanding probationers, or setting bail, in order to circumvent the sheriff's department's early release program. Judge Elswick stated there was concern among the judiciary about how the early release program might affect a defendant's participation in the Substance Treatment and Re-Entry Transition (START) program. START is a jail-based treatment program that began offering services in April 2017 to inmates with a minimum amount of days left on their sentence and who meet other clinical criteria. The proceedings in *Hsu*, *Glover*, and *Zavala*, however, had concluded prior to the implementation of START, and the defendants were not sentenced to qualifying terms of incarceration.

Judge Elswick contends that, at most, her conduct constituted legal error and, as such, is not subject to discipline under *Oberholzer v. Commission on Judicial Performance* (1999) 20 Cal.4th 371, 395. The California Supreme Court in *Oberholzer* held that legal error alone does not constitute judicial misconduct subject to discipline. (*Id.* at pp. 395-398.) A judge who

commits legal error, however, which, in addition, clearly and convincingly reflects “bad faith,” “bias,” “abuse of authority,” “disregard for fundamental rights,” “intentional disregard of the law,” “or any purpose other than the faithful discharge of judicial duty” is subject to sanctions. (*Id.* at p. 398.)

The commission found that Judge Elswick abused her authority and disregarded the defendants’ fundamental rights to due process by de facto revoking probation and imposing a sentence without affording the right to a revocation hearing in all three matters. These proceedings failed to comply with minimum due process requirements as specified by the California Supreme Court in *People v. Vickers* (1972) 8 Cal.3d 451, 457-458. Judge Elswick contends that she had discretion to remand defendants into custody pending their revocation hearings, as long as the time before the hearing was not unreasonable, under *Morrissey v. Brewer* (1972) 408 U.S. 471. The problem here was not the length of time between the remand and a hearing, but that the judge continued the matters for dates to *set* the hearing in order that the defendants serve a predetermined sanction, without conducting a revocation hearing or obtaining a waiver of the right to a hearing. While a judge may remand a probationer pending probation violation hearings, the remand cannot be for the improper purpose of requiring a probationer to serve a predetermined sentence.

In addition, the commission concluded that Judge Elswick acted for a purpose other than the faithful discharge of judicial duties, abused her authority, and disregarded Mr. Hsu’s fundamental rights by recommitting him to custody for having exercised his right to post bail. The commission also found that Judge Elswick used bail for the improper purpose of imposing a predetermined sentence. Bail may not be used to punish a defendant, and it is misconduct for a judge to impose bail in a punitive or arbitrary manner. (See Cal. Const., art. I, § 12; Rothman et al., Cal. Judicial Conduct Handbook (4th ed. 2017) § 3:24, pp. 171-172; *People v. Gilliam* (1974) 41 Cal.App.3d 181, 191.) Moreover, Judge Elswick improperly recommitted Mr. Hsu to custody after he posted bail, when none of the statutory circumstances warranting remand existed. (See Pen. Code, §§ 1310, 1129, 1166.) Judge Elswick admitted that she should not have recommitted Mr. Hsu to custody after posting bail, but could not recall why she did so.

Further, Judge Elswick disregarded Ms. Zavala’s right to counsel by failing to advise her of her right to counsel, and denying the public defender’s request to speak with Ms. Zavala prior to her being incarcerated.

The commission also found that Judge Elswick's conduct toward Mr. Hsu was discourteous, sarcastic, and conveyed the appearance of embroilment, bias, and retaliation. After Mr. Hsu exercised his statutory right to post bail, the judge stated, "I wasn't playing. I just don't think that the defendant gets to run the show." The judge told Mr. Hsu, "The tail does not wag the dog, okay. You are the criminal defendant" She also warned him, "Do not have Dad, Mom, your great uncle, your rich aunt, don't have them bail you out."

Judge Elswick's conduct was inconsistent with her obligations to avoid impropriety and the appearance of impropriety in all of her activities (canon 2); to respect and comply with the law and act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary (canon 2A); to accord to every person the full right to be heard according to law (canon 3B(7)); to dispose of all judicial matters fairly, promptly, and efficiently, and to manage the courtroom in a manner that provides all litigants the opportunity to have their matters fairly adjudicated in accordance with the law (canon 3B(8)); to be patient, dignified, and courteous to litigants with whom the judge deals in an official capacity (canon 3B(4)); and to perform judicial duties without bias or prejudice, and not to engage in speech, gestures, or other conduct that would reasonably be perceived as bias or prejudice (canon 3B(5)).

II. RESPONSE TO PEREMPTORY CHALLENGE

On October 21, 2015, the public defender filed a peremptory challenge, pursuant to Code of Civil Procedure 170.6, in *People v. Jingles*.

The next day, during an arraignment in an unrelated matter, *People v. Salinas*, Deputy Public Defender Diane Link filed the defendant's completed financial documents and appointment of counsel forms when the case was called. The documents had been prepared in advance of the case being called. Judge Elswick asked how the forms could have been filed when the public defender had not been appointed yet, then stopped the arraignment and called Ms. Link into chambers, with a court reporter and the prosecutor. In chambers, Judge Elswick summarized her view of what had happened in court, indicating that Ms. Salinas had been approached by Ms. Link and given financial paperwork. The following exchange then occurred:

THE COURT: *At the outset, the Court does not wish to engage in a battle with the public defender's office.*

MS. LINK: I'm not engaging.

THE COURT: I'm not saying, I'm just making a statement as for the record, calmly and professionally as I can. Not because I'm angry, but because I don't want there to be any misinterpretation. *When I say 'the Court has no intent to engage in a battle with the public defender's office,' okay, that's what I mean by that.* Okay. [¶] However, it is a violation of the law to solicit. I'm not saying you solicited. It is a violation of the law for a lawyer to solicit a client. I'm not saying you did, but we do have what we have here. I'm just -- let me finish. I'm not saying you solicited.

(R.T. 2:9-23, italics added.)

In response to the judge's expressed concern that Ms. Link had engaged in improper solicitation of a client, Ms. Link explained that she had been approached by the defendant's father, who said the defendant wanted a public defender. After discussion of the alleged solicitation and the judge's arraignment practice, Judge Elswick said, "*I understand there's a battle between your office and myself, okay.* I'm not trying to make a battle is my point. I'm just trying to lay it all out there for everyone based upon what the constitution says, what the law says, and doing my best to follow it. . . . [¶] *I shouldn't have to wake up in the middle of the night racking my brain over these particular issues when they are what they are* [¶] . . . [¶] *It's not done on the part of my, not done out of animosity.*" (R.T. 9:22-10:19, italics added.) Judge Elswick ultimately made a finding that there was no solicitation.

After learning of the in-chambers discussion with Ms. Link, Jeffrey Graves, who was then the Deputy in Charge of the Alhambra branch of the Los Angeles County Public Defender's Office, approached Judge Elswick about the allegation that the public defender had violated the law by soliciting clients. Judge Elswick met with Mr. Graves and the prosecutor in chambers with a court reporter.

In chambers, Judge Elswick described the *Jingles* arraignment, which occurred the day before. During the discussion of whether Ms. Link had been improperly soliciting a client, the judge said:

And I looked. Because Miss Link was standing there. If you want me to respond -- I'm not here to discuss 170 with you, I'm just letting you know what happened so the record is clear. Because I know I can't discuss 170's with parties. [¶] But the clerk told me, Your Honor, there's a 170.6. I looked, I saw Miss Link standing at the clerk's desk, I saw the defendant still there in custody. I thought to myself, okay, and the clerk says 'Do you want to see it?' I said 'Yes, I do.' [¶] So I looked at it and it had Mr. Jingles' name on it, it had my name on it and it was signed by Tavoukjian.

So then I was thinking, oh, how does somebody paper the court prior to even their appointment? Now they didn't hand it to the court prior to the public defender's appointment, but certainly it was filled out before an appointment was even filled out, before it was even requested by the public defender. [¶] . . . [A]nd immediately she called madam clerk to find out where that particular case would go. . . . Again, I'm not discussing the merits or the fact of the 170 that was filed, but I'm willing, you know, how that scenario played out [*sic*]. . . . [¶] . . . [¶] After I got papered, I thought, okay, well, they had a plan. That's what I thought. They may not have had a plan, but clearly I thought they had a plan because there was a, immediately, affidavit by a lawyer who was not present and it was completed before even the appointment. [¶] So taken that [*sic*] into consideration and, again, I didn't mention that on the record a little while ago, take all that into consideration, two things, yesterday and today, it's like, well, I just need to say something to the People and see, by People I mean [the prosecutor] and Miss Link, to see what is going on.

(R.T. 39:4-40:23.)

Judge Elswick then mentioned that she was not engaging in battle with the public defender's office and mentioned the word "battle" several times during the in-chambers discussions with Mr. Graves.

Contrary to Judge Elswick's assertion, it was the judge who introduced the *Jingles* peremptory challenge, and mentioned the "battle" with the public defender numerous times in her conversation with Mr. Graves. Judge Elswick's statement, "Again, I'm not discussing the merits or the fact of the 170 that was filed, but I'm willing, you know, how that scenario played out [*sic*]," appeared to invite Mr. Graves to discuss the peremptory challenge. Mr. Graves, however, did not comment on the peremptory challenge.

When a 170.6 challenge is properly and timely filed, a judge must accept the disqualification without inquiry. (*McCartney v. Commission on Judicial Qualifications* (1974) 12 Cal.3d 512, 531-532.) Litigants have a statutory right to file a peremptory challenge of a judge. (Code Civ. Proc., § 170.6.) As noted by Judge David M. Rothman, "Any conduct by a judge that amounts to retaliation for the exercise of a lawful right amounts to judicial misconduct." (Rothman et al., Cal. Judicial Conduct Handbook, *supra*, § 7:12, p. 405.) It is improper for a judge to inquire of the attorney, or the agency for which she works, about a peremptory challenge. (*Id.* at p. 407.)

Judge Elswick asserts that her intent in raising the issue of the peremptory challenge was to inquire how the public defender could file a peremptory challenge in *Jingles* when the public defender had not yet been appointed, as proof of her concerns that the public defender was improperly interfering with the defendant's right to self-representation in the *Salinas* case. In the commission's view, the relevance is attenuated, at best, and did not authorize the judge to comment on the peremptory challenge.

The commission found that Judge Elswick's repeated remarks to Ms. Link regarding her battles with the public defender's office, the day after the public defender had filed a peremptory challenge in *Jingles*, conveyed an appearance of bias and embroilment in violation of canons 2, 2A, and 3B(5). The commission found that Judge Elswick improperly created the appearance of impropriety, in violation of canon 2, by discussing the *Jingles* peremptory challenge with Mr. Graves, who was the public defender misdemeanor attorney supervisor.

III. REFERENCES TO PERSONAL EXPERIENCE AND POOR DEMEANOR

The commission found that Judge Elswick referred to her personal experiences in a manner that failed to promote confidence in her impartiality and displayed poor demeanor in two cases, and, also displayed poor demeanor in a third case.

A. *People v. David Hong*

On September 16, 2016, Judge Elswick presided over an expungement motion in the matter of *People v. David Hong*, in which Mr. Hong was convicted of a DUI in 2010. Judge Elswick denied an expungement petition because an outstanding balance of \$372 had not been paid, and the court lacked jurisdiction to accept payment after probation expired. The public defender appeared as a friend of the court and stated that Mr. Hong did not have the ability to pay previously, when the following exchange occurred:

THE COURT: *He had the ability to pay SC [University of Southern California]. I went to SC. I'm a fellow [Trojan]. If I could help you, I'd help you; Bruin, I wouldn't help you. He's a Bruin.¹ That's why I said it. I said a Bruin I wouldn't help you.*

[¶] ... [¶]

¹ The team name for the University of California at Los Angeles is the "Bruins." The team name for the University of Southern California is the "Trojans." It appears the judge meant to say, "He's not a Bruin," or "He's a Trojan."

THE COURT: Here's my position. I've already said it. I can't say it more clearly. He had money for his alcohol program. *He had money to pay SC. You see what I'm saying.*

(R.T. 10:25-11:16, italics added.)

When Mr. Hong asked to address the court again, the following exchange occurred:

THE DEFENDANT: Your Honor, if I had the ability to pay the fees --

THE COURT: You had. You had the ability. You had the abilities.

THE DEFENDANT: I lost my job. I have records from the Social Security with me, I guess, year old, my year old income. I think I made --

THE COURT: *How are you paying for housing and SC, or were you living at home?*

THE DEFENDANT: I was living at home.

THE COURT: Okay. And under whose roof?

THE DEFENDANT: My mother. But she's, she's also, she wasn't working at the time.

THE COURT: *Welcome to reality.*

THE DEFENDANT: Right.

THE COURT: *You could have had a job. [¶] Did you have a job?*

THE DEFENDANT: Excuse me?

THE COURT: *Did you have a job while going to school at SC?*

THE DEFENDANT: No, I did not.

THE COURT: *You could have had a job. I had a job, okay.*

THE DEFENDANT: Understood.

THE COURT: *Went to school full time, worked part-time.*

THE DEFENDANT: Understood.

THE COURT: *Over at University Village. [¶] You know where University Village is? Okay.*

THE DEFENDANT: Your Honor, I'm just trying to explain my situation. I'm not going to make excuses for what I didn't do, so I didn't have a job at the time I was going through school. I had financial aid.

THE COURT: *So did I.*

(R.T. 12:10-13:16, italics added.)

B. *People v. Rutu Shah*

On October 29, 2015, Judge Elswick presided over *People v. Rutu Shah*, in which Ms. Shah had been granted deferred entry of judgment (diversion) for one year on March 13, 2015, for shoplifting. Ms. Shah requested an extension (her first) on October 29, 2015 to complete five days of community labor.

When the case was called, Judge Elswick asked if Ms. Shah had completed the community labor. After Ms. Shah said she could not, because she got behind on schoolwork when she had to go to India, due to a family emergency, the following exchange occurred:

THE DEFENDANT: I am in school, graduate school, right now. And it became really difficult to finish off.

THE COURT: *No, it didn't. I, too, was in graduate school and I worked part time, which is more than five days over four months, okay?*

THE DEFENDANT: I don't know how I can go further. Is there anyway out? I have not been able to finish that.

THE COURT: Did you start it?

THE DEFENDANT: No, I went to report but I couldn't go. I had planned to go.

THE COURT: *Ma'am, you had plenty of time to go.*

THE DEFENDANT: Yes, I know. I know.

THE COURT: The Court is very clear that at the time of your guilty or no contest plea to this theft case --

THE DEFENDANT: I --

THE COURT: I am still talking. I will let you speak. I believe I heard you went to India; that you had a family emergency.

THE DEFENDANT: Yes.

THE COURT: *That you were there for a month, okay? That you are in graduate school. That you are very busy. That you, quote, "Tried to do it".* [¶] The Court gave you 6 months to do 5 days. That is not even a day per month. [¶] Is there anything else you want to tell the Court? Is there anything else you want to tell me?

(R.T. 1:28-2:25, italics added.)

The judge terminated diversion and imposed a sentence with two years of summary probation.

In both *Hong* and *Shah*, by mentioning that when she was in college and graduate school she had worked, Judge Elswick implied that the defendants should have been able to do the same. Judge Elswick's reference to her personal life suggests prejudgment or bias, or that the judge was making determinations based on information outside the record. The commission found that Judge Elswick's statements about her personal experience created the impression that her personal experience might be influencing her decision-making in the matter before her, and violated canons 2A and 3B(5).

The commission also found that Judge Elswick's statements to Mr. Hong ("Welcome to reality," and comments on his ability to get a job), and her statements to Ms. Shah ("[Y]ou had plenty of time to go," and "That you are very busy. That you, quote, 'Tried to do it.'") were sarcastic and discourteous, in violation of canon 3B(4).

C. *People v. Humberto Maya*

On November 15, 2016, Judge Elswick presided over a motion to continue sentencing in the above-entitled case, in which the defendant was convicted of driving with a suspended license. The defense requested to continue the sentencing hearing in order to allow the defendant time to obtain his driver's license. Judge Elswick denied the continuance request, citing several prior failures to appear. Mr. Maya stated that he had a newborn baby and had one more ticket to clear before obtaining his license, when the following exchange occurred:

THE DEFENDANT: I told you I have ADHD.

THE COURT: And that's why it's written for you. *If you have that, then I don't know how you can drive, but that's a different story. Okay. If you forget everything, it doesn't make sense.*

Okay. [¶] I'm not saying you don't have that condition, okay, but your lawyer did write it down for you, okay.

(R.T. 3:18-25, italics added.)

The commission found that Judge Elswick's statement that she did not know how Mr. Maya could drive if he had ADHD was sarcastic and discourteous, in violation of canons 2A and 3B(4).

The judge's conduct, at a minimum, constituted improper action.

IV. DISCIPLINE

Judge Elswick has engaged in numerous incidents of misconduct over a three-year period. In the commission's view, the judge's misconduct involving abuse of authority and disregard of the defendants' fundamental rights, resulting in deprivation of liberty, is particularly serious. Despite Judge Elswick's long tenure on the bench without prior discipline, the commission determined that the multitude and severity of the misconduct in this matter warrants imposition of a public admonishment.

Commission members Nanci E. Nishimura, Esq.; Hon. Michael B. Harper; Anthony P. Capozzi, Esq.; Hon. William S. Dato; Mr. Eduardo De La Riva; Dr. Michael A. Moodian; and Mr. Richard Simpson voted for a public admonishment. Commission members Ms. Sarah Kruer Jager and Hon. Erica R. Yew voted for a private admonishment. Commission members Ms. Pattyl A. Kasparian and Mr. Adam N. Torres did not participate.

Dated: December 13, 2018


Nanci E. Nishimura
Chairperson