

December 9, 2024

Writer's Direct Contact
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JDouglass@mofocomChief Justice Patricia Guerrero
and Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4783Re: *Family Violence Appellate Project and Bay Area Legal Aid v. Superior Courts
of California, Counties of Contra Costa, Los Angeles, Santa Clara, and San
Diego*
S288176

Dear Chief Justice Guerrero and Associate Justices:

On behalf of the Center for Judicial Excellence (“CJE”), we write to request that the Court consider this letter in support of the Petition for Writ of Mandamus/Prohibition filed by the Family Violence Appellate Project and Bay Area Legal Aid (“Petition”). The convergence of California’s shortage of court reporters and its law preventing electronic recording in most civil proceedings has resulted in thousands of civil proceedings, including those of litigants who cannot afford a private court reporter, going unrecorded. (See Petition at pp. 50-51.) The lack of verbatim recordings in turn results in these litigants being denied equal access to justice in civil disputes involving matters of fundamental importance. (See Petition at p. 13.) However, that is not the only severe consequence of the denial of access to verbatim records. CJE submits this letter because the lack of verbatim recordings denies CJE’s constituents, particularly self-represented litigants who are child abuse and domestic violence survivors, the ability to obtain meaningful review of their complaints when judicial misconduct occurs in their cases. Such review is critical in these cases, as they involve issues of fundamental importance, including child custody, safety from domestic violence, and the financial resources necessary to support domestic violence survivors and their children.

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CJE’s Interest in the Petition

CJE is a nonprofit organization whose mission is to protect child abuse and domestic violence survivors in the U.S. family court system and to foster accountability throughout the judicial branch. For nearly two decades, CJE has been a voice for vulnerable children and a catalyst for child safety that works to expose systemic failures in U.S. family courts that are harming countless children.

The Commission on Judicial Performance

As part of its mission, CJE assists child abuse and domestic violence survivors in pursuing complaints before the California Commission on Judicial Performance (the “Commission”), the body constitutionally charged with the responsibility to investigate and discipline misconduct by state court judges. (Cal. Const., art. VI, §§ 8, 18.) The Commission investigates such misconduct as “rude, abusive, and improper treatment of lawyers, litigants, witnesses, jurors, court staff or others, failure to disqualify when the law requires, receipt of information about a case outside the presence of one party, abuse of contempt or sanctions, and delay in decision-making.”¹ And the Commission may disqualify, suspend, retire, censure, and admonish judges depending on the results of its proceedings. (Cal. Const., art. VI, § 18, subds. (b)-(c).)

A complainant may initiate Commission action concerning a judicial officer by submitting a written statement. (Rules of Com. on Jud. Performance, rule 109(a).)² The Commission advises that the written statement should “fully describe what the judicial officer did and said” and “not simply state conclusions, such as ‘the judge was rude’ or ‘the judge was biased.’”³ The complainant may submit a copy of a

¹ (Cal. Com. on Jud. Performance, Filing a Complaint <https://cjp.ca.gov/file_a_complaint/> [as of Dec. 6, 2024].)

² (See also Cal. Com. on Jud. Performance, Commission Proceedings <https://cjp.ca.gov/wp-content/uploads/sites/40/2022/04/CN_Proceedings_Combined_Flow_Charts.pdf> [as of Dec. 6, 2024].)

³ (Cal. Com. on Jud. Performance, Filing a Complaint, *supra*.)

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transcript showing the alleged misconduct with their written statement.⁴ Based upon the written statement and transcript, if provided, the Commission determines whether to initiate a preliminary investigation and, depending on the results of that investigation, may institute formal proceedings.

If formal proceedings are instituted, members of the Commission or appointed special masters hold an evidentiary hearing in which they receive testimony and other evidence. (Rules of Com. on Jud. Performance, rules 121, 125.) Depending on the evidence presented, the Commission may issue an advisory letter to admonish, censure, remove or retire a judge, or find a person unfit to serve as a subordinate judicial officer. (Rules of Com. on Jud. Performance, rule 134.) Importantly, any such action against a judge or other judicial officer must be based upon “clear and convincing evidence.” (See, e.g., *Broadman v. Com. on Jud. Performance* (1998) 18 Cal.4th 1079, 1090.) To satisfy this burden, the examiner must provide evidence showing that there is a “high probability” that the charges are true. (*Id.*)

The Petition Should Be Granted Because the Lack of Verbatim Recordings Precludes Complainants from Obtaining Meaningful Commission Review

Every day, California litigants go to court to resolve issues that are important to them. For CJE’s constituents, these issues include child custody, safety from domestic violence, and the financial resources necessary to support domestic violence survivors and their children. Typically, the judges overseeing these proceedings run them in a manner that comports with California’s standards of judicial conduct. Too often, however, the judges engage in conduct that falls short of these standards. In these situations, a verbatim recording of the proceedings is critical objective evidence of the judicial misconduct.

The Commission has reported that 95% of the complaints it receives concern conduct by judges while performing judicial duties in court proceedings.⁵ But an

⁴ (*Ibid.*)

⁵ (Victoria B. Henley, Com. on Jud. Performance, letter to Governor Brown, C. J. Cantil-Sakauye, Sen. Steinberg, and Speaker Perez, Feb. 29, 2012, p. 2

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ongoing shortage of court-appointed court reporters in California precludes many litigants from having access to verbatim recordings of their court proceedings. The Judicial Council reported that, between October 1, 2023, and March 31, 2024, over 480,000 hearings in family, probate, and unlimited civil cases had no verbatim record.⁶ This amounted to over 70% of those proceedings.⁷ The Judicial Branch of California’s website further shows that hearings in over 90% of unlimited civil cases during the relevant time had no verbatim record.⁸

The lack of access to verbatim recordings frustrates the ability of litigants who have been subject to judicial misconduct to file a sufficient complaint, inhibits the Commission’s ability to investigate and review allegations of judicial misconduct, and renders it extraordinarily difficult if not impossible to meet the “clear and convincing evidence” standard required for a finding of judicial misconduct. The Commission’s decision to institute an investigation depends on the litigant’s ability to provide a detailed description of “action[s] or behavior” amounting to misconduct.⁹ Litigants who cannot afford a private court reporter are therefore at a disadvantage because they do not have a written record of their proceedings to help them recount these specific details, or to provide direct evidence of what occurred. Moreover, these litigants are frequently unrepresented and lack the ability to understand or articulate in their complaint the facts necessary to trigger Commission review. Because these litigants do not have a verbatim record to submit with their complaint, they run the risk of having their complaint dismissed based not on the strength of the claims but rather on their inability to articulate those claims.

<<https://centerforjudicialexcellence.org/wp-content/uploads/2013/12/Commission-on-Judicial-Performance-ReportLetter.pdf>> [as of Dec. 6, 2024] [hereafter CJP Letter].)

⁶ (Judicial Council of Cal., Fact Sheet: Shortage of Certified Shorthand Reporters in California (June 2024) <<https://beta.courts.ca.gov/system/files/file/fact-sheet-shortage-certified-shorthand-reporters-june2024.pdf>> [as of Dec. 6, 2024].)

⁷ (*Ibid.*)

⁸ (Jud. Branch of Cal., Research and Data: Shortage of Court Reporters in California (June 2024) <<https://beta.courts.ca.gov/shortage-court-reporters-california>> [as of Dec. 6, 2024].)

⁹ (See Cal. Com. on Jud. Performance, Filing a Complaint, *supra.*)

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Furthermore, the Commission considers, as part of the decision whether to initiate investigation of a complaint and then in the subsequent investigation, prior complaints against a judicial officer to assess whether the judicial officer has engaged in a pattern of misconduct.¹⁰ If determining the existence of misconduct without a transcript for a current complaint is difficult, making that determination for prior complaints where there was no transcript and witness recollection is vague or nonexistent, is far more difficult. Transcripts submitted with prior complaints would enable the Commission to more accurately assess whether the judicial officer has engaged in a pattern of misconduct.

Even when litigants manage to submit a complaint that escapes dismissal, a verbatim record remains crucial to fair adjudication of their claims. The “clear and convincing” standard of proof in Commission disciplinary proceedings poses an enormous, if not insurmountable, obstacle for complainants where there is no verbatim record. As the Commission has recognized, “it can be very difficult, if not impossible, to establish what was said and what occurred in the courtroom without any record of the proceedings.”¹¹ Moreover, as set forth above, a pattern of misconduct, which can provide significant support for satisfying the “clear and convincing” standard, may be even more difficult to show for past instances of possible judicial misconduct where there is no verbatim record and witness recollection may be faded or lost.

The inequities resulting from the lack of verbatim recordings are particularly acute in family court proceedings, including those involving custody and domestic

¹⁰ (See Com. to Review the Operations and Structure of the Com. on Jud. Performance, Report and Recommendations (Mar. 27, 2023), pp. 22, 24 [noting that “intake and investigating attorneys now routinely take potential patterns of misconduct into account when evaluating and investigating complaints” and that “investigating attorneys formulate case plans that, among other things, assess whether there is a potential pattern of misconduct to investigate”] <<https://cjp.ca.gov/wp-content/uploads/sites/40/2023/03/REPORT.March2023-ADA.pdf>> [as of Dec. 6, 2024].)

¹¹ (CJP Letter, *supra*, p. 2.)

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violence. According to a joint statement by the CEOs of California Superior Courts, “[o]ver 50% of the California courts have reported that they are unable to routinely [provide court reporters to] cover non-mandated case types including civil, family law and probate.”¹² And the Commission on the Future of California’s Court system has reported that, in some courts, about 75% of family law litigants are unrepresented.¹³ In the case of domestic violence restraining orders filed in California, that figure has been reported to exceed 90%. (*In re Marriage of D.S. & A.S.* (2023) 87 Cal.App.5th 926, 934, citing *Ross v. Figueroa* (2006) 139 Cal.App.4th 856, 861 & fn. 3.) Moreover, family law proceedings—and particularly those involving domestic violence allegations in which the perpetrator is in the courtroom—present extraordinarily stressful situations for the victims or parents of victims who are unrepresented. It is unrealistic to expect unrepresented litigants in those circumstances to have a clear, detailed understanding of what happened. It is even more unrealistic to expect them to be able to set that forth in a complaint in a way that permits a determination that judicial misconduct may have occurred, rather than that the complainant was merely unhappy with the outcome (which may well be the primary focus of an unsophisticated, unrepresented litigant who has been subject to judicial misconduct). In these circumstances, the lack of a verbatim recording is not merely an obstacle to meaningful evaluation of possible judicial misconduct, it effectively precludes it.

In sum, the convergence of the shortage of court-appointed court reporters and California’s law preventing electronic recording in most civil proceedings presents an often-insurmountable hurdle for litigants seeking review of judicial misconduct. Equally important, the absence of a recording of court proceedings prevents the swift and complete exoneration of judges by the Commission when appropriate.

¹² (Chad Finke et al., Joint CEO Statement Regarding Court Reporter Shortage Crisis in California (Nov. 2, 2022), p. 2 <https://www.alameda.courts.ca.gov/system/files/general/11022022-joint-ceo-statement-re-court-reporter-shortage_.pdf> [as of Dec. 6, 2024].)

¹³ (Com. on Future of California’s Court System, Report to the Chief Justice (2017), p. 240 <<https://www4.courts.ca.gov/documents/futures-commission-final-report.pdf>> [as of Dec. 6, 2024].)

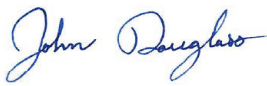
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Accordingly, CJE supports Petitioners Family Violence Appellate Project and Bay Area Legal Aid's Petition.

Respectfully submitted,

Morrison & Foerster LLP
Penelope A. Prevolos
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By: 

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Cc: Per attached proof of service

Document received by the CA Supreme Court.

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PROOF OF SERVICE

I am employed in the County of San Francisco, State of California. My business address is 425 Market Street, San Francisco, CA 94105.

On December 9, 2024, I served true copies of the following document described as:

**LETTER IN SUPPORT OF THE PETITION FOR WRIT OF
MANDAMUS/PROHIBITION FILED BY THE FAMILY VIOLENCE
APPELLATE PROJECT AND BAY AREA LEGAL AID**

on the interested parties in this action as follows:

BY UPS: I enclosed said document(s) in an envelope or package provided by UPS, with delivery fees paid and provided for, and addressed to the persons at the addresses listed in the attached Service List. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of UPS or delivered such document(s) to a courier or driver authorized by UPS to receive documents.

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

Executed on December 9, 2024, at San Francisco, California.

/s/ Christy Marty Holdt
Christy Marty Holdt

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