

STATE OF CALIFORNIA
BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

INQUIRY CONCERNING
JUDGE GARY G. KREEP,

No. 198

REPORT OF THE SPECIAL MASTERS:
FINDINGS OF FACT AND
CONCLUSIONS OF LAW

This case presents a tale of contrasts. Deputy city attorneys who regularly appeared in the courtroom of Judge Gary G. Kreep at the San Diego County Superior Court described his courtroom environment as upsetting, offensive and “toxic” and said he often behaved inappropriately, but deputy public defenders who regularly appeared in his courtroom said they did not witness anything inappropriate. (RT 80, 84, 108, 142, 292, 1028, 1038, 1081-1084) Judge Kreep expressed sensitivity to how individuals appearing in his courtroom might perceive his prior activities as an attorney (RT 372-374, 948), yet he was tone deaf to how attorneys might react to the casual way he ran his courtroom or the comments he made about their appearance and ethnicity. Although he worked diligently on his assigned cases, participated in judicial education opportunities, and volunteered for community outreach, he nevertheless delegated, delayed or ignored some of his most pressing ethical responsibilities. He had a sincere desire to connect with people and to help them in the courtroom, but his approach was improper for a judicial officer. Despite the numerous complaints about his conduct during his first year or so as a judge, the evidence suggests he now has an assignment that works for him and for the public.

Notwithstanding these contrasts, the evidence of Judge Kreep’s specific conduct is, for the most part, undisputed. Based on that evidence, the Commission on Judicial Performance (Commission) filed a Notice of Formal Proceedings (Notice) on October 12, 2016. The Notice charged Judge Kreep with willful misconduct, conduct prejudicial to the administration of justice that brings the judicial office into disrepute

(prejudicial misconduct), and improper action. (Notice of Formal Proceedings p. 1) Judge Kreep filed his answer on October 27, 2016. The Chief Justice of the California Supreme Court appointed us as Special Masters to hold an evidentiary hearing and to report to the Commission. We presided over an eight-day hearing in February 2017, and submit this report in accordance with Rule 129 of the Rules of the Commission on Judicial Performance.

As we will explain, we conclude Judge Kreep committed willful misconduct, prejudicial misconduct and improper action.

LEGAL STANDARDS FOR JUDICIAL MISCONDUCT

A judge may be disciplined for willful misconduct, prejudicial misconduct, or improper action. (Cal. Const., art. VI, § 18, subd. (d); *Adams v. Commission on Judicial Performance* (1995) 10 Cal.4th 866, 877 (*Adams*).) The most serious basis for discipline is willful misconduct (*Inquiry Concerning MacEachern* (2008) 49 Cal.4th CJP Supp. 289, 303), which is 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 (*Broadman*).)

A judge engages in unjudicial conduct when he or she violates a canon of the California Code of Judicial Ethics. (*Broadman, supra*, 18 Cal.4th at p. 1104; *Dodds v. Commission on Judicial Performance* (1995) 12 Cal.4th 163, 172 (*Dodds*).) The California Code of Judicial Ethics guides the standard of conduct a judge should observe. (Preamble to current Cal. Code of Jud. Ethics; *Oberholzer v. Commission on Judicial Performance* (1999) 20 Cal.4th 371, 395 (*Oberholzer*).) We construe and apply the California Code of Judicial Ethics with an eye toward preserving the integrity and independence of the judiciary. (Cal. Code Jud. Ethics, canon 1; *Oberholzer, supra*, 20 Cal.4th at p. 395; *Geiler v. Commission on Judicial Qualifications* (1973) 10 Cal.3d 270, 281 (*Geiler*).)

Bad faith is synonymous with actual malice and is the opposite of acting “with a conscientious purpose to faithfully discharge judicial duties.” (*Broadman, supra*, 18 Cal.4th at p. 1092.) A judge acts in bad faith when he or she performs a judicial act (1) for a corrupt purpose, that is, for any purpose other than the faithful discharge of judicial duties, or (2) with knowledge that the act is beyond the judge’s lawful judicial power, or (3) that exceeds the judge’s lawful power with a conscious disregard for the limits of the judge’s authority. (*Ibid.*) Thus, a judge who lacks actual knowledge of the limits of his or her judicial authority, is aware of that lack of knowledge, but nevertheless does not take reasonably available steps or makes a good faith effort to determine the extent of his or her judicial authority before undertaking to exercise it acts in bad faith. (*Ibid.*) A judge also acts in bad faith when he or she indulges in personal hostility. (*Geiler, supra*, 10 Cal.3d at p. 286.) Negligence alone is insufficient to establish bad faith. (*Broadman, supra*, 18 Cal.4th at p. 1092.)

A judge acts in a judicial capacity when he or she performs one of the functions, whether adjudicative or administrative, associated with the position of a judge or when he or she uses or attempts to use the authority of the judicial office for an improper purpose. (*Broadman, supra*, 18 Cal.4th at p. 1104.) In determining whether a judge acts in his or her judicial capacity we consider the location of the conduct. (*Dodds, supra*, 12 Cal.4th at p. 172.)

The lesser charge of prejudicial misconduct consists of conduct a judge undertakes in good faith but which would appear to an objective observer to be unjudicial and prejudicial to public esteem for the judicial office. (*Fletcher v. Commission on Judicial Performance* (1998) 19 Cal.4th 865, 878; *Broadman, supra*, 18 Cal.4th at pp. 1092-1093; *Ryan v. Commission on Judicial Performance* (1988) 45 Cal.3d 518, 530-531 (*Ryan*).) Prejudicial misconduct may also consist of willful misconduct committed by a judge who is not acting in a judicial capacity. (*Fletcher,*

supra, 19 Cal.4th at p. 878.) The canons in the California Code of Judicial Ethics are relevant to whether a judge's actions constitute prejudicial misconduct because " '[t]he failure . . . to comply with the canons "suggests performance below the minimum level necessary to maintain public confidence in the administration of justice." ' " (*Adams, supra*, 10 Cal.4th at p. 878.) We apply an objective standard by inquiring whether it would appear to an objective observer familiar with the facts and the standards of conduct that the conduct in question is prejudicial to public esteem for the judiciary. (*Inquiry Concerning Van Voorhis* (2003) 48 Cal.4th CJP Supp. 257, 266.) It is not necessary that actual observers view the judge's conduct as prejudicial to the public esteem for the judiciary. (*Doan v. Commission on Judicial Performance* (1995) 11 Cal.4th 294, 324-325 (*Doan*).) " '[C]onduct prejudicial to the administration of justice that brings the judicial office into disrepute," ' " within the meaning of article VI, section 18, subdivision (d) of the California Constitution, does not require notoriety. (*Doan*, at p. 325.)

Improper action is the least serious type of judicial misconduct. It consists of conduct which violates the California Code of Judicial Ethics but does not rise to the level of willful misconduct or prejudicial misconduct. (*Inquiry Concerning Velasquez* (2007) 49 Cal.4th CJP Supp. 175, 186; *Inquiry Concerning Harris* (2005) 49 Cal.4th CJP Supp. 61, 67.)

STANDARD OF PROOF

The Commission, through its Examiner, must prove each charge by clear and convincing evidence sufficient to sustain the charge to a reasonable certainty. (*Doan, supra*, 11 Cal.4th at p. 313; *Geiler, supra*, 10 Cal.3d at p. 275.) "Evidence of a charge is clear and convincing so long as there is a 'high probability' that the charge is true." (*Broadman, supra*, 18 Cal.4th at p. 1090.) The judge has the burden of coming forth with evidence to explain or justify the conduct if he or she claims the conduct does

not warrant discipline. (*Mardikian v. Commission on Judicial Performance* (1985) 40 Cal.3d 473, 484.)

ANALYSIS OF CHARGES AND EVIDENCE

I. COUNT ONE

A. Misrepresentations on judicial election campaign Web site.

The Notice alleged that Judge Kreep's 2012 judicial election campaign Web site contained the following misrepresentations: that in 2012 the Family Values Coalition (FVC) was a nonprofit California corporation; and that then-candidate Kreep was the current president of FVC, the Justice Political Action Committee (JPAC), and the California Justice Political Action Committee (CALJPAC). (Notice of Formal Proceedings p. 2) The Notice charged Judge Kreep with violating the California Code of Judicial Ethics, former canon 5B(2), which provided that a candidate for judicial office shall not knowingly or with reckless disregard for the truth misrepresent any fact concerning the candidate. (Notice of Formal Proceedings p. 2) The Examiner argued this was prejudicial misconduct. (Examiner's prehearing brief p. 8)

1. Findings of Fact.

Judge Kreep was a candidate for judicial office during the June 5, 2012 election in San Diego County.¹ (Exhibit 16) He paid Darshan Brahmhatt to create an election campaign Web site for him. (RT 862-863, 916; Exhibit 14) Judge Kreep told Mr. Brahmhatt he wanted a Web site that would allow people to donate to his campaign and that would list his endorsers. (Kreep Depo. 29:19-30:15, 41:1-3) Judge Kreep provided Mr. Brahmhatt with a list of his endorsers (RT 886; Kreep Depo. 41:4-10), but he did not give Mr. Brahmhatt any other instructions on what to include on the

¹ Although this case includes time periods when Gary Kreep was not yet a judge, we will generally refer to him as Judge Kreep in this report for ease of reference and out of respect for his current office unless clarity or accuracy require otherwise.

Web site. (RT 888; Kreed Depo. 31:22-32:2, 41:11-13)

The Web site created by Mr. Brahmbhatt included, among other things, a link to Judge Kreed's biography. (RT 991; Exhibit 13, CJP 3537) Mr. Brahmbhatt copied the biography from the Web site for the United States Justice Foundation (USJF), an organization Judge Kreed co-founded. (RT 863, 939; Kreed Depo. 79:12-16) Judge Kreed was involved with the USJF until shortly before he was sworn in as a judge. (RT 863, 939; Kreed Depo. 79:12-16) Mr. Brahmbhatt did not tell Judge Kreed that he copied Judge Kreed's biography from the USJF Web site. (RT 889)

Judge Kreed's election campaign Web site went up sometime around April 2012. (RT 879-881) Judge Kreed did not receive a "final draft" of the Web site before it "went live," but he looked at the Web site once during his campaign. (Kreed Depo. 30:21-31:6, 31:15-21, 41:14-20, 43:7, 44:13-15; RT 1219) Not long after the Web site first went up, Judge Kreed told Mr. Brahmbhatt he did not like the content of the Web site. (RT 879-880, 885) But Judge Kreed did not specify what he did not like about the Web site or ask Mr. Brahmbhatt to change the Web site content. (RT 879-880, 885)

According to Judge Kreed, he did not see a biography on the Web site when he reviewed it and did not know there was a biography on the Web site. (RT 993, 1219; Kreed Depo. 31:8-9, 43:19-20, 44:10-12) We find, however, that the link to Judge Kreed's biography was in plain sight on his Web page. (Exh. 13; RT 882-883.) We further find that Judge Kreed looked at his election campaign Web site after the Web site went up but he did not review the biography that was on the Web site.

The biography on Judge Kreed's election campaign Web site stated, in part, "Gary co-founded [JPAC] in 1985" and "served as President of JPAC since then." (CJP 3538 in Exhibit 13) "Gary co-founded [CALJPAC] in 1996" and "served as President of CALJPAC since then." (CJP 3538 in Exhibit 13) "Gary co-founded [FVC] in 1998" and he "has served as the President of FVC since then. FVC is a

nonprofit California corporation organized under [Internal Revenue Code section] 501(c)(4).” (CJP 3538 in Exhibit 13) The phrase “President . . . since then” means Judge Kreep was the current president of FVC, JPAC, and CALJPAC. (Black’s Law Dict. (6th ed. 1990) p. 1385 [“in its apparent sense . . . [since] includes the whole period between the event and the present time].) Judge Kreep’s Web site represented that FVC was an existing nonprofit corporation in 2012.

The statements about FVC and Judge Kreep’s position with FVC, JPAC and CALJPAC were false at the time of Judge Kreep’s 2012 campaign. Judge Kreep was not the president of FVC and FVC was not in operation in 2012. (RT 995, 1220; Kreep Depo. 53:20-54:4. 56:18-57:3) The State administratively terminated CALJPAC prior to 2012. (RT 1533, 1537; Exhibit 13, CJP 3538) Nevertheless, Judge Kreep resigned his position with JPAC and CALJPAC on February 24, 2012. (RT 992-994, 1215, 1217-1219, 1532-1533, 1536) Therefore, he was not the president of FVC, JPAC or CALJPAC at the time his Web site said he was the current president of those organizations.

2. Conclusions of Law.

A candidate for judicial office must comply with the provisions of canon 5. (Cal. Code Jud. Ethics, canons 6E and 6F.) As we have explained, former canon 5B(2) provided that a candidate for judicial office shall not knowingly or with reckless disregard for the truth misrepresent any fact concerning the candidate. (Cal. Code Jud. Ethics, former canon 5B(2) [effective April 29, 2009, now found at canon 5B(1)(b)].) In a judicial campaign, dishonesty about any fact concerning the candidate is a basis for discipline. (Rothman, Cal. Judicial Conduct Handbook (3d ed. 2007) §§ 11.50, p. 591, 11.66, p. 608 (Rothman).) False information provided during a campaign for judicial office may constitute prejudicial misconduct. (See, e.g., *Inquiry Concerning Couwenberg* (2001) 48 Cal.4th CJP Supp. 205, 209-211, 220-221 [intentionally

providing false information on personal data questionnaire submitted to the Governor, Commission on Judicial Nominees Evaluation, and judicial selection advisory board for the purpose of applying for a judicial appointment constituted prejudicial misconduct]; *Public Reproval of Judge Bruce Van Voorhis* (Sep. 8, 1992) p. 2 [judge committed prejudicial misconduct by referring to his ex-wife as his wife in judicial election campaign literature].) In addition, a candidate for judicial office is responsible for ensuring the veracity of the statements published on his or her judicial election campaign Web site. (Cal. Code Jud. Ethics, canon 5B(2) [a candidate shall review and approve the content of all campaign materials produced by the candidate or his or her campaign committee before their dissemination]; Com. on Jud. Performance, Ann. Rep. (1991), Advisory Letter 16, p. 12 [judge failed to exercise control over the judge's campaign committee, which published defamatory falsehoods with apparent disregard for the truth].) The judge cannot escape responsibility by blaming staff. (*In the Matter Concerning Judge Charles R. Brehmer* (Oct. 25, 2012) Dec. & Order Imposing Public Admonishment, pp. 4-5 [judge violated canons 2A and 3B(2) even though there was no evidence the judge intended to conceal information from the public and the violations were the result of a failure to oversee the work of an inexperienced campaign treasurer]; *In the Matter Concerning Former Judge Paul E. Zellerbach* (Nov. 2, 2011) Dec. & Order Imposing Public Admonishment, p. 6 (*Zellerbach*) [the judge is ultimately responsible for ensuring that his campaign activities complied with his ethical obligations under the canons]; Com. on Jud. Performance, Ann. Rep. (1996), Advisory Letter 25, pp. 25-26 [judge violated the Political Reform Act and was negligent in failing to take any steps to ensure that the judge's inexperienced campaign committee complied with the law, even though there was no evidence of intent to conceal campaign finance information]; Rothman, *supra*, § 11.45, p. 587.)

Judge Kreep argued there is no evidence anyone relied on the false information

to vote for him. (Answer pp. 5-6; Judge's prehearing brief pp. 5-6) That is true, but a false campaign statement may violate former canon 5B(2) even if there is no reliance on the false statement and the false statement does not affect the outcome of an election. Judge Kreep cites no authority to the contrary.

Judge Kreep acknowledged he was responsible for ensuring that his campaign Web site was accurate. (Kreep Depo. 43:13-18) The false statements could have been identified but Judge Kreep did not check all the links on his campaign Web site or review his biography. Although there is no evidence Judge Kreep made knowing misstatements on his campaign Web site, he engaged in a reckless disregard for the truth by failing to confirm the veracity of the statements contained on his campaign Web site, in violation of former canon 5B(2) of the California Code of Judicial Ethics.

Candidate Kreep's false Web site statements constituted improper action.

B. Failure to resign as president or chairman of three political action committees.

The Notice charged that Judge Kreep violated canon 5A(1) of the California Code of Judicial Ethics when he became a candidate for judicial office before resigning as president of JPAC, president of CALJPAC, and chairman of the Republican Majority Campaign (RMC). (Notice of Formal Proceedings pp. 2-3) The Examiner argued Judge Kreep committed prejudicial misconduct. (Examiner's prehearing brief p. 12; RT 1604)

1. Findings of Fact.

On February 13, 2012, Judge Kreep filed a Candidate Intention Statement and a Declaration of Intention to become a candidate for superior court judge (Office number 34) with the San Diego County Registrar of Voters. (Exhibit 17, CJP 2872; Exhibit 18, SCJP 3139; Exhibit 19) He paid his filing fee and declared his intention to be a candidate in the June 5, 2012 election. (Exhibit 17, CJP 2872; Exhibit 18, SCJP 3139) His Candidate Intention Statement was filed with the California Secretary of

State on February 16, 2012. (Exhibit 17, CJP 2872)

Also on February 13, 2012, Jim Sills posted an item on sdrostra.com announcing that Judge Kreep filed for Office 34. (Exhibit 20, CJP 3514) Mr. Sills was Judge Kreep's friend and was the person who suggested that Judge Kreep run for judicial office. (RT 1212-1213, 1281-1282) Among other things, the posting said candidate Kreep "heads the United States Justice Foundation in North County, a conservative law agency that specializes in Constitutional Law and protection of family rights." The posting said Kreep's candidacy assured that voters would have options. (Exhibit 20, CJP 3515, 3532) The posting purported to include a statement from then-candidate Kreep about why he sought a judicial position. (Exhibit 20, CJP 3532)

Eleven days later, on February 24, 2012, Judge Kreep resigned his positions as chairman of the RMC and as president of JPAC and CALJPAC. (Answer p. 6; RT 992-994, 1217-1219; Exhibit 22, CJP 3224; Kreep Depo. 57:5-18) RMC is a political action committee formed in 2008. (RT 1530) Judge Kreep was the chairman of RMC. (RT 1531) He was "chairman for purposes of public communication;" he formulated fund-raising ideas, "looked at copy," and signed letters as the chairman of RMC. (RT 1531) JPAC is a political action committee formed in 1982. (RT 1532) Judge Kreep was the chairman of JPAC. (RT 1532) He oversaw fund-raising and signed letters as the chairman of JPAC. (RT 1532-1533) CALJPAC is a political action committee that was never operational. (RT 1533)

2. Conclusions of Law.

Judge Kreep argues he already responded to a Fair Political Practices Commission (FPPC) investigation regarding this charge. (Judge's prehearing brief pp. 7) But that does not preclude us from finding that he engaged in judicial misconduct. (*In the Matter Concerning Judge Charles R. Brehmer, supra*, at pp. 1-2, 4-5; *In the Matter Concerning Judge Stephen E. Benson* (Nov. 15, 2006) Dec. & Order

Imposing Public Admonishment, pp. 2-4.)

A judicial candidate shall not act as a leader or hold any office in a political organization. (Cal. Code Jud. Ethics, canon 5A(1).) An “office” “commonly suggests a position of . . . trust or authority.” (Black’s Law Dict. (6th ed. 1990) p. 1082, col. 2.) A political organization within the meaning of canon 5A(1) includes a political action committee. (Cal. Code Jud. Ethics, Terminology.)

A person becomes a judicial candidate as soon as he or she makes a public announcement of candidacy, declares or files as a candidate with the election authority, or authorizes solicitation or acceptance of contributions or support. (Cal. Code Jud. Ethics, Terminology.) Except in cases where the Governor fills a vacancy by appointment, a judicial candidate must file a declaration of intention with the proper elections official to become a candidate for judicial office. (Elec. Code, § 8023, subd. (a).) No one may be a judicial candidate nor have his or her name printed on any ballot as a candidate for judicial office unless he or she has filed the declaration of intention required in Elections Code section 8023. (Elec. Code, § 8023, subd. (b).) The candidate must pay a filing fee at the time he or she files the declaration of intention. (Elec. Code, § 8105, subd. (b).) In addition, prior to the solicitation or receipt of any contribution or loan, an individual who intends to be a judicial candidate must file with the Secretary of State an original statement, signed under penalty of perjury, of intention to be a candidate. (Gov. Code, § 85200; Cal. Code Regs., tit. 2, § 18520, subd. (b).)

Judge Kreep asserts he intended to run for judicial office only if no one else ran against the sole candidate for Office 34 and he did not consider himself “an official candidate” until February 23, 2012, when he learned no one else would run for that office. (RT 1216-1217) But regardless of his private intentions, Judge Kreep became a candidate for judicial office on February 13, 2012, when he filed his Candidate

Intention Statement, allowing him to begin soliciting and accepting contributions and loans for his campaign, and when he made a public announcement of his candidacy on sdrostra.com. (Exhibit 17, CJP 2782; Exhibit 19; Exhibit 20, CJP 3532) Judge Kreed argues he was not interviewed for the sdrostra.com announcement but no evidence before us supports his assertion. (Judge's post-hearing brief p. 10) As a candidate for judicial office, Judge Kreed could not act as a leader, or hold any office, in a political organization. (Cal. Code Jud. Ethics, canons 5A(1), 6E.) The prohibition under canon 5A(1) was effective immediately when Judge Kreed became a candidate for judicial office. (Cal. Code Jud. Ethics, canon 6F.)

The RMC, JPAC, and CALJPAC are political action committees and thus they are political organizations. (Exhibit 21, CJP 3239; Exhibit 22, CJP 3224; Exhibit 159, CJP 1816) Judge Kreed held offices or positions of leadership in those political organizations when he became a candidate of judicial office on February 13, 2012, and he did not resign until 11 days later. (Answer p. 6; RT 992-994; Exhibit 22, CJP 3224; Exhibit 159, CJP 1816; Kreed Depo. 57:5-18) He violated canon 5A(1) of the California Code of Judicial Ethics.

Judge Kreed's violation constituted improper action. Because he resigned within 11 days, we conclude his violation did not rise to the level of prejudicial misconduct.

C. Misrepresentation on Statement of Economic Interests (FPPC Form 700).

The Notice charged Judge Kreed with violating former canon 5B(2) of the California Code of Judicial Ethics by stating on his FPPC Form 700 that he served as chairman of the Beat Obama Political Action Committee (Beat Obama PAC) when he never held such position. (Notice of Formal Proceedings p. 3) The Examiner argued this was prejudicial misconduct. (Examiner's prehearing brief pp. 13-14)

1. Findings of Fact.

On March 5, 2012, then-candidate Kreed signed an FPPC Form 700 under

penalty of perjury. (Exhibit 21, CJP 3235) He verified that he had reviewed the statement and that to the best of his knowledge, the information contained therein and in the attached schedules was true and complete. (Exhibit 21, CJP 3235) Candidate Kreep stated in an attached schedule that he received a salary of between \$1,000 and \$10,000 as chairman of the Beat Obama PAC. (Exhibit 21, CJP 3240) The statement was filed with the San Diego County Registrar of Voters on March 9, 2012. (Exhibit 21, CJP 3235, 3241)

Candidate Kreep's representation that he was chairman of the Beat Obama PAC and received a salary from that organization was false. (Exhibit 21, CJP 3240; Exhibit 22, CJP 3224) Judge Kreep was not chairman of the Beat Obama PAC; rather, he performed legal services for the Beat Obama PAC. (RT 1534; Answer p. 7)

On June 27, 2013, more than a year after filing the original, Judge Kreep signed an amended schedule stating he received income from the Beat Obama PAC in the form of attorney's fees. (Exhibit 22, CJP 3224) He included a comment that he erroneously listed himself as chairman of the Beat Obama PAC. (Exhibit 22, CJP 3224)

2. Conclusions of Law.

A candidate for judicial office must know and strictly adhere to all applicable election laws (Cal. Code Jud. Ethics, canon 5; *Inquiry Concerning Hall* (2006) 49 Cal.4th CJP Supp. 146, 163) and shall not knowingly or with reckless disregard for the truth misrepresent any fact about himself or herself (Cal. Code Jud. Ethics, former canon 5B(2)).

Whether he was a chairman or only an attorney for the Beat Obama PAC should have been within Judge Kreep's knowledge. Judge Kreep does not claim that his relationship with the Beat Obama PAC was unclear to him. On the other hand, the Examiner did not prove that Judge Kreep intentionally misrepresented his position with

the Beat Obama PAC. Judge Kreep disclosed he received income from the Beat Obama PAC, which indicates he did not intend to conceal his relationship with that organization. There is no evidence Judge Kreep had a motive to overstate his role with the Beat Obama PAC.

We conclude Judge Kreep submitted the FPPC Form 700 with reckless disregard for the truth. He committed improper action in violation of former canon 5B(2) of the California Code of Judicial Ethics.

D. Publicly opposing former President Barack Obama's reelection in 2012.

The Notice charged Judge Kreep with violating the California Code of Judicial Ethics, canon 5A(2) by publicly opposing former President Barack Obama's reelection to the office of the President of the United States during Judge Kreep's candidacy for judicial office in 2012. (Notice of Formal Proceedings pp. 3-5) The Examiner argued this was prejudicial misconduct. (Examiner's prehearing brief p. 18; RT 1617) The charge is based on letters dated May 14, 2012, May 31, 2012, and June 18, 2012, which were signed by Judge Kreep in his capacity as Executive Director of USJF. (Notice of Formal Proceedings pp. 3-5.)

1. Findings of Fact.

Judge Kreep signed fundraising letters for USJF during his 2012 candidacy for judicial office. (Kreep Depo. 77:17-78:21 and Exhibit 8 to the deposition; RT 360-264; see above discussion about when Judge Kreep became a candidate for judicial office) One letter is dated May 14, 2012, and appears to be on USJF's letterhead. (Exhibit 23, CJP 351) The letterhead stated, "United States Justice Foundation [¶] IMPEACH AND PROSECUTE OBAMA! [¶] A Special Project of the United States Justice Foundation." (Exhibit 23, CJP 351) The letter urged the recipient to sign a congressional investigation petition to, among other things, force the House of Representatives to investigate the validity of the long form birth certificate that

President Obama released to the public; hold a House hearing on the validity of President Obama's eligibility to hold the office of President of the United States; and launch impeachment proceedings if it was proven that President Obama falsely claimed he was a natural born citizen of the United States. (Exhibit 23, CJP 351) The letter said Congress needed to take action before the November elections. (Exhibit 23, CJP 351) The letter continued, "[w]e also do not believe that Barack Obama can, or will, be beaten this November by any of the Republican challengers . . . [¶] . . . and that our effort may be all that stands between four more years of Barack Obama in the White House and catastrophe for our economy, our liberty, and our security." (Exhibit 23, CJP 352) The letter announced an intention to "lead a massive election year public education campaign, to ensure that millions of Americans know, by this fall, exactly what" crimes President Obama may have committed. (Exhibit 23, CJP 353-354) Then-candidate Kreep solicited an "emergency donation" to the USJF. (Exhibit 23, CJP 354, 356) The letter was signed by "Gary G. Kreep, Executive Director." (Exhibit 23, CJP 356)

Judge Kreep also signed as "Executive Director" a letter dated May 31, 2012, which also appears to be on USJF letterhead. (Exhibit 24, CJP 359, 362; Kreep Depo. 77:17-78:21 and Exhibit 8 to the deposition) The letter urged the recipient to send an emergency gift to USJF before June 29; the letter said that could be the day the Supreme Court ruled in favor of USJF's challenge to President Obama's eligibility to be on the 2012 presidential ballot. (Exhibit 24, CJP 359, 362) The letter added that even if the Supreme Court ruled in USJF's favor, USJF could not "simply sit out the rest of this crucial election year on the sidelines." (Exhibit 24, CJP 359) The letter explained, "we will STILL have a great deal of work to do between now and Election Day." (Exhibit 24, CJP 359) It said the 2012 election may prove to be the most important election year since 1860, and USJF's grassroots and legal teams were

working on projects that “go right to the heart of this year’s elections,” including USJF’s efforts to counter, among other things, President Obama’s suspicious campaign money machine. (Exhibit 24, CJP 360) The letter stated that the stakes would only get higher as Election Day approached, and “[w]e sit back and hope that he is defeated in November at our own peril!” (Exhibit 24, CJP 360) The letter declared that USJF was fighting to ensure President Obama could not and would not “steal this year’s elections.” (Exhibit 24, CJP 361)

The Examiner also presented evidence of a June 18, 2012 letter with the heading, “From the Desk of GARY KREEP” and USJF’s name at the bottom of the page. (Exhibit 25, CJP 371) The letter was signed by “Gary G. Kreep, Executive Director.” (Exhibit 25, CJP 376) June 18, 2012 was after Judge Kreep won the June 5, 2012 election but before he was sworn in as a judge. (RT 946; Exhibit 16) The letter repeated the appeals from the May 31, 2012 letter and urged that “we” cannot “simply sit out the rest of this crucial election year on the sidelines.” (Exhibit 25, CJP 372) The June 18 letter said there was a lot of work to do before Election Day. (Exhibit 25, CJP 372) The letter repeated that USJF was working on projects that went to the heart of the 2012 elections, including efforts to expose and counter various misdeeds by President Obama. (Exhibit 25, CJP 372-373) The letter added that USJF had plans for the weeks and months leading to November and the stakes would only get higher as Election Day approached. (Exhibit 25, CJP 373) The letter then repeated, “We sit back and hope that he is defeated in November at our own peril!” (Exhibit 25, CJP 373) The letter assured that USJF had been fighting to ensure President Obama did not steal the election. (Exhibit 25, CJP 374) Judge Kreep asked in the letter for a gift to USJF to help pay for its election year efforts. (Exhibit 25, CJP 375)

Judge Kreep did not know Rebecca Dorner, the recipient of the letters presented in evidence. (Kreep Depo. 77:19-22) He believed the letters were sent en masse to a

list of people USJF obtained from vendors. (Kreep Depo. 79)

2. Conclusions of Law.

Former canon 5 cautioned that a judge must “avoid political activity that may create the appearance of political bias or impropriety,” and “[j]udicial independence and impartiality should dictate the conduct of judges and candidates for judicial office.” (Cal. Code Jud. Ethics, former canon 5 [eff. Apr. 29, 2009].) The term “political activity” does not prevent private commentary. (Cal. Code Jud. Ethics, canon 5A, Advisory Com. commentary [effective April 29, 2009].) But judges and candidates for judicial office shall not publicly oppose a candidate for nonjudicial office. (Cal. Code Jud. Ethics, canon 5A(2); *Zellerbach*, *supra*, at pp. 4-5; see also Rothman, *supra*, § 11.05, p. 572 [it is improper for a judge to support a nonjudicial candidate even if the judge does not use his or her title].)

The letters at issue are not private commentary. Judge Kreep did not know Rebecca Dorner and believed the letters were sent en masse to a list of people USJF obtained from vendors. (Kreep Depo. 77:19-22, 79) He signed the letters on behalf of the USJF as its Executive Director. (Exhibit 23, CJP 356; Exhibit 24, CJP 362; Exhibit 25, CJP 376) Judge Kreep argues, but does not cite authority for, the proposition that canon 5A(2) does not prohibit a judicial candidate from signing a letter that otherwise violates canon 5A(2) as long as the judicial candidate signs the letter on behalf of a group that is not a “political organization.”² (Judge’s prehearing brief pp. 14-15; Judge’s post-hearing brief pp. 18-19) We reject that argument as unsupported by the language of canon 5A(2) and contrary to the goal of prohibiting political activity that

² Citing the biography on his judicial election campaign Web site, Judge Kreep says USJF was an educational organization and not a “political organization” within the meaning of the California Code of Judicial Ethics. (Judge’s post-hearing brief pp. 16, 19) But the biography described USJF as a “nationwide, nonprofit, conservative, legal action foundation.” (Exhibit 13, CJP 3538) It did not say USJF was an educational organization. (Exhibit 13, CJP 3538)

may create the appearance of political bias or impropriety. (Cal. Code Jud. Ethics, former canon 5 [eff. Apr. 29, 2009].)

Judge Kreep's argument that his letters did not oppose former President Obama's reelection effort is disingenuous. (Answer pp. 9, 11; Judge's prehearing brief pp. 10, 12-14; Judge's post-hearing brief p. 16) The letters clearly opposed Barack Obama's reelection as President of the United States.

Judge Kreep's solicitation letters violated canon 5A(2) of the California Code of Judicial Ethics and his conduct constituted prejudicial misconduct in that it would appear to an objective observer to be unjudicial and harmful to the independence and impartiality of the judicial office.

E. Failure to report accrued election campaign expenses.

The Notice charged Judge Kreep with committing prejudicial misconduct in violation of Government Code section 84211, subdivision (k) and the California Code of Judicial Ethics, canons 1, 2A and 3B(2) by failing to disclose in his FPPC Recipient Committee Campaign Statement (FPPC Form 460) \$6,135 in accrued campaign expenses for the period March 18 through May 19, 2012, and \$2,700 in accrued campaign expenses for the period May 20 through June 30, 2012 (Notice of Formal Proceedings pp. 5-6; RT 1617), and by not filing amended statements to include the omitted accrued campaign expenses before he took the bench. (Notice of Formal Proceedings p. 6.)

1. Findings of Fact.

Judge Kreep signed an FPPC Form 460 for the period March 18, 2012 through May 19, 2012, and the period May 20, 2012 through June 30, 2012. (Exhibit 28, CJP 2892; Exhibit 29, CJP 2912) He verified, under penalty of perjury, that he used all reasonable diligence in preparing and reviewing those statements and that to the best of his knowledge the information contained therein and in the attached schedules was true

and complete. (Exhibit 28, CJP 2892; Exhibit 29, CJP 2912) But the schedules attached to the statement for the period March 18, 2012 through May 19, 2012 do not show \$6,135 in accrued campaign expenses owed to four sub-vendors of Landslide Communications for slate mailers. (Exhibit 27, CJP 2062, 2066; Exhibit 28, CJP 2901-2908) And the schedules attached to the statement for the period May 20, 2012 through June 30, 2012 do not show \$2,700 in accrued campaign expenses owed to Landslide Communications of Nevada for phone banking services. (Exhibit 27, CJP 2062, 2066; Exhibit 29, CJP 2918-2920) Judge Kreep's candidate-controlled campaign committee filed amended statements on June 28, 2013, listing the omitted accrued campaign expenses. (Exhibit 27, CJP 2066)

Judge Kreep entered into a stipulation with the Enforcement Division of the FPPC on September 18, 2015, agreeing that he violated the Political Reform Act, in particular, Government Code section 84211, subdivision (k), by failing to timely disclose accrued campaign expenses totaling \$8,835, the expenses owed to the sub-vendors of Landslide Communications and to Landslide Communications of Nevada. (Exhibit 27, CJP 2060, 2062-2063, 2065-2067; Kreep Depo. 80:6-82:12)

2. Conclusions of Law.

A candidate for judicial office must know and strictly adhere to all applicable election laws. (Cal. Code Jud. Ethics, canon 5; *Inquiry Concerning Hall, supra*, 49 Cal.4th CJP at p. 163.) A judge violates canons 1, 2A and 5 by failing to read the law governing his or her election and then contravening that law. (*Inquiry Concerning Hall, supra*, 49 Cal.4th CJP Supp. at pp. 162-163 [strict standard of liability applies].) Ignorance of the law aggravates a violation in this context. (*Inquiry Concerning Hall, supra*, 49 Cal.4th CJP at p. 163.)

The Political Reform Act of 1974 (Gov. Code, § 81000 et seq.) requires full and truthful disclosure of expenditures in election campaigns so “the voters may be fully

informed and improper practices may be inhibited.” (Gov. Code, § 81002, subd. (a).) “Public confidence in the integrity of the judicial campaign process and the judiciary is harmed when the public is deprived of important information, such as sources of contributions and amounts of expenditures made by a campaign.” (*In the Matter Concerning Judge Charles R. Brehmer, supra*, at p. 4.)

Each campaign statement³ required by Government Code section 84200 et seq. must contain, among other things, the following for each person to whom an expenditure of one hundred dollars (\$100) or more has been made during the period covered by the statement: the full name, street address, amount of each expenditure, and description of the consideration for which each expenditure was made. (Gov. Code, § 84211, subd. (k).) “Expenditure” includes accrued expenses. (*Ibid.*)

Judge Kreep violated Government Code section 84211, subdivision (k) by failing to disclose accrued expenses for his judicial election campaign. (Exhibit 27, CJP 2060, 2062-2063, 2065-2067) His violation was not an isolated incident, but involved two reporting periods. (Exhibits 28 and 29) His conduct contravened the purposes of the Political Reform Act. His conduct also violated the California Code of Judicial Ethics, canons 1 [a judge shall uphold the integrity and independence of the judiciary], 2A [a judge shall respect and comply with the law], 3B(2) [a judge shall be faithful to the law regardless of partisan interests, public clamor or fear of criticism], and 5 [judges and candidates for judicial office shall comply with all applicable election, election campaign, and election fundraising laws] and constituted prejudicial misconduct because it would appear to an objective observer that his failure to comply with the Political Reform Act was unjudicial and harmful to the public esteem for the judicial

³ “Campaign statement” means an itemized report which is prepared on a form prescribed by the FPPC and which provides the information required by Government Code section 84100 et seq. (Gov. Code, § 82006.)

office. (*Inquiry Concerning Hall, supra*, 49 Cal.4th CJP Supp. at pp. 157, 162-163; *In the Matter Concerning Former Judge Paul D. Seeman* (Dec.16, 2013) pp. 6-7; *In the Matter Concerning Judge Charles R. Brehmer, supra*, at pp. 2-4; *In the Matter Concerning Judge Stephen E. Benson, supra*, at pp. 2-4; Rothman, *supra*, at § 11.65, p. 607.)

F. Using a personal bank account and credit card to pay for campaign expenses.

The Notice charged Judge Krep with committing prejudicial misconduct in violation of Government Code section 85201, subdivision (e) by using his personal credit card or personal bank account rather than his campaign contribution account to make campaign expenditures totaling \$41,796. (Notice of Formal Proceedings p. 6; RT 1617)

1. Findings of Fact.

During his 2012 judicial election campaign, Judge Krep made 14 campaign expenditures totaling \$41,796 using his personal credit card or personal bank account. (Exhibit 27, CJP 2062, 2065) He entered into a stipulation with the Enforcement Division of the FPPC on September 18, 2015, agreeing that he violated the Political Reform Act by making campaign expenditures totaling \$41,796 from accounts other than his campaign bank account. (Exhibit 27, CJP 2060, 2062-2063, 2065-2067; Krep Depo. 80:6-82:12) He agreed his conduct violated Government Code section 85201, subdivision (e). (Exhibit 27, CJP 2062, 2066) The expenditures from Judge Krep's personal accounts were approximately 82 percent of his total campaign expenditures for the audit period. (Exhibit 27, CJP 2068; Examiner's prehearing brief p. 23)

2. Conclusions of Law.

Upon filing a statement of intention pursuant to Government Code section 85200, a candidate must establish a campaign contribution account at a financial institution located in the State. (Gov. Code, § 85201, subd. (a).) All campaign expenditures must

be made from that account. (Gov. Code, § 85201, subd. (e).)

Judge Kreep violated Government Code section 85201, subdivision (e) by making campaign expenditures using his personal bank account and personal credit card. His violation of section 85201 only came to light because of a Franchise Tax Board audit. (Exhibit 27, CJP 2065-2066; Examiner's prehearing brief p. 23) Judge Kreep's conduct violated canons 2A and 3B(2) of the California Code of Judicial Ethics (*In the Matter Concerning Judge Charles R. Brehmer, supra*, at pp. 3-5; *In the Matter Concerning Judge Stephen E. Benson, supra*, at pp. 2-4), contravened the purposes of the Political Reform Act, and constituted prejudicial misconduct.

G. Failing to take adequate steps to withdraw as counsel of record.

The Notice charged that Judge Kreep violated the California Code of Judicial Ethics, canons 1, 2, 2A and 4G by remaining as counsel of record in a federal action captioned *Liberi v. Taitz* for approximately six weeks after he was sworn in as a judge. (Notice of Formal Proceedings p. 6) The Examiner urged that the conduct constituted prejudicial misconduct. (Examiner's prehearing brief p. 26)

1. Findings of Fact.

Judge Kreep was designated in June 2011 as local counsel for Pennsylvania attorney Philip Berg in *Liberi v. Taitz*, a case in the United States District Court for the Central District of California. (RT 1309; Exhibit 31, CJP 3430) Mr. Berg represented three plaintiffs. (Exhibit 30, CJP 3425)

Judge Kreep was elected as a judge for the San Diego County Superior Court on June 5, 2012. (Exhibit 16) Judge Kreep testified he asked Mr. Berg on a number of occasions after July 3, 2012 (when Judge Kreep was declared the winner for the judicial position) to find a replacement local counsel in *Liberi v. Taitz* and Mr. Berg promised he would do so. (RT 1273, 1309)

During a December 17, 2012 meeting with Judge Kreep, Presiding Judge Robert

Trentacosta urged Judge Krep to get his substitutions of counsel squared away before he was sworn in. (RT 366-367, 369, 389; Exhibit 183) According to Judge Krep, he had conversations with Mr. Berg through the end of December 2012 regarding Mr. Berg filing a motion to substitute another attorney in place of Judge Krep as local counsel, but Mr. Berg did not file such a motion in December. (RT 955, 1273, 1309; Exhibit 32, CJP 2253-2257; Exhibit 193, CJP 2365)

Judge Krep filed a motion to withdraw as counsel of record on January 4, 2013, three days before he was sworn in as a judge. (RT 955, 1273, 1309; Exhibit 32, CJP 2253-2257; Exhibit 193, CJP 2365) The notice of motion is captioned motion to withdraw as attorney of record for plaintiff. (Exhibit 32, CJP 2253) The memorandum of points and authorities in support of the motion refers both to plaintiff and plaintiffs. (Exhibit 32, CJP 2255-2256) On January 9, 2013, Mr. Berg filed a request for approval of substitution of attorney. (Exhibit 35, CJP 2260) Judge Krep did not sign the request indicating his consent to the substitution. (Exhibit 35, CJP 2260) The district court set a status hearing for January 14, 2013 because Judge Krep's motion to withdraw did not set a hearing date and the court found it unclear. (Exhibit 34, CJP 2258) On January 22, 2013, the district court concluded Judge Krep's motion to withdraw as counsel of record and Mr. Berg's request for approval of substitution of attorney were both deficient. (Exhibit 36, CJP 2262) The district court did not permit Judge Krep to withdraw as counsel of record at that time, noting that Mr. Berg represented he would file a corrected request that would address the deficiencies. (Exhibit 36, CJP 2262)

Presiding Judge Trentacosta met with Judge Krep on January 30, 2013 to discuss matters including Judge Krep's withdrawal as counsel of record in *Liberi v. Taitz*. (RT 385-390, 443-453) Judge Trentacosta again urged Judge Krep to take care of substituting out of the federal case. (RT 389-390, 444) Judge Trentacosta told

Judge Kreep that getting substituted out of *Liberi v. Taitz* was a priority. (RT 390)

Mr. Berg filed another request for approval of substitution of attorney on February 7, 2013. (Exhibit 37, CJP 2275) Judge Kreep signed the request. (Exhibit 37, CJP 2275-2276) Although the district court found there were continuing deficiencies that were “most troubling,” the district court recognized that Judge Kreep’s judicial duties prevented him from practicing law. (Exhibit 38, CJP 2277) On February 14, 2013, the district court granted the request for substitution. (Exhibit 38, CJP 2277)

2. Conclusions of Law.

“A judge shall not practice law.” (Cal. Code Jud. Ethics, canon 4G.) An individual must wrap up legal practice and ensure he or she is no longer counsel of record in any case before taking the oath of judicial office. (Com. on Jud. Performance, Ann. Rep. (2012), Advisory Letter 29, p. 27; Com. on Jud. Performance, Ann. Rep. (1998), Advisory Letters 43 and 44, p. 29; Com. on Jud. Performance, Ann. Rep. (1997), Advisory Letter 42, p. 23; Rothman, *supra*, at §§ 8.10-8.11, p. 394.)

Judge Kreep remained counsel of record in *Liberi v. Taitz* after he was sworn in as a judge. Even if Judge Kreep did not perform any legal work and did not make any appearance in *Liberi v. Taitz*, his status as local counsel allowed Mr. Berg to continue to appear as counsel pro hac vice in the case. (Cal. Rules of Court, rule 9.40(a).) (Judge’s prehearing brief, p. 18; Judge’s post-hearing brief pp. 26-27)

We conclude Judge Kreep did not exercise reasonable diligence in seeking to withdraw as counsel of record. It is true the matter was not entirely within his control -- he needed approval from the district court judge -- but for almost six months he simply relied on Mr. Berg to take care of the matter and did not file his own motion until three days before he was sworn in as a judge. Even then, he filed a deficient motion, and the district court judge found it “most troubling” that the deficiencies still

had not been corrected more than a month later. Presiding Judge Trentacosta twice urged Judge Kreep to take care of this priority matter.

Judge Kreep violated the California Code of Judicial Ethics, canons 1, 2 [a judge shall avoid impropriety and the appearance of impropriety], 2A, and 4G [a judge shall not practice law]. Because he made some effort to seek a substitution but did not use reasonable diligence, we conclude his conduct constituted improper action.

H. Giving the impression of practicing law after taking the bench.

The Notice charged Judge Kreep with violating canons 1, 2 and 2A of the California Code of Judicial Ethics by issuing four checks between March and May 2014 which identified the account holder as “Gary G Kreep Sole Prop, DBA The Law Offices of Gary G Kreep.” (Notice of Formal Proceedings p. 6) The Notice alleged the use of those checks improperly created the impression that Judge Kreep was continuing to practice law after he had been sworn in as a judge. (Notice of Formal Proceedings p. 6) The Examiner argued Judge Kreep committed, at a minimum, improper action. (Examiner’s prehearing brief p. 28)

1. Findings of Fact.

On December 3, 2013, an arbitrator issued an award of \$14,914.65 in favor of Robert E. Thompson, one of Judge Kreep’s former clients, and against Judge Kreep in relation to an attorney fee dispute.⁴ (Exhibit 39, CJP 2073-2079) Judge Kreep paid Mr. Thompson using a check from the Attorney Client Trust Account of the Law Office of Gary G. Kreep. (Exhibit 40, CJP 1286; RT 927)

Judge Kreep had been on the bench for over a year at the time the check was written. (RT 1273; Exhibit 40) Judge Kreep said he made the payment out of his law

⁴ Judge Kreep cites various authorities relating to the confidential nature of arbitration proceedings. (Judge’s prehearing brief pp. 19-20) None of the authorities require the conclusion that his partial payment check could not be admitted into evidence in this proceeding.

office account in order to keep track of expenses or obligations incurred in connection with his law practice. (RT 1224-1226)

2. Conclusions of Law.

It is improper for a judge to be connected in any way with his or her former law firm or to give the appearance that the judge is practicing law. (Com. on Jud. Performance, Ann. Rep. (1993), Advisory Letter 4, p. 17; Com. on Jud. Performance, Ann. Rep. (1987), Private Discipline and Disposition, p. 10; Rothman, *supra*, at § 8.14, p. 396.) For example, “[s]ince it is improper to practice law after taking the oath of judicial office, a judge should not use legal stationery to communicate with former clients or others concerning a former client’s legal matters.” (Rothman, *supra*, at § 8.14, p. 396.) And a judge must not allow his or her name to appear on the letterhead of his or her former law firm. (*Ibid.*)

The check sent by Judge Kreep to his former client gave the appearance that Judge Kreep still maintained a law practice. His conduct violated canons 1, 2 and 2A of the California Code of Judicial Ethics and constituted improper action.

Summary of Conclusions Regarding Count One

Count One A: improper action -- false statements on campaign Web site. Count One B: improper action -- holding an office in political organizations while a candidate for judicial office. Count One C: improper action -- false statements on FPPC Form 700. Count One D: prejudicial misconduct -- publicly opposing former President Obama in his reelection effort. Count One E: prejudicial misconduct -- violation of Political Reform Act by failing to report campaign expenses on FPPC Form 460s. Count One F: prejudicial misconduct -- violation of Political Reform Act by using personal bank account and credit card to pay campaign expenses. Count One G: improper action -- failing to take adequate steps to withdraw as counsel of record. Count One H: improper action -- giving the impression of maintaining a law practice

after assuming judicial office.

II. COUNT TWO

The Notice charged Judge Krep with violating the California Code of Judicial Ethics, canons 1, 2, 2A, 3B(3), 3B(4) and/or 3B(5) by engaging in conduct that reflected a lack of proper courtroom decorum or was otherwise improper when he presided in Department 3 and the traffic and small claims department of the San Diego County Superior Court in 2013. (Notice of Formal Proceedings pp. 7-10) The Examiner argued Judge Krep committed prejudicial misconduct or, at a minimum, improper action. (Examiner's prehearing brief pp. 32-77)

The following legal principles apply to the charges in Count Two. "An independent, impartial, and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary is preserved." (Cal. Code Jud. Ethics, canon 1.) A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities. (Cal. Code Jud. Ethics, canon 2.) "Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges." (Cal. Code Jud. Ethics, canon 2A, Advisory Com. commentary.) "The test for the appearance of impropriety is whether a person aware of the facts might reasonably entertain a doubt that the judge would be able to act with integrity, impartiality, and competence." (*Ibid.*) "A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. A judge shall not make statements, whether public or nonpublic, that commit the judge with respect to cases, controversies, or issues that are likely to come before the courts or that are inconsistent with the impartial performance of the adjudicative duties of judicial office." (Cal. Code Jud. Ethics, canon 2A.)

In addition, “[a] judge shall require order and decorum in proceedings before the judge.” (Cal. Code Jud. Ethics, canon 3B(3).) “A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity” (Cal. Code Jud. Ethics, canon 3B(4).) “A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, engage in speech, gestures, or other conduct that would reasonably be perceived as (a) bias or prejudice, including but not limited to bias or prejudice based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, or (b) sexual harassment.” (Cal. Code Jud. Ethics, canon 3B(5).)

A. Comments to Deputy Public Defender Leticia Hernandez.

1. Findings of Fact.

Judge Kreep sat in Department 3, the in-custody misdemeanor arraignment department, from January 2013 to September 9, 2013. (RT 40, 159, 956, 961, 984-985) Deputy Public Defender Leticia Hernandez appeared before Judge Kreep in Department 3 to enter a change of plea in a criminal case on January 17, 2013. (Exhibit 44, CJP 3242, 3244-3245) The following exchange occurred after Ms. Hernandez stated her appearance:

“THE COURT: I love her accent.

“[DEPUTY PUBLIC DEFENDER LETICIA] HERNANDEZ: I’m Mexican.

“THE COURT: Are you a citizen of the country of Mexico, Ms. Hernandez?

“[DEPUTY PUBLIC DEFENDER] HERNANDEZ: No.

“THE COURT: Okay. Okay. There is an attorney in town that I know that is actually a citizen of the - of Mexico who does immigration work here in California.

“[DEPUTY PUBLIC DEFENDER] HERNANDEZ: Oh no, your Honor. I am a U.S. citizen and proud of it.

“THE COURT: The -- I wasn’t planning on having you deported.”

(Exhibit 44, CJP 3245) The exchange between Judge Kreep and Ms. Hernandez was reported in CityBeat magazine. (RT 383-384)

Ms. Hernandez testified she was not offended by Judge Kreep’s comments. (RT 1088-1089, 1111, 1550-1553) But she reported the incident to Melvin Epley, a supervising attorney with the Public Defender’s Office. (RT 1088-1089, 1111, 1550-1553)

Judge Kreep testified he did not intend to belittle Ms. Hernandez by commenting on her accent. (RT 1155) He intended his comment as a compliment. (RT 1155-1156) Nevertheless, he acknowledges his reference to deportation was inappropriate. (RT 1156-1157, 1246) He says he was “[t]rying to get a laugh” and “put people at ease.” (RT 1156) Judge Kreep apologized to Ms. Hernandez for his statements. (RT 1157)

2. Conclusions of Law.

Commenting on Ms. Hernandez’s accent was questionable from the start. But the conversation quickly snowballed to an inappropriate query about Mexican citizenship and culminated in a jaw-dropping remark about deportation. Regardless of Judge Kreep’s intent when he made the comments and regardless whether Ms. Hernandez was offended, the comments were likely to offend members of the public and could be construed as discourteous, demeaning, or as suggesting bias based on ethnic or national origin. (*Gonzalez v. Commission on Judicial Performance* (1983) 33 Cal.3d 359, 376 (*Gonzalez*); *Public Admonishment of Judge Nancy Pollard* (Jul. 13, 2011) pp. 1, 3; *Public Admonishment of Judge Harvey Giss* (Mar. 16, 2011) p. 1; *Public Reproval of Judge Richard A. Haugner* (Apr. 11, 1994) pp. 1-2; Com. on Jud. Performance, Ann. Rept. (1992), Advisory Letter 30, p. 16; see also *Ryan, supra*, 45 Cal.3d at p. 545.)

Judge Kreep testified that when he started as a judge, Presiding Judge Trentacosta told him to “create a friendly courtroom environment.” (Judge’s prehearing brief p. 21) It is certainly important to make courts accessible and welcoming to courtroom participants, and each judge has a particular style to accomplish those worthy goals. A certain level of levity or humor is not necessarily improper. But the cultivation of a particular judicial personality or courtroom environment may not be used as an excuse for prejudicial misconduct. “Judicial humor should never be used in a courtroom . . . to ridicule, embarrass or disparage others, or in a manner that diminishes the dignity of the judicial process.” (*Inquiry Concerning Judge Deann M. Salcido* (Nov. 10, 2010) Dec. & Order Imposing Public Censure Pursuant to Stip., p. 21; see Rothman, *supra*, at § 3.42, p. 140.) “Judges are expected to administer justice and resolve serious issues, not to provide entertainment.” (*Inquiry Concerning Judge Deann M. Salcido*, at p. 22.)

In response to many of the charges asserted in Count Two, Judge Kreep suggests he did not receive sufficient guidance or training during his first year as a judge. (Judge’s prehearing brief p. 22; Judge’s post-hearing brief p. 39) But Judge Kreep, who had been an attorney for about 37 years and had appeared in different courts before becoming a judge (RT 938-944, 955), received substantial guidance and training when he became a judge, arguably more than most other California judges. Before he was sworn in he was given David Rothman’s California Judicial Conduct Handbook and said he read it “cover to cover,” except for the parts dealing with supervisory duties. (RT 949-950, 1284) And before he took the oath he observed commissioners and judges in various departments at the San Diego County Superior Court for about a week. (RT 951-954) Then, after he was sworn in, Judge Kreep sat with an experienced commissioner in Department 3 observing the proceedings in that department. (RT 378, 955-956) He attended monthly or bi-monthly judicial education courses offered by the San Diego County Superior Court. (RT 960) He received guidance, advice and

instructions from other judges on many occasions, including more guidance from the Presiding Judge, Assistant Presiding Judge and Supervising Judge than most judges usually receive. (RT 200, 204-205, 207-212, 281, 385-390, 394-403, 405-407, 409-410, 443-460, 468-470, 1134; Exhibits 41, 173) Although Judge Kreep suggested in his prehearing brief that his requests for guidance were met with hostility (Judge's prehearing brief p. 22), there is no evidence of that. Moreover, Judge Kreep completed his new primary assignment orientation presented by the California Center for Judicial Education and Research (CJER) in February or March 2013. (RT 379, 958, 1304-1305) He attended a separate New Judge Orientation for a week in April 2013, and attended Judicial College, a two-week course, beginning on August 5, 2013. (RT 380, 957-959, 1305-1306; Exhibit 173, CJP 1149) In addition to all of the foregoing, judicial scripts prepared by CJER and the San Diego County Superior Court, sentencing guidelines, benchbooks, online courses and other types of training were available to Judge Kreep. (RT 432-434, 381-382, 1177-1178, 1185)

The charged conduct violated canons 1, 2, 2A, 3B(3), 3B(4) and 3B(5) of the California Code of Judicial Ethics and constituted prejudicial misconduct. Judge Kreep's conduct did not rise to the level of willful misconduct because he did not act with bad faith or actual malice.

B. Using nicknames to address attorneys appearing before him.

1. Findings of Fact.

During a January 30, 2013 meeting with Judge Kreep, Presiding Judge Trentacosta counseled Judge Kreep about his January 17, 2013 statements to Ms. Hernandez and an article in CityBeat reporting those statements. (RT 383-385; Exhibit 44) Judge Trentacosta guided Judge Kreep on appropriate judicial conduct and courtesy. (RT 386) He told Judge Kreep that statements singling out a person based on the person's accent and questions about where a person was born could make the

person uncomfortable, and those matters had nothing to do with any issue before Judge Kreep. (RT 388) Judge Kreep expressed contrition for his conduct and promised not to do it again. (RT 388)

Brianne McLaughlin, Thanh Ho and Nate Crowley were interns with the San Diego County Public Defender's Office in 2013. (RT 64-65, 289, 1010, 1055) They made appearances in Department 3 before Judge Kreep. (RT 65-66, 288-289, 1011-1012)

Judge Kreep referred to Ms. McLaughlin as "bun head," a nickname he came up with. (RT 289-290; Answer p. 17) He frequently called Ms. Ho "Ms. Dimples." (RT 1026; Answer p. 18) Ms. Ho did not invite Judge Kreep to use that nickname and no one at the Public Defender's Office referred to Ms. Ho by that name. (RT 1037, 1059) Although the nickname "Ms. Dimples" did not bother Ms. Ho, no other judge called her that name and Ms. Ho preferred that judges call her by her given name. (RT 1027, 1059-1060)

Mr. Crowley is six feet seven inches tall. (Answer p. 17; RT 65; Exhibit 46, CJP 3548; Exhibit 47, CJP 3246; Exhibit 49, CJP 3248; RT 683-685, 688) Judge Kreep called him "Shorty." (Answer p. 17; RT 65; Exhibit 46, CJP 3548; Exhibit 47, CJP 3246; Exhibit 49, CJP 3248; RT 683-685, 688) Mr. Crowley recalled that Judge Kreep called him Shorty in open court about 10 to 15 times during the approximately two and a half months Mr. Crowley appeared in Department 3. (RT 65-66) Mr. Crowley did not invite Judge Kreep to call him Shorty. (RT 67, 69-70)

Terri Winbush was a Deputy City Attorney with the City Attorney's Office in San Diego in 2013. (RT 74) She appeared in Judge Kreep's courtroom multiple times each week from January 2013 until August 2013. (RT 77, 96) Judge Kreep called Ms. Winbush "Star Parker" when she made appearances in his courtroom. (RT 78-81, 766-767, 1149, 1576-1578; Answer p. 17) The parties dispute how many times Judge

Kreep used the nickname; we find he used the nickname several times, enough that the repetition annoyed and upset Ms. Winbush. (RT 78-81, 766-767, 1149, 1576-1578; Answer p. 17) Judge Kreep told Ms. Winbush Star Parker was a beautiful African American woman and Ms. Winbush resembled Star Parker. (RT 78-80) Ms. Winbush was not flattered by the comparison. (RT 82) Judge Kreep's use of the nickname made Ms. Winbush uncomfortable. (RT 82, 108) Judge Kreep admits he was wrong to call Ms. Winbush the nickname. (RT 1149, 1151)

On August 1, 2013, Supervising Deputy City Attorney Mark Skeels complained to Judge Timothy Walsh (Supervising Criminal Judge of the San Diego County Superior Court) about Judge Kreep's conduct toward Ms. Winbush and some other deputy public defenders. (RT 183-184, 189, 192-193, 248, 254-255) That same day a supervising attorney with the City Attorney's Office complained to Judge Kreep that, among other things, his comparing Deputy City Attorney Winbush to Star Parker was objectionable. (RT 256; Exhibit 192, CJP 1215; Exhibit 42, CJP 1199; see also Exhibit 173, CJP 1148; Exhibit 192, CJP 1215-1216)

Judge Kreep admitted to Assistant Presiding Judge David Danielsen on August 1, 2013, that he called Ms. Winbush Star or Star Parker. (RT 1546-1548) Judge Kreep told Judge Danielsen that Star Parker was a friend and that he told Ms. Winbush Star Parker was a beautiful woman and Ms. Winbush looked like Star Parker. (RT 1548-1549) The next day, Judge Kreep admitted to Judge Walsh that he used the nicknames Star Parker, Shorty, bun head, and Ms. Dimples. (RT 196-197)

Judge Trentacosta, Judge Danielsen and Judge Walsh met with Judge Kreep on August 2, 2013. (RT 195-197, 199-200, 256, 397-403, 464, 468-470, 1544-1546; Exhibit 42, CJP 1199-1200) Among other things, Judge Trentacosta talked with Judge Kreep about the City Attorney's Office complaint that Judge Kreep was using nicknames. (RT 200, 397-403, 468-470) Judge Kreep again admitted he had used the

nicknames Star, Shorty, Ms. Dimples, and bun head. (RT 200-202, 398, 403) Judge Trentacosta instructed Judge Kreep not to use nicknames. (RT 207, 402-430, 468-470) Judge Kreep stopped using nicknames after that meeting. (RT 1148, 1151, 1223)

Judge Kreep admits his use of nicknames was wrong. (RT 1151) He says he has learned from his mistake. (RT 1151-1152)

2. Conclusions of Law.

Judge Kreep's unilateral creation and use of nicknames for attorneys and interns appearing in his courtroom was discourteous and did not convey proper respect for them. His use of the nicknames was overly casual, could be perceived as demeaning, could suggest a lack of impartiality, and could undermine public confidence in and respect for the judiciary. In particular, Judge Kreep's comments to Ms. Winbush could have reasonably been perceived as improper attention based on her gender, race and physical appearance. (RT 130-131) Judge Kreep should have known then what he concedes now: it was improper to address attorneys and law student interns appearing before him with his self-created nicknames.

Judge Kreep's conduct violated the California Code of the Judicial Ethics, canons 1, 2, 2A, 3B(3) and 3B(4) and constituted prejudicial misconduct. (*Kennick v. Commission on Judicial Performance* (1990) 50 Cal.3d 297, 324-325, disapproved on other grounds in *Doan, supra*, 11 Cal.4th at pp. 319-320; *Inquiry Concerning Willoughby* (2000) 48 Cal.4th CJP Supp. 145, 151, 155-156; *Public Admonishment of Judge John B. Gibson* (Dec. 14, 2010) p. 2 [judge's conduct in, among other things, referring to a tall, thin female attorney with short hair who appeared before him as a "Q-tip" violated canons 1, 2A and 3B(4)]; *Inquiry Concerning Judge Deann M. Salcido, supra*, at pp. 11, 13, 15 [judge engaged in prejudicial misconduct and violated canons 1, 2A, 3B(3) and 3B(4) by, among other things, referring to an attorney as "Mr. Federal Case" and referring to court staff as "cucumbers"].)

C and D. Commenting on the physical appearance of attorneys.

1. Findings of Fact.

During his January 30, 2013 meeting with Presiding Judge Trentacosta when the two discussed Judge Kreep's remarks to Ms. Hernandez and the resulting CityBeat article, Judge Kreep promised that he would not make inappropriate statements again. (RT 388, 1246-1247) At that meeting, Judge Trentacosta counseled Judge Kreep that it might make a person feel uncomfortable if they are singled out by the judge for something that is not relevant to an issue before the judge. (RT 388)

On July 12, 2013, after setting two cases for further hearing and before calling the next case, Judge Kreep said to someone in the courtroom, "She's a pretty girl, you know you could smile." (Exhibit 51, CJP 3250) That same day, Deputy City Attorney Caroline Song introduced a friend who was observing the proceedings in the courtroom. (Exhibit 52, CJP 3251; RT 688-689, 768-769) A clerk directed the friend where to sit, and Judge Kreep said (apparently to the friend), "We've got all sorts of very attractive, young PD's around here, so." (Exhibit 52, CJP 3251; RT 690-691)

Deputy Public Defender Leticia Hernandez testified that Judge Kreep commented on the physical appearance of female attorneys who appeared before him. (RT 1115-1116) As an example, she said Judge Kreep asked a defendant, "the lovely attorney next to you went over the form, correct?" (RT 1116) Deputy City Attorney Terri Winbush and Deputy City Attorney Caroline Song also testified that Judge Kreep commented on the attractiveness of the female attorneys who appeared before him. (RT 84-85, 754-757, 767-769)

Deputy City Attorney Paige Hazard appeared in Department 3 before Judge Kreep at least once a week for about three months in 2013. (RT 141-142, 177) She testified Judge Kreep referred to a deputy public defender as "the pretty brown one." (RT 146-147, 177) Ms. Hazard perceived Judge Kreep's demeanor as sexist. (RT 143)

Judge Kreep concedes he may have said to a defendant, “The lovely woman next to you is your public defender.” (RT 1158) According to Judge Kreep, the comment was meant to be descriptive and not demeaning. (Answer p. 18) He also admits that on a date prior to August 2, 2013, during an appearance by a female defendant charged with prostitution who was represented by a male deputy public defender, Judge Kreep made a comment about how attractive the male deputy public defender was and the defendant responded in agreement. (Answer pp. 18-19; RT 1158) Judge Kreep said “he was going for a laugh” but now agrees his comment was wrong and he has not made such a comment since then. (RT 203, 1158-1159)

At a meeting on August 2, 2013 between Judges Trentacosta, Danielsens, Walsh and Kreep, Judge Trentacosta referenced a complaint by the City Attorney’s Office that Judge Kreep had made comments about the physical appearance of persons in his courtroom. (RT 200; 397-403, 468-470) Judge Trentacosta instructed Judge Kreep not to make such comments. (RT 207, 402-403, 470)

2. Conclusions of Law.

Judge Kreep’s comments about the physical appearance of persons appearing in his courtroom were not relevant to the court proceedings, made others in the courtroom uncomfortable, did not afford proper respect to the individuals, diminished the dignity of the judicial process, and may have created the appearance of bias or impartiality. (See, e.g., *In re Marriage of Iverson* (1992) 11 Cal.App.4th 1495, 1499 [judge’s statement that a female witness who was in her 40s was a “lovely girl” showed gender bias toward her], disapproved on another point in *People v. Freeman* (2010) 47 Cal.4th 993, 1006, fn. 4; Judicial Council of Cal., Advisory Com. Access and Fairness, et al., Guidelines for Judicial Officers: Avoiding the Appearance of Bias (Aug. 1996) p. 15 [judicial officers should think before commenting on the physical appearance of others].)

Even if any one of the charged incidents was not improper by itself, the pattern of behavior violated canons 1, 2A, 3B(3), 3B(4) and 3B(5) of the California Code of Judicial Ethics and constituted prejudicial misconduct. (*Inquiry Concerning Harris*, *supra*, 49 Cal.4th CJP Supp. at pp. 71-72; see also *Fitch v. Commission on Judicial Performance* (1995) 9 Cal.4th 552, 556-558; *Inquiry Concerning Hyde* (2003) 48 Cal.4th CJP Supp. 329, 354-355.)

However, we reject the Examiner's suggestion that the conduct charged in Count Two rose to the level of sexual harassment. (Examiner's prehearing brief pp. 38, 40, 42, 44; RT 1631-1632) Although Judge Krep engaged in a pattern of inappropriate behavior, his conduct was not sufficiently severe or pervasive to create an abusive working environment. (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 609.)

E. Comments referencing the pregnancy of Deputy City Attorney Danielle Stroud.

1. Findings of Fact.

Deputy City Attorney Danielle Stroud appeared before Judge Krep in 2013 when she was pregnant. (RT 38-42) During one appearance, Judge Krep said to defense counsel, "Let's get on with this case" and then added something like "We don't want Ms. Stroud to have her baby in the courtroom." (RT 44) On other occasions Judge Krep made comments to Ms. Stroud about her pregnancy such as "It's getting closer, Ms. Stroud" and "She wants to go home and have her baby. I'll pick on her today." (RT 46) Judge Krep made these comments in open court, sometimes on the record. (RT 46)

Judge Krep testified he asked Ms. Stroud how she was doing and when she was due, but that was the extent of his comments about her pregnancy. (RT 1154, 1245) However, Ms. Stroud's testimony, which we find more credible, contradicts Judge

Kreep's version, and it is corroborated by the testimony of Department 3's bailiff, Deputy Sheriff Piper Paulk. Deputy Paulk said Judge Kreep told Ms. Stroud, "Ooh, I hope you don't have this baby in here." (RT 805, 1579)

Judge Kreep explains his conduct by stating that he regularly overheard conversations between Ms. Stroud and other attorneys regarding her pregnancy. (RT 1153-1154; Answer p. 19) But Ms. Stroud denied that her pregnancy was a matter of regular discussion in the courtroom. (RT 47-48) Deputy Paulk likewise did not recall Ms. Stroud talking to anyone about her pregnancy when she was in Department 3. (RT 1579) We find that while Ms. Stroud may have talked with people in Department 3 about her pregnancy, she did not do so regularly nor invite comments about her pregnancy from Judge Kreep. (RT 47, 59-60) Judge Kreep's comments made Ms. Stroud uncomfortable. (RT 47)

2. Conclusions of Law.

A judge's comments about an attorney's pregnancy can suggest or give an appearance of gender bias or discrimination. (Sandy Mastro, *Courtroom Bias: Gender Discrimination Against Pregnant Litigators* (2001) pp. 155, 165.) "Unprofessional remarks made in the courtroom concerning an attorney's personal appearance, pregnancy, or sexuality, can have an impact on the credibility of women in court; and when addressed to a woman lawyer, such remarks make it difficult for her to effectively represent her clients." (Rothman, *supra*, at § 2.11, p. 52.)

Regardless of his intent, Judge Kreep's references to Ms. Stroud's pregnancy go beyond a show of concern or polite inquiry. His comments were indecorous, discourteous, and undignified and could reasonably be perceived as gender bias. His conduct violated canons 1, 2, 2A, 3B(3) and 3B(4) of the California Code of Judicial Ethics and constituted prejudicial misconduct.

F. Comment regarding prostitution and Deputy City Attorney Carolyn Westfall.

1. Findings of Fact.

Deputy City Attorney Carolyn Westfall appeared in Judge Kreep's courtroom during the period January through June 2013. (RT 129-130) On one occasion, when Ms. Westfall entered the courtroom Judge Kreep said, "Speaking of prostitution, here's Miss Westfall." (RT 132) Judge Kreep was on the bench and court staff and other attorneys were present when Judge Kreep made the comment. (RT 133, 135) Ms. Westfall understood the remark as Judge Kreep trying to be funny, but she found the remark to be "ridiculous." (RT 133)

Judge Kreep does not remember making the remark but concedes he may have used that language in referring to Ms. Westfall. (RT 1152) He explains that he may have been referring to the prostitution cases handled by the City Attorney's office. (RT 1152)

We find Ms. Westfall's testimony credible and reject the suggestion in the closing argument by Judge Kreep's attorney that Judge Kreep may have actually said "prosecution" rather than "prostitution" but Ms. Westfall misheard what Judge Kreep said. (RT 1662-1663; Judge's post-hearing brief p. 53) No evidence supports that version of the incident. (RT 1152-1153)

2. Conclusions of Law.

Judge Kreep's comment made a connection between prostitution and Deputy City Attorney Westfall in a manner that did not refer to the prostitution cases handled by the City Attorney's office. It was an attempt at a joke, but it was an inappropriate joke that did not afford proper respect to an attorney appearing in Judge Kreep's courtroom. The comment violated the California Code of Judicial Ethics, canons 1, 2, 2A, 3B(3) and 3B(4) and constituted prejudicial misconduct. (*Inquiry Concerning Velasquez, supra*, 49 Cal.4th CJP Supp. at pp. 215-216.)

G. Comments disclosing intimate personal facts.

1. Findings of Fact.

Judge Kreep told someone in his courtroom he took care of a friend with whom he traveled because the friend had seizures. (RT 1159-1160) Judge Kreep shared that he showered and slept with the friend but “[t]here was no sex involved. We were just -- we were just friends. It was purely platonic.” (RT 1159-1160; see also RT 772)

2. Conclusions of Law.

Judge Kreep claims the anecdote was part of his effort to maintain cordial relations with court staff, bailiffs, and attorneys. (Answer p. 20) While it is not necessarily improper for a judge to share personal anecdotes in the courtroom, Judge Kreep’s disclosure was an example of sharing too much information. The personal details were not relevant to the proceeding, they conjured a mental image of the judge that may not have been welcome, and they diminished the dignity of the judicial office.

Judge Kreep’s comments violated canons 3B(3) and 3B(4) of the California Code of Judicial Ethics and constituted prejudicial misconduct.

H. Comments to a female defendant in a prostitution case.

1. Findings of Fact.

During the taking of a plea on July 12, 2013, Judge Kreep asked a defendant charged with prostitution, “Ma’am, anything I can do to get you out of the life?” (Exhibit 53, CJP 3252) Later, when the defendant indicated she read, understood, and signed the Acknowledgment of Constitutional Rights form, Judge Kreep asked, “Is it you like the money? Or you just like the action?” (Exhibit 53, CJP 3254) His question was not prompted by any statement by the defendant or her counsel. (Exhibit 53, CJP 3254) When the defendant started talking about her plans for the future, Judge Kreep cut her off and asked, “Are you going to try to get a job at the Bunny Ranch in

Nevada?” (Exhibit 53, CJP 3254) Judge Kreep subsequently encouraged the defendant to change her “lifestyle.” (Exhibit 53, CJP 3254-3255)

Judge Kreep testified that he would often ask defendants what he could do because he wanted to help defendants charged with prostitution get out of that lifestyle. (RT 1161-1162) He said in this instance he was trying to show support for the defendant but may also have been trying to shame her into changing her lifestyle. (RT 1162) He denied intending to embarrass or demean the defendant. (RT 1163)

2. Conclusions of Law.

Judge Kreep’s asserted goal may be laudable, but his questions -- “you just like the action?” -- were insensitive, indecorous and discourteous to the defendant. Judge Kreep admitted he may have been attempting to shame her. (RT 1162)

Judge Kreep suggested his reference to the Bunny Ranch was in response to the defendant’s statement that she was planning to go somewhere where prostitution was legal. (Answer p. 21) But Judge Kreep’s question about the Bunny Ranch followed the defendant’s statement that she was “certified for MT” and “wanted to go to PT” and it was well after she discussed getting a passport and going somewhere where prostitution was allowed. (Exhibit 53, CJP 3252-3254) We agree with the Examiner that Judge Kreep’s questions created the appearance of embroilment. (Rothman, *supra*, at § 2.01, p. 37 [embroilment refers to the loss of “the necessary professional distance between” the judge and the attorneys, parties, or causes before the judge].)

Judge Kreep’s conduct violated canons 1, 2, 2A, 3B(3) and 3B(4) of the California Code of Judicial Ethics and constituted prejudicial misconduct.

I. Comment to Abraham William Tanoury.

1. Findings of Fact.

Abraham William Tanoury was a law student intern with the City Attorney’s

Office in 2013. (RT 307-308, 313) He appeared in Judge Kreep's courtroom for an arraignment on one occasion, along with his Supervising Deputy City Attorney Caroline Song. (RT 308-309, 315) Before he went on the record, Judge Kreep picked up a plastic container of animal crackers, gestured at Mr. Tanoury, and said in the presence of Ms. Song and court staff, "If you're good during your argument, I'll give you some cookies, little boy." (RT 309-310; Exhibit 188, CJP 1889) Mr. Tanoury was in his early 20's at the time and was taken aback by Judge Kreep's comment. (RT 307, 310) Mr. Tanoury felt that Judge Kreep's statement was unprofessional and demeaning. (RT 310)

Judge Kreep testified he did not intend to demean or embarrass Mr. Tanoury. (RT 1180-1182)

2. Conclusions of Law.

Regardless of his intent, Judge Kreep's statement to Mr. Tanoury was demeaning, indecorous, discourteous, undignified, and prejudicial to the public esteem for the judicial office. Judge Kreep's conduct violated the California Code of Judicial Ethics, canons 3B(3) and 3B(4) and constituted prejudicial misconduct. (*Public Admonishment of Judge Christine K. Moruza* (Dec. 16, 2008) p. 10 [judge's comment to deputy district attorney, "How old are you? Eighteen?" was demeaning, undignified and contrary to canon 3B(4)].)

J. Comment to Deputy City Attorney Caroline Song.

1. Findings of Fact.

During a sidebar conference for a prostitution case in July or September 2013, Judge Kreep used the words "Chinese prostitutes," then turned to Deputy City Attorney Caroline Song and said, "No offense to Chinese people." (RT 772-773, 1163-1165; Exhibit 172, CJP 1144; Exhibit 180, CJP 1902-1903) Judge Kreep made the comment to Ms. Song in the presence of one of Ms. Song's supervisors along with a City

Attorney's Office intern and Deputy Public Defender Chelsea Kopp. (RT 772-773) Judge Kreep explains he said "[n]o offense to Chinese people" because Ms. Song gave him an angry look when he used the term "Chinese prostitutes." (RT 1165, 1240-1241) We believe that in this context, Judge Kreep was actively trying not to offend Ms. Song, and yet still managed to upset her.

Caroline Song testified she was bothered by the "[n]o offense to Chinese people" comment because Judge Kreep constantly mentioned her ethnicity. (RT 774) By way of example she mentioned a time when Judge Kreep introduced visitors from Korea. (RT 774) Judge Kreep told the visitors Ms. Song was from China and spoke Mandarin. (RT 774) Ms. Song is not from China. (RT 774)

Judge Kreep testified he would not have indicated Ms. Song was from China or that she spoke Mandarin because he had no personal knowledge of those things. (RT 1165-1166) But in an audio recording of Judge Kreep's courtroom, Judge Kreep told individuals apparently visiting from Korea that Ms. Song was "of Chinese heritage" and spoke Mandarin. (RT 1242)

It is clear from the evidence that Judge Kreep and Caroline Song did not have a smooth working relationship, and that both individuals shared responsibility for those difficulties. (Answer p. 22; Judge's prehearing brief p. 22; RT 757-758, 1172, 1380, 1442, 1581) In addition, Ms. Song made some assertions in other contexts that we find not credible and that have been discredited by other witnesses. But in this context, we find Ms. Song's testimony credible regarding Judge Kreep's references to her ethnicity and the impact the comments had on her.

2. Conclusions of Law.

Judge Kreep concedes he made the "[n]o offense to Chinese people" statement. (RT 1163-1165; Answer p. 22) The comment upset Ms. Song because Judge Kreep singled her out based on her perceived ethnicity or national origin. Under the

circumstances and in light of all the evidence, the comment was inappropriate and could have been perceived as indicating bias. Judge Kreep's comment violated canons 1, 2, 2A, 3B(4) and 3B(5) of the California Code of Judicial Ethics and constituted improper action.

The charged conduct did not rise to the level of prejudicial misconduct because an objective observer would have understood that Judge Kreep was attempting not to offend Ms. Song.

K. The Gift of the Day.

1. Findings of Fact.

Excerpts from recordings made of proceedings in Department 3 on July 18, 23, 24, 26, 30, and 31, 2013, and September 3 and 5, 2013, show that Judge Kreep mentioned giving a defendant or defense counsel a "gift of the day," "gift for the day," or "gift for today" during sentencing. (Exhibit 55, CJP 3260-3261; Exhibit 57, CJP 3262-3264; Exhibit 59, CJP 3268; Exhibit 61, CJP 3272; Exhibit 65, CJP 3283; Exhibit 67, CJP 3289; Exhibit 71, CJP 3293; Exhibit 73, CJP 3296) Judge Kreep made a statement about giving a "gift" in the presence of other defendants. (RT 88, 775-776)

On July 26, 2013, Judge Kreep said, "Here's your gift for your new child" before he vacated a fine. (Exhibit 63, CJP 3280) On July 30, 2013, he said in another case, "I already gave the gift of the day." (Exhibit 65, CJP 3285) Nevertheless, he appeared to stay the requirement to pay the balance of a \$286 fine pending the successful completion of probation. (Exhibit 65, CJP 3285) Then in a different case, he said he would stay the payment of a fine pending the defendant's successful completion of probation. (Exhibit 65, CJP 3286) Judge Kreep told that defendant, "That's a gift, ma'am. [Unintelligible] don't take it for granted, alright. If you come back before me on another case, you'll have to pay that fine plus whatever you got to do on the other one." (Exhibit 65, CJP 3286)

On July 31, 2013, Judge Kreep said he was giving a “[s]econd gift of the day since we’re going so long.” (Exhibit 69, CJP 3291)

Judge Kreep testified that he used the term “gift of the day” to convey that he was giving the defendant “a break” and the defendant needed to “live the straight and narrow.” (RT 1166-1168) Judge Kreep concedes it was not a good idea to use the term “gift of the day.” (RT 1168)

2. Conclusions of Law.

The phrases “gift of the day,” “gift for the day,” and “gift for today” may have improperly suggested to court participants that Judge Kreep was ordering something that was not deserved under the law, that he was dispensing favored treatment to certain defendants or defense counsel and withholding that special treatment from others, and that such special treatment was only available once a day to a lucky recipient. The characterization of Judge Kreep’s discretionary rulings as a gift suggested unequal treatment and bias, which may have reduced public confidence in the dignity and impartiality of the court. Judge Kreep’s conduct violated the California Code of Judicial Ethics, canons 1, 2, 2A, 3B(3) and 3B(4) and constituted prejudicial misconduct. (*Gonzalez, supra*, 33 Cal.3d at p. 375; *Inquiry Concerning Velasquez supra*, 49 Cal.4th CJP Supp. at pp. 213-215.)

L. Advising defendants to say it was all big mistake.

1. Findings of Fact.

In proceedings set for Judge Kreep’s courtroom, prosecution and defense attorneys often entered into agreements allowing a defendant to withdraw his or her guilty plea upon successful completion of diversion or satisfaction of the required terms and conditions. (RT 121, 556-557) The prosecution would then dismiss the defendant’s case. (RT 121, 556-557)

On July 18, 2013, after a defendant withdrew his guilty plea and the prosecution

dismissed his case, Judge Kreep advised the defendant about what to say if someone inquired about the prior criminal action. (Exhibit 74, CJP 3299) Judge Kreep said, “This conviction, this case, may pop up on a database. And if it does and they ask you about it, you say here, it was all a big mistake, the case was dismissed. Uh. If they want to know the details, it’s really none of their business -- so.” (Exhibit 74, CJP 3300)

Judge Kreep made similar comments to defendants on July 22, 2013. (Exhibit 75, CJP 3301-3302) He advised those defendants charged with theft, “If somebody asks you about it, you say hey, it was all a big mistake. Case was dismissed, here’s the proof. It’s really none of their business. So. Ok?” (Exhibit 75, CJP 3302)

Judge Kreep provided the same advice to another defendant on July 22, 2013. (Exhibit 76, CJP 3303) Judge Kreep said, “So if, if it comes up that you were charged and pled guilty or whatever. Uh, or they say, what’s this theft conviction? You just say, it’s all a big mistake, and it was [chuckle] on your part, and that the case has been dismissed and it’s really none of their business all the details. Okay, sir.” (Exhibit 76, CJP 3303)

Judge Kreep again gave the same advice to a defendant on July 29, 2013. (Exhibit 78, CJP 3306) Judge Kreep said, “If this pops up on a database, they say hey, what about this? Say it’s all a big mistake. Case is dismissed and if they want to know the details, it’s really none of their business. Okay?” (Exhibit 78, CJP 3306)

Judge Kreep gave the same advice on August 1, 2013. (Exhibit 80, CJP 3307-3308) He said, “And if they, you’re asked about it, you just say, hey, it was all a big mistake, case got dismissed. And if they wanna know the details, it’s really none of their business. Okay?” (Exhibit 80, CJP 3308)

None of the defendants in the above proceedings solicited Judge Kreep’s advice. (Exhibit 74, CJP 3299; Exhibit 75, CJP 3301; Exhibit 76, CJP 3303; Exhibit 78, CJP

3305-3306; Exhibit 80, CJP 3307-3308) Judge Kreep testified he did not mean to suggest to defendants that someone other than the defendant had made a mistake. (RT 1170) He says he never stated that the mistake was made by the City Attorney's Office. (RT 1171)

2. Conclusions of Law.

Judge Kreep's advisories were incomplete and ambiguous. On only one occasion did he suggest he was referring to a mistake made by the defendant; all other times his comments could have been interpreted to mean that the legal proceedings were flawed or that it had been a mistake to file charges against the defendant. The latter implication was false. The cases were not dismissed due to a defect or mistake.

In any event, Judge Kreep should not have been giving such advice to the defendants at all. Contrary to the suggestion in Judge Kreep's Answer (Answer p. 23), there is no evidence any of the defendants asked Judge Kreep about the effect on future employment or what to say if someone asked about the case. But even if he had been asked, it was improper for Judge Kreep to render legal advice, that is, render an opinion on the legal effect of a theft conviction and counsel defendants on what they should say to potential employers. (Cal. Code Jud. Ethics, canon 4G; see generally Cal. State Bar Rules, rule 2.30(B); *Birbrower, Montalbano, Condon & Frank v. Superior Court* (1998) 17 Cal.4th 119, 128 [for purposes of Business and Professions Code section 6125, which prohibits the practice of law in California unless a person is an active member of the State Bar, the practice of law includes giving legal advice]; Vapnek, Tuft, Peck & Wiener, Cal. Practice Guide: Professional Responsibility (The Rutter Group 2016) p. 1-115, ¶ 1:213.)

Judge Kreep's conduct violated canons 1, 2, 2A and 4G of the California Code of Judicial Ethics and constituted improper action.

M. Using crude language.

1. Findings of Fact.

On July 22, 2013, Judge Kreep continued a hearing in a criminal case upon defense counsel's request and with Deputy City Attorney Caroline Song's agreement. (Exhibit 81, CJP 3309-33311) When defense counsel expressed a wish to finish the continued hearing by 9:30 a.m., Judge Kreep responded, "if Ms. Song isn't here, I'll kick her in the butt." (Exhibit 81, CJP 3311-3312) Judge Kreep testified that Ms. Song was not in the courtroom when he made his comment. (RT 1251-1252) However, the recording of the proceeding indicates Ms. Song was present when Judge Kreep made the statement. (Exhibit 81)

Judge Kreep testified Ms. Song was routinely late for the 8:30 a.m. calendar and her tardiness was frustrating to him. (RT 1172) The testimony of other witnesses corroborates Judge Kreep's testimony that Ms. Song was habitually tardy. (RT 1380, 1442, 1581) Judge Kreep explains he simply wanted Ms. Song to be on time, but acknowledges he used inappropriate language in this instance. (RT 1173-1174, 1176)

In another case the same day, Deputy Public Defender Jeffrey Hill informed the court that his client was in an abusive relationship. (Exhibit 83, CJP 3313, 3315) Judge Kreep addressed the client as follows: "Just so you know, ma'am, I grew up in a relationship where I used to get the crap beat out of me on a regular basis by a stepfather [unintelligible] my mother. So I have some understanding of what you're going through, okay? From a child's perspective." (Exhibit 83, CJP 3315; RT 844-848) Judge Kreep later testified he intended to convey that a person does not turn to a life of crime just because they are being abused. (RT 1174-1175)

The next day, when a defense attorney requested reinstatement of probation for a client, Judge Kreep said: "Yeah, your client's no virgin . . . as far as these cases are going." (Exhibit 85, CJP 3320-3321; RT 848-851)

On July 29, 2013, Judge Kreep heard a case in which the defendant had fulfilled his diversion program requirements and his case had been dismissed. (Exhibit 87, CJP 3323) When Judge Kreep advised the defendant to stay off drugs, defendant's mother, who was in court, responded "for sure." (Exhibit 87, CJP 3323) After the mother identified herself to the judge, Judge Kreep said, "His mother, okay. Slap him upside the head a few times, make sure he stays off the drugs." (Exhibit 87, CJP 3323) Contrary to the suggestion in Judge Kreep's Answer, the mother did not ask Judge Kreep for advice on how to keep her son out of jail. (Answer p. 25) Judge Kreep explains he made the comment to get the defendant's mother to take an active role in making sure the defendant stayed off drugs. (RT 1175) He did not intend for the mother to beat the defendant. (RT 1175)

Judge Kreep says he did not intend to demean or embarrass anyone when he made the foregoing comments, and he no longer uses such language in court. (RT 1175-1176)

2. Conclusions of Law.

The Notice alleged that on July 30, 2013, Judge Kreep told a defendant, "If you violate your OR, I'll throw his butt in jail." (Notice of Formal Proceedings p. 10) The Examiner did not present evidence on that allegation. We conclude that allegation is not proven.

Nevertheless, Judge Kreep concedes he made various crude remarks in court. (RT 1249-1251) Swearing is "unbecoming, injudicious and unsuited to the proper decorum of a courtroom." (*McCartney v. Commission on Judicial Qualifications* (1974) 12 Cal.3d 512, 535 (*McCartney*); see also *Fitch, supra*, 9 Cal.4th at pp. 556-558.) Judge Kreep promised not to make inappropriate statements again when he and Presiding Judge Trentacosta met on January 30, 2013, to discuss the incident involving Ms. Hernandez. (RT 388, 1246-1247) Judge Kreep should have known that it was

inappropriate to use crude language during court proceedings. (*Inquiry Concerning Judge Deann M. Salcido, supra*, at p. 20 [“It is self-evident that crude comments and sexually suggestive jokes from a judge have no place in a courtroom.”].)

The words “butt” and “crap” may be relatively tame examples of crude language, particularly when compared to the vulgar language rampant in culture, social media, and entertainment. But a higher standard of conduct is required in our courtrooms, and for good reason. The Code of Judicial Ethics requires that judges conduct themselves in a manner that maintains the dignity of our courts and respect for our judicial institutions. (Cal. Code Jud. Ethics, canon 3B(4).) Casual conduct and crude language are inconsistent with those requirements. (*Inquiry Concerning Judge Deann M. Salcido, supra*, at pp. 4, 6, 15 [judge violated canons 1, 2A, 3B(3) and 3B(4) by, among other things, using crude language during proceedings (the word “screwed”)].) Judge Kreep’s statements were indecorous and undignified, and in some cases did not convey proper respect for the individuals appearing in his courtroom.

His conduct violated canons 1, 2, 2A, 3B(3), 3B(4) and 3B(5) of the California Code of Judicial Ethics and constituted improper action.

N. Speaking Spanish during courtroom proceedings.

1. Findings of Fact.

In January 2013, Presiding Judge Trentacosta received concerns about Judge Kreep using Spanish to address individuals with Hispanic surnames. (RT 382-383, 435) In his January 30, 2013 meeting with Judge Kreep, Judge Trentacosta instructed Judge Kreep not to use Spanish when calling a case or communicating with a defendant. (RT 383-387, 434)

Nevertheless, Judge Kreep spoke Spanish during courtroom proceedings on July 22, 23, 24, 25, 26, 29, 30, and 31 and September 5, 2013. (Exhibit 59, CJP 3266-3267, 3268; Exhibit 61, CJP 3270, 3271, 3272; Exhibit 76, CJP 3303, 3304; Exhibit 88, CJP

3449; Exhibit 89, CJP 3450; Exhibit 91, CJP 3451; Exhibit 93, CJP 3452; Exhibit 95, CJP 3453; Exhibit 97, CJP 3455; Exhibit 99, CJP 3458; Exhibit 100, CJP 3459; Exhibit 101, CJP 3463-3464; Exhibit 102, CJP 3465; Exhibit 103, CJP 3466; Exhibit 104, CJP 3468; Exhibit 105, CJP 3470; Exhibit 107, CJP 3471; Exhibit 108, CJP 3473; Exhibit 109, CJP 3475; Exhibit 110, CJP 3477; Exhibit 111, CJP 3479; Exhibit 112, CJP 3480; Exhibit 113, CJP 3482; Exhibit 114, CJP 3483; Exhibit 115, CJP 3486-3487, 3489; Exhibit 117, CJP 3491; Exhibit 119, CJP 3493; Exhibit 120, CJP 3495; Exhibit 121, CJP 3496; Exhibit 122, CJP 3499; Exhibit 123, CJP 3500; Exhibit 124, CJP 3502; Exhibit 126, CJP 3503-3504; Exhibit 128, CJP 3506; Exhibit 165.) He addressed Ms. Hernandez and other defense attorneys as señor or señora and sometimes spoke in Spanish to ask how they were doing. (Exhibit 59, CJP 3267; Exhibit 61, CJP 3271; Exhibit 91, CJP 3451; Exhibit 95, CJP 3453; Exhibit 97, CJP 3455; Exhibit 99, CJP 3458; Exhibit 103, CJP 3466; Exhibit 107, CJP 3471; Exhibit 108, CJP 3473; Exhibit 111, CJP 3479; Exhibit 114, CJP 3483; Exhibit 126, CJP 3503-3504)

Judge Kreep also addressed some defendants as señor, señora, or señorita. (Exhibit 61, CJP 3270; Exhibit 108, CJP 3473; Exhibit 115, CJP 3486-3487, 3489; Exhibit 121, CJP 3496; Exhibit 122, CJP 3499; Exhibit 123, CJP 3500) He also greeted some defendants and court interpreters with “buenos dias,” “buenos tardes,” or “vaya con Dios. (Exhibit 76, CJP 3303, 3304; Exhibit 88, CJP 3449; Exhibit 89, CJP 3450; Exhibit 93, CJP 3452; Exhibit 100, CJP 3462; Exhibit 104, CJP 3468; Exhibit 109, CJP 3475; Exhibit 113, CJP 3482; Exhibit 120, CJP 3495; Exhibit 121, CJP 3496)

Judge Kreep claims he merely used Spanish in greetings or to wish defendants well. (Answer p. 26; Judge’s post-hearing brief p. 78) But his characterization is incorrect. He asked one defendant with the last name Ontiveros, “Habla Ingles?” (Exhibit 61, CJP 3271) When Mr. Ontiveros indicated he did not speak English, Judge

Kreep said, “Señor, we’ll explain it to you all in Español. Un momento por favor.” (Exhibit 61, CJP 3271) Judge Kreep then asked Mr. Ontiveros’ counsel, “Would you explain to his mama, por favor?” (Exhibit 61, CJP 3272)

Moreover, in telling a defendant with the last name Sanchez that she should retain certain paperwork, Judge Kreep said, “Keep your paperwork, okay? Muy importante.” (Exhibit 93, CJP 3452) There is no indication in the recorded proceeding that Ms. Sanchez spoke Spanish. (Exhibit 93) Ms. Sanchez did not appear with an interpreter and she responded in English when Judge Kreep greeted her. (Exhibit 93, CJP 3452)

In a different case, Judge Kreep spoke to a defendant in Spanish even though a court interpreter was present. (Exhibit 100, CJP 3459) He asked the defendant, “Culpable o no culpable?” (Exhibit 100, CJP 3460) Judge Kreep also referred to “papeles.” (Exhibit 100, CJP 3462)

Judge Kreep again addressed another defendant in Spanish even though a court interpreter was present. (Exhibit 119, CJP 3493) Judge Kreep told the defendant, “No cerveza. No tequila. No alcohol. Nada.” (Exhibit 119, CJP 3493)

Deputy City Attorney Terri Winbush testified that Judge Kreep used Spanish when the defendant was “Hispanic-appearing” and the judge was not always correct that the defendant spoke Spanish. (RT 93; see also RT 778 [Song]) She recalled that in some cases the defendant responded, “I actually speak English” and Judge Kreep stopped using Spanish. (RT 94)

Consistent with Ms. Winbush’s testimony, in a July 26, 2013 proceeding, Judge Kreep greeted a defendant with the last name Torres in Spanish even after the defendant said she understood the terms and conditions of her probation in English. (Exhibit 101, CJP 3463-3464) And in a case heard on July 31, 2013, involving a defendant whose last name was Silva, Judge Kreep spoke in Spanish to the defendant’s mother and girlfriend, who were in the courtroom. (Exhibit 124, CJP 3502) Judge

Kreep asked the two women, in Spanish, whether they spoke English. (Exhibit 124, CJP 3502) They responded that they spoke English, and Judge Kreep addressed them in English. (Exhibit 124, CJP 3502)

During an August 2, 2013 meeting, Presiding Judge Trentacosta again urged Judge Kreep not to speak Spanish in court. (RT 207, 402-403, 470, 1145-1146) During an August 19, 2013 meeting, Presiding Judge Trentacosta counseled Judge Kreep for a third time not to speak Spanish in the courtroom. (RT 471-472) Judge Kreep testified that he stopped using Spanish in the courtroom after that instruction from Judge Trentacosta. (RT 1223) But that is also incorrect. Judge Kreep referred to defendant Trujillo as señor on September 5, 2013. (Exhibit 165 - disc, no transcript [at 35:58/59:58]) On the same date, Judge Kreep referred to defendant Arguenta as “señor,” although he quickly apologized and called the defendant Mr. Arguenta. (Exhibit 128, CJP 3506)

Deputy public defenders Katherine Tesch and Jose Orozco testified that Judge Kreep’s use of Spanish did not upset their clients or make the clients feel uncomfortable. (RT 1339-1341, 1346, 1373-1374, 1378-1379, 1387-1388) But according to Supervising Deputy Public Defender Melvin Epley, Deputy Public Defender Leticia Hernandez reported to him that although Judge Kreep’s use of Spanish was not malicious, it “could be naive and insensitive towards Hispanics.” (RT 1549-1550, 1559)

2. Conclusions of Law.

Judicial proceedings must be conducted in English. (Code Civ. Proc., § 185, subd. (a).) This statutory mandate does not contain an express exception. Even if salutations and greetings do not violate the mandate, Judge Kreep’s use of Spanish during court proceedings went farther.

An assumption that a person with a Latino/Hispanic surname speaks Spanish

can suggest stereotyping based on race, national origin, or ethnicity. It may offend individuals in the courtroom or suggest differential treatment. Judge Kreep's conduct violated canons 1, 2, 2A and 3B(5) of the California Code of Judicial Ethics and, under the totality of the circumstances, including the January 2013 instruction from Presiding Judge Trentacosta not to use Spanish, constituted prejudicial misconduct. (Com. on Jud. Performance, Ann. Rep. (2011), Advisory Letter 24, p. 26; Com. on Jud. Performance, Ann. Rep. (2006), Advisory Letter 16, p. 33.)

O. Addressing insurance company representative as "Mr. Insurance Man."

1. Findings of Fact.

Judge Kreep was assigned to hear traffic and small claims matters at the Kearny Mesa Branch Courthouse from September 9, 2013 to November 2013. (RT 1177, 1183-1184) He heard a case entitled *Liu v. Wood*, a small claims personal injury action, on October 3, 2013. (Exhibit 130) Dominic Figuera, a representative of the defendant's insurance company, was present during the proceeding. (Exhibit 130, CJP 3326) Judge Kreep repeatedly referred to Mr. Figuera as "Mr. Insurance Man" during the proceeding. (Exhibit 130, CJP 3325-3327, 3329, 3333, 3340)

Judge Kreep testified that the term "Mr. Insurance Man" was not intended to be demeaning or embarrassing. (RT 1179) He says he did not remember Mr. Figuera stating his name on the record and Mr. Figuera was not a party or witness. (RT 1179) According to Judge Kreep, no one objected to his use of "Mr. Insurance Man" and he was simply trying to get through the case quickly. (RT 1179-1180)

2. Conclusions of Law.

It is true, as Judge Kreep testified, that small claims court proceedings are informal. (RT 1178) (Civ. Proc. Code, § 116.510.) But repeatedly referring to the insurance company representative as "Mr. Insurance Man" rather than by his name was discourteous and did not convey proper respect for the individual appearing in Judge

Kreep's courtroom. It could also suggest a lack of impartiality. If he did not hear Mr. Figuera state his name, Judge Kreep could have asked for the name. That no one objected, or that Judge Kreep desired to get through the cases on his calendar quickly, did not justify unjudicial conduct. Judge Kreep's conduct violated the California Code of Judicial Ethics, canons 1, 2, 2A, 3B(3) and 3B(4) and constituted improper action. (*Inquiry Concerning Willoughby*, *supra*, 48 Cal.4th CJP Supp. at pp. 151, 155; *Public Admonishment of Judge John B. Gibson*, *supra*, at p. 2; *Inquiry Concerning Judge Deann M. Salcido*, *supra*, pp. 11, 13, 15.)

Summary of Conclusions Regarding Count Two.

Count Two A: prejudicial misconduct -- improper remarks referencing an attorney's perceived ethnicity or national origin. Count Two B: prejudicial misconduct -- use of nicknames. Count Two C and D: prejudicial misconduct -- commenting on the physical attractiveness of attorneys. Count Two E: prejudicial misconduct -- remarks referencing an attorney's pregnancy. Count Two F: prejudicial misconduct -- improper connection between an attorney and prostitution. Count Two G: prejudicial misconduct -- sharing a personal anecdote containing intimate facts. Count Two H: prejudicial misconduct -- inappropriate comments during the taking of a plea. Count Two I: prejudicial misconduct -- improper remark to an intern during an arraignment. Count Two J: improper action -- singling out an attorney based on her perceived ethnicity or national origin. Count Two K: prejudicial misconduct -- inappropriate comments during sentencing. Count Two L: improper action -- giving defendants a misleading legal advisory. Count Two M: improper action -- using crude language during court proceedings. Count Two N: prejudicial misconduct -- speaking Spanish during court proceedings. Count Two O: improper action -- repeatedly addressing a person as "Mr. Insurance Man" during a court proceeding.

III. COUNT THREE

Investigating beyond the four corners of a TRO.

The Notice alleged that on approximately May 17, 2013, Judge Kreep asked a deputy city attorney who was in the courtroom during a civil ex parte temporary restraining order (TRO) proceeding to contact the San Diego Police Department to inquire about the existence of a surveillance video referenced by the TRO applicant. (Notice of Formal Proceedings p. 10) The Notice alleged the charged conduct violated canons 1, 2, 2A, 3B(7) and 3C(2) of the California Code of Judicial Ethics. (Notice of Formal Proceedings p. 10.) The Examiner argued this was prejudicial misconduct. (Examiner's prehearing brief p. 79)

1. Findings of Fact.

Civil TRO applications were heard by Judge Kreep in Department 3. (RT 779-780) The City Attorney's Office was not a party in those proceedings and instructed its deputy city attorneys not to get involved in civil TRO application proceedings. (RT 779, 781-782)

We credit Judge Kreep's testimony in finding the following facts: In one case, Judge Kreep issued a requested TRO because the applicant made a prima facie case in her application. (RT 1139) The TRO applicant reported in court that a police officer told her there was a video of the subject occurrence. (RT 1139) With the applicant present, Judge Kreep asked a deputy city attorney how the applicant could get a copy of the police video. (RT 1139-1140)

Deputy City Attorney Caroline Song testified about a May 17, 2013 e-mail in which she reported that Judge Kreep asked her to call a police officer to enquire about a surveillance video and she informed Judge Kreep she had been instructed not to get involved in any case which the City Attorney's Office was not handling. (Exhibit 190; RT 785-786) Ms. Song's e-mail and testimony does not contradict Judge Kreep's

testimony that, in the presence of the TRO applicant, he asked a deputy city attorney a question about a police video after he had granted the requested TRO. (RT 1139-1140) The evidence indicates Judge Kreep did not make his request outside the presence of the parties and he did not make the request to help him decide the case. The applicant desired to obtain the video and Judge Kreep inquired how she might do that.

2. Conclusions of Law.

The Examiner failed to prove that on or about May 17, 2013, Judge Kreep communicated with a nonparty concerning a pending proceeding outside the presence of the parties or attempted to obtain information outside of the record in order to help him decide a TRO application. (Examiner's prehearing brief p. 79)

There was evidence presented that in another case, Judge Kreep called the YWCA to get more information in order to help him decide a TRO application. (RT 1137-1138) But that conduct was not charged in the Notice. The Examiner conceded during closing argument that the YWCA incident is not the basis for this count. (RT 1635) We may not find misconduct if it is not charged in the Notice. (*Doan, supra*, 11 Cal.4th at p. 313, fn. 11.) The Notice must specify the charges against the judge and the alleged facts upon which such charges are based. (Rules of Com. on Jud. Performance, rule 118(b).) Although amendment of the Notice is permitted to conform to proof or to set forth additional facts (Rules of Com. on Jud. Performance, rule 128(a)), no amendment was requested in this case and Judge Kreep has not been given an opportunity to answer and defend against such an amendment. (Examiner's post-hearing brief p. 1, fn. 1 [conceding that the special masters do not have authority to conform to proof in this case]; Judge's post-hearing brief, p. 3.)

IV. COUNT FOUR

Response to blanket challenge.

The Notice charged Judge Kreep with violating canons 1, 2, 2A and 3B(7) of the

California Code of Judicial Ethics based on his response to a “blanket” challenge from the City Attorney’s Office. The Notice alleged Judge Kreep warned deputy public defenders and public defender interns to “watch out” because if the City Attorney’s Office was “coming for” Judge Kreep, they were also likely coming for Deputy Public Defender Katherine Tesch. (Notice of Formal Proceedings pp. 10-11) The Notice also alleged Judge Kreep engaged in improper ex parte communications about pending cases with deputy public defenders and public defender interns. (Notice of Formal Proceedings pp. 10-11) The Examiner argued Judge Kreep’s conduct was, at a minimum, prejudicial misconduct. (Examiner’s prehearing brief p. 81)

1. Findings of Fact.

On September 4 or 5, 2013, Supervising Deputy City Attorneys Marlea Dell’Anno and Mark Skeels informed Supervising Judge Walsh that, among other things, Judge Kreep had “called out” deputy city attorneys who complained about him, and Judge Kreep’s recent diversion case decisions appeared to be retaliatory. (RT 216-221, 271-275; Exhibit 174; Exhibit 172; Exhibit 174) On September 5, 2013, the City Attorney informed Presiding Judge Trentacosta that his office would file “blanket” challenges against Judge Kreep, i.e., Code of Civil Procedure section 170.6 challenges against Judge Kreep in each new Department 3 case. (RT 477-478)

Upon learning that the City Attorney’s Office planned to file blanket challenges against Judge Kreep, Judge Walsh informed Judge Kreep on September 9, 2013, that he was being reassigned to traffic court at the Kearny Mesa branch courthouse. (RT 223, 268-269, 413-414, 984-985) Judge Walsh instructed Judge Kreep to report immediately to Commissioner Blair at the Kearney Mesa courthouse. (RT 223)

Instead of proceeding immediately to the Kearny Mesa courthouse, Judge Kreep went to Department 1, a courtroom where he was not assigned, when he saw no attorneys in his courtroom. (RT 574-575, 577, 642-643, 661, 986-987; Exhibit 166,

CJP 1910) Although Department 1 was not in session at the time, it was fairly busy. (RT 583, 650-651) Deputy city attorneys Eric Pooch and Taylor Garrot were in Department 1 discussing the morning calendar; deputy public defenders and public defender interns were also present in the courtroom. (RT 546-551, 586-587, 641-645, 661, 663-664; Exhibit 166, CJP 1910) Judge Kreep approached the deputy public defenders and public defender interns and spoke with them; he did not speak with the deputy city attorneys. (RT 551, 556, 586-587, 644-645, 663-664)

Judge Kreep told the deputy public defenders and public defender interns the City Attorney's Office had filed a blanket challenge against him. (RT 552-553, 1299-1300; see also Exhibit 167, CJP 1912) He said the challenge was because of a case in which he granted a request made by Deputy Public Defender Tesch to set a motion to enforce a plea agreement which the City Attorney's Office refused to honor. (RT 552-553, 821, 1299-1300; see also Exhibit 167, CJP 1912) The motion referenced by Judge Kreep was pending in another courtroom when Judge Kreep made the statement. (RT 1303-1304) Judge Kreep also talked about how he would handle cases on his calendar for that afternoon. (RT 647-648, 670-671) He mentioned specific cases during his conversation with the deputy public defenders and public defender interns. (RT 670)

Judge Kreep asked the deputy public defenders and interns to tell Ms. Tesch something like the following: "If they're coming for me, they are likely coming for you." (RT 553, 594-595, 646, 672, 989, 1300) Judge Kreep then added something like, "You know why I'm not talking to them," gesturing toward Deputy City Attorneys Pooch and Garrot as he left Department 1. (RT 646-647) Mr. Pooch and Mr. Garrot found Judge Kreep's statements inappropriate. (RT 652-653) Mr. Garrot reported what he witnessed to his supervisors. (RT 653)

According to Judge Kreep, he said "they are likely coming for you" because it had become increasingly tense between Deputy City Attorney Caroline Song and

Deputy Public Defender Katherine Tesch and he was concerned Ms. Song would attack Ms. Tesch's reputation. (RT 990, 1301, 1303, 1314-1315) Judge Kreep said he simply went to Department 1 as a courtesy to tell the deputy public defenders another judge would hear their cases because he did not see any attorneys in Department 3 and he could not remember if any of his staff were present in Department 3 at the time. (RT 987, 1298) He said he could not have discussed any of the cases on the Department 3 calendar for that day because at that point he did not know what would be on the calendar. (RT 988-989)

Judge Kreep's explanation is not credible. We find that he was angry and upset when he learned of the blanket challenge against him and he specifically went to Department 1 to discuss the challenge with the deputy public defenders in order to vent his anger and in contravention of his supervising judge's instruction. We further find that Judge Kreep talked about at least one case pending in another courtroom during his discussion with the deputy public defenders and public defender interns in Department 1: the case in which he had granted the request made by Ms. Tesch to set a motion to enforce a plea agreement. (RT 552-553, 1299-1300, 1303-1304; see also Exhibit 167, CJP 1912)

2. Conclusions of Law.

A judge should know the proper method for handling a motion for disqualification. (*Spruance v. Commission on Judicial Qualifications* (1975) 13 Cal.3d 778, 797.) A litigant has the right to disqualify a judge under Code of Civil Procedure section 170.6. (*McCartney, supra*, 12 Cal.3d at p. 531.) Pursuant to that statute, a judge of a superior court shall not try an action or hear any matter that involves a contested issue of law or fact when it is established, as provided in that statute, that the judge is prejudiced against a party or attorney or the interest of a party or attorney appearing in the action or proceeding. (Code Civ. Proc., § 170.6, subd. (a)(1).) When

a Code of Civil Procedure section 170.6 challenge is filed, the disqualified judge has no jurisdiction to hold further proceedings in the matter, except to inquire into the timeliness and sufficiency of the affidavit under the statute. (*McCartney, supra*, 12 Cal.3d at pp. 531-532.) It is misconduct for a judge to display hostility toward an attorney who filed a motion to disqualify the judge. (*In re Rasmussen* (1987) 43 Cal.3d 536, 538 [judge violated canon 3 by discouraging the exercise of peremptory disqualification rights by inappropriate means including making intemperate remarks to counsel and attempting to inconvenience counsel by withholding judgments in unrelated cases]; *Spruance, supra*, 13 Cal.3d at pp. 786-787, 797; *McCartney, supra*, 12 Cal.3d at p. 529; *Inquiry Concerning Velasquez, supra*, 49 Cal.4th CJP Supp. at pp. 208-210, 212 [judge engaged in willful misconduct by demanding that attorney whom the judge knew had filed an affidavit of disqualification against the judge produce copies of the letters of complaint the attorney submitted to the presiding judge and threatening to report the attorney to the Bar if the letters were incorrect; the conduct violated Code of Civil Procedure section 170.4 and canons 1, 2A, 3B(2), and 3B(4)]; *Inquiry Concerning Hall, supra*, 49 Cal.4th CJP Supp. at pp. 165-167 [judge committed willful misconduct and violated canons 1 and 2A by asking the deputy district attorney to explain why he filed a peremptory challenge against her]; *Inquiry Concerning Harris, supra*, 49 Cal.4th CJP Supp. at p. 74 [judge engaged in improper action and violated canons 1, 2A and 3B(4) by asking an attorney who had filed a Code of Civil Procedure section 170.6 motion against him to make a record of her reasons for filing the challenge before agreeing to transfer the case to another judge and, while that attorney was still in the courtroom, asking another deputy city attorney whether he would also seek to disqualify the judge].)

We agree with the Examiner that there was no legitimate reason for Judge Kreep to speak with deputy public defenders and public defender interns about the challenge.

(Examiner's prehearing brief p. 81) We also agree with the Examiner that Judge Kreep's conduct constituted embroilment. (Examiner's prehearing brief p. 81) Judge Kreep was angry about the challenge by the City Attorney's Office. He went looking for deputy public defenders because he wanted to talk with them about the challenge. He also spoke with the deputy public defenders and interns about the motion to set aside a plea agreement, a matter that was still pending in another courtroom in the superior court. Judge Kreep acted in bad faith and for a purpose other than the faithful discharge of his judicial duties. (*Geiler, supra*, 10 Cal.3d at p. 286 [judge acts in bad faith when he indulges in personal hostility].)

In general, it is improper for a judge to initiate, permit, or consider an ex parte communication, that is, any communication to or from the judge outside the presence of the parties concerning a pending proceeding. (Cal. Code Jud. Ethics, canon 3B(7); *Haluck v. Ricoh Electronics, Inc.* (2007) 151 Cal.App.4th 994, 1002 (*Haluck*); *Nguyen v. Superior Court* (2007) 150 Cal.App.4th 1006, 1013, fn. 2 (*Nguyen*).) Judge Kreep engaged in improper ex parte communications about at least one pending case with the deputy public defenders who were in Department 1. (RT 647-648, 670-671)

Judge Kreep's conduct on September 9, 2013, violated canons 1, 2, 2A and 3B(7) of the California Code of Judicial Ethics and constituted willful misconduct.

V. COUNT FIVE

Comment at Halloween costume contest.

The Notice charged Judge Kreep violated the California Code of Judicial Ethics, canons 1, 2, 2A and 4A by telling an African-American superior court employee who had participated in a Halloween costume contest that she should not say she "didn't win due to racism" or words to that effect. (Notice of Formal Proceedings p. 11) The Examiner argued Judge Kreep committed prejudicial misconduct. (Examiner's prehearing brief p. 83)

1. Findings of Fact.

Maurisa Young worked in the small claims division of the San Diego County Superior Court in 2013. (RT 506-507) She participated in a Halloween costume contest for court employees in October 2013. (RT 508-509) Judge Kreep was one of the contest judges. (RT 508) Ms. Young won third place in one of the contest categories. (RT 510; Exhibit 131, CJP 1802)

Ms. Young was talking with coworker Maria Fujita about the contest when Judge Kreep joined their conversation and gave his opinion about some of the costumes. (RT 510-513) Ms. Young asked Judge Kreep why third place winners did not get prizes. (RT 513) Judge Kreep responded that he did not have control over the prizes. (RT 514) He said the contest was conducted fairly and he did not want anyone to say “I didn’t win due to race.” (RT 514) Ms. Young is African American. According to Ms. Fujita’s recollection, Judge Kreep used the word “black” or “colored” and said something about racism. (RT 529-530, 534) Judge Kreep’s statement shocked and offended Ms. Young. (RT 515, 529-530) She later complained to her supervisor about Judge Kreep’s comment. (RT 515-516)

Judge Kreep denies making any comment about race. (RT 1203-1204)

We find Ms. Young’s testimony to be credible and find no evidence or indication of a motive or incentive for her to present a false account. We credit her version of the incident.

2. Conclusions of Law.

“A judge shall conduct all of the judge’s extrajudicial activities so that they do not [¶] (1) cast reasonable doubt on the judge’s capacity to act impartially; [¶] (2) demean the judicial office; [¶] (3) interfere with the proper performance of judicial duties; or [¶] (4) lead to frequent disqualification of the judge.” (Cal. Code Jud. Ethics, canon 4A.) “Expressions of bias or prejudice by a judge, even outside the judge’s

judicial activities, may cast reasonable doubt on the judge's capacity to act impartially as a judge. Expressions that may do so include inappropriate use of humor or the use of demeaning remarks.” (Cal. Code Jud. Ethics, canon 4A, Advisory Com. commentary.)

Judge Kleep told Ms. Young, an African-American superior court employee, that he did not want anyone saying “I didn’t win due to race.” (RT 514) By doing so, he injected race for the first time into the conversation and suggested unfairly that she might question the results based on her race. His comment shocked and offended Ms. Young. It was insensitive and demeaning and could reasonably have been perceived as racial or ethnic bias. His conduct violated canons 1, 2, 2A and 4A of the California Code of Judicial Ethics and constituted prejudicial misconduct. (See also *Public Reproval of Judge Richard A. Haugner*, *supra*, at pp. 1-2.)

VI. COUNT SIX

Giving the appearance of prejudging a case.

The Notice charged that Judge Kleep violated the California Code of Judicial Ethics, canons 1, 2, 2A, 3B(5), 3B(7) and 3B(8) by giving the appearance of prejudging the case entitled *Vismara v. Coplin*. (Notice of Formal Proceedings pp. 12-13) The Examiner argued Judge Kleep committed prejudicial misconduct. (Examiner’s prehearing brief p. 90)

1. Findings of Fact.

Vismara v. Coplin, an unlawful detainer action, was before Judge Kleep for trial on September 26, 2014. (Exhibit 133, CJP 2993, 3009; Exhibit 136; RT 1187-1188) Richard Hein, a representative of the plaintiff, was present at the trial with plaintiff’s counsel Richard C. Alter. (Exhibit 133, CJP 2993-2994, 3000; Exhibit 134, CJP 1618) Defendants Ken Coplin, Alex Iatridis and Ed Kinney were also present. (Exhibit 133-134, CJP 1618, 2987, 2991) The courtroom clerk administered the oath to the witnesses. (Exhibit 133, CJP 2987, 2990-2991)

After someone explained that defendants were no longer in possession of the premises, Judge Kreep asked the parties questions to determine who had personal property on the premises and what it was. (Exhibit 133, CJP 2993-3000) Judge Kreep said he was “just trying to figure . . . what’s going on before we get too far into this case.” (Exhibit 133, CJP 2999) He said, “We haven’t gotten into testimony yet. I’m just trying to get a feel for this.” (Exhibit 133, CJP 3001) Nevertheless, Judge Kreep received and reviewed documents with the permission of the parties and questioned the parties about the lease and lease payments. (Exhibit 133, CJP 2999, 3001, 3003-3008) The plaintiff dismissed Mr. Kinney as a defendant without prejudice because Mr. Kinney represented he had no personal property on the premises. (RT 1188; Exhibit 133, CJP 2995)

Plaintiff’s counsel clarified that the only issue for trial was possession of the premises because defendants’ bankruptcy actions precluded a claim for damages against them. (Exhibit 133, CJP 3009; RT 1518-1522) Judge Kreep responded, “I was trying to figure out what’s going on, so. You understand that gentlemen? They’re not seeking any money from you [¶] . . . [¶] They just want the property back.” (Exhibit 133, CJP 3009) During the proceeding, Mr. Coplin and Mr. Iatridis did not challenge plaintiff’s right to possession of the premises. (Exhibit 133, CJP 3009-3022)

Judge Kreep acknowledges he did not know whether there was anything left for him to try and he was not sure he had authority to do anything. (RT 1190-1192) However, he urged the parties to reach a compromise about how much time defendants would have to remove their personal property from the premises. (RT 1191; Exhibit 133, CJP 3010-3017) Plaintiff’s counsel welcomed Judge Kreep’s help. (RT 1523) When one of the defendants asked for 60 days to remove his belongings, Judge Kreep said “that’s not gonna cut it.” (Exhibit 133, CJP 3010, 3012) It appears the plaintiff expressed willingness to give Mr. Coplin and Mr. Iatridis 30 days to remove their

possessions. (Exhibit 133, CJP 3013)

Judge Kreep then said, “I’m trying to resolve this in a way that every -- is to the extent possible a win-win.” (Exhibit 133, CJP 3014) “What is before me is possession of these premises and I’m trying to work out something here so that you can get your stuff out.” (Exhibit 133, CJP 3015) Judge Kreep asked Mr. Coplin to talk with the plaintiff to “work out” a timeframe to remove his property from the premises. (Exhibit 133, CJP 3016; Exhibit 134, CJP 1618) Judge Kreep said, “If you’re not willing to do that then I will -- then we’ll go through the trial and I’ll make a formal finding and, depending on the evidence, I’m not saying I’m going to rule against you -- uh -- but I, you know, just what I know of this case, there’s -- there’s somewhat of a prima facie case made unless you start paying rent and they agree to accept the rent now.” (Exhibit 133, CJP 3016) Judge Kreep added, “Try to talk civilly and calmly about a timeframe and see if you can come up with something. And if you guys agree on a timeframe, I’ll make that the order of the court so it’s enforceable. And if you can’t then we’ll finish it -- then we’ll go through the formalities and I’ll issue an order. But let me tell you, if they don’t agree to something more than the standard time, you’re going to get the standard time which means about two and a half to thr -- about two and a half weeks before you’re locked out because that’s what it’s taken; about eight to 12 days for the Marshal to get out there and post it. And once they post it, it’s five days after that and then you’re out. And then you got to go to court to get your stuff back if you don’t have it all out. So, court will be in recess.” (Exhibit 133, CJP 3017) Plaintiff agreed to give defendants 30 days to remove their belongings after the parties conferred. (Exhibit 133, CJP 3019) Judge Kreep entered an order awarding possession of the premises to plaintiff, with the lockout stayed until October 31, 2014. (Exhibit 136, CJP 1510)

Mr. Alter, who practiced landlord tenant law and had appeared before Judge Kreep about 300 times, testified that what occurred in *Vismara* was “pretty run-of-the-

mill.” (RT 1514-1515, 1524)

2. Conclusions of Law.

The Examiner argues that Judge Kreep did not give defendants an opportunity to present evidence and neither side was given an opportunity to cross-examine witnesses or present argument. (Examiner’s prehearing brief p. 88; RT 1638-1641) But the only issue for trial was possession of the premises and that issue had already been resolved. (Exhibit 133, CJP 1518-1522, 2993, 3009) (*Union Oil Co. v. Chandler* (1970) 4 Cal.App.3d 716, 721 [in general, the sole issue before the court in an unlawful detainer proceeding is the right to possession of real property], disapproved on another point in *Green v. Superior Court* (1974) 10 Cal.3d 616, 633, fn. 19.) Instead, Judge Kreep sought to help the parties negotiate the removal of defendants’ personal property.

Judge Kreep should not have said that he would proceed with trial if defendants were unwilling to work something out with plaintiff. There was no issue left for trial. (Exhibit 133, CJP 3016; RT 1191-1192) Also, he should not have said “we’ll go through the formalities and I’ll issue an order” if the parties could not agree. (Exhibit 133, CJP 3017) Such a comment can suggest prejudgment of the case. But considering the entirety of the September 26, 2014 proceeding along with Mr. Alter’s testimony, we conclude Judge Kreep’s approach at the hearing was welcomed and appreciated by the parties and resolved their remaining issues. Although Judge Kreep should have been more cautious with some of his statements, his conduct was not coercive and did not constitute prejudgment of the case. (Notice of Formal Proceedings p. 12; Examiner’s prehearing brief pp. 85, 88-90)

“[W]hen a litigant is self-represented, a judge has the discretion to take reasonable steps, appropriate under the circumstances and consistent with the law and the canons, to enable the litigant to be heard.” (Cal. Code Jud. Ethics, canon 3B(8), Advisory Com. commentary.) Here, Judge Kreep elicited information from defendants

Coplin and Iatridis (who were not represented by counsel) as well as from plaintiff's representative. (See, e.g., Exhibit 133, CJP 2994, 2996-2998, 3005) The Examiner failed to prove by clear and convincing evidence that Judge Kreep acted with bias or prejudice, that his conduct would reasonably be perceived as bias or prejudice, or that he denied a litigant an opportunity to have his case fairly adjudicated. (Notice of Formal Proceedings p. 12 [citing canons 3B(5), 3B(7), and 3B(8)])

VII. COUNT SEVEN

Comment about the Filipino teacher.

The Notice charged Judge Kreep with violating the California Code of Judicial Ethics, canons 1, 2, 2A, 3B(3), 3B(4) and 3B(5) by saying during a court proceeding, "And I had a Filipino teacher who always used to ask for a shit of paper." (Notice of Formal Proceedings p. 12) The Examiner argued the conduct was prejudicial misconduct. (Examiner's prehearing brief p. 92)

1. Findings of Fact.

On January 30, 2013, Judge Trentacosta counseled Judge Kreep not to make comments that singled out a person based on his or her accent because such a comment could make the person uncomfortable. (RT 388) On August 2, 2013, in the context of discussing complaints by the City Attorney's Office, Judge Walsh instructed Judge Kreep to filter what he said and "keep his radar up," i.e., be aware of where he was, who was in the room, what he said, and how it might offend people. (RT 204, 207) Judge Danielsen instructed Judge Kreep to reflect on his conduct, share less with others, and be more judicial. (RT 205)

The case *Pinewood Park, LP v. Anderson* was before Judge Kreep for an unlawful detainer trial on October 27, 2014. (Exhibit 138, CJP 3342, 3347-3348) Mary Plandor was present as the representative of the plaintiff, the owner of the subject property, along with plaintiff's counsel. (Exhibit 138, CJP 3342-3343, 3353)

Defendant Paula Anderson was also present at the trial. (Exhibit 138, CJP 3342) Ms. Anderson rented the subject property from the owner (Exhibit 138, CJP 3343) and she was describing the circumstances ever since the owner had “filed” on her when the following colloquy ensued:

“THE COURT: Ever since she what on you?

“ANDERSON: Ever since she, um, gave me --

“THE COURT: Filed on you?

“ANDERSON: Yes, filed.

“THE COURT: I thought you said fouled on me. I’m sorry, filed on me.

“ANDERSON: Oh, sorry. We talk with, I got Texas, my parents are from Texas.

“THE COURT: Don’t worry about it.

“ANDERSON: We might say y’all or something like that.

“THE COURT: Doesn’t bother me a bit. I just misunderstood what you said.

“LANDLORD’S ATTY: My husband asks for a pin all the time, but it’s a pen.

“THE COURT: That’s okay I, I talk about doing the warsh [*sic*], so. Anyway, people look at me like, are you crazy? Anyway. And I had a Filipino teacher who always used to ask for a shit of paper.”

(Exhibit 138, CJP 3354)

Judge Kreep testified he made the “shit of paper” remark because Ms. Anderson joked about her accent and the plaintiff’s attorney made a joke about her husband’s accent. (RT 1192) He says his remark was “made in an attempt to bring some levity and relaxation into the proceeding.” (Answer p. 33; Judge’s prehearing brief p. 27) Nevertheless, Judge Kreep admits he should not have made the statement and he apologizes for his comment. (RT 1192)

2. Conclusions of Law.

Judge Krep had been previously counseled about commenting on accents and he was advised to filter what he said, share less with others and be more judicial. (RT 388, 204-205, 207) He should have known not to make a comment about a Filipino teacher's accent and not to use the word "shit" in the courtroom, even if it referred to a sheet of paper. (*McCartney, supra*, 12 Cal.3d at p. 535; *Inquiry Concerning Judge Deann M. Salcido, supra*, at p. 20.)

Judge Krep's conduct violated canons 1, 2, 2A, 3B(3), 3B(4) and 3B(5) of the California Code of Judicial Ethics. But given the context of the comment, in which other individuals initiated a discussion about accents, we conclude Judge Krep's comment in this instance constituted improper action and not prejudicial misconduct.

VIII. COUNT EIGHT

Soliciting legal opinions from counsel not on the case.

The Notice charged Judge Krep with violating the California Code of Judicial Ethics, canons 1, 2, 2A and 2(B)(1) by soliciting the legal opinion of attorneys who did not represent a party in the case before him. (Notice of Formal Proceedings p. 13) The Examiner argued Judge Krep committed prejudicial misconduct. (Examiner's prehearing brief p. 95)

1. Findings of Fact.

In *Gelb Revocable 2010 Trust v. Chapman*, Judge Krep held a hearing on October 2, 2014, regarding defendant Carlton Noble's ex parte application for an order staying a lockout and for an order shortening the time to hear a motion to set aside a default judgment. (Exhibits 139-141, 142, CJP 1635) The plaintiff and Mr. Noble were represented by counsel at the hearing. (Exhibit 140, CJP 3371) During argument about whether Mr. Noble received proper service of the summons and complaint, Judge Krep turned to attorney Patricia Coyne, who was sitting in the courtroom but did not

represent the plaintiff or Mr. Noble, and asked her, “Does the 30-day notice require the abandonment of property wording?” (Exhibit 140, CJP 3371, 3373; Exhibits 141-143) Ms. Coyne responded in the affirmative and Judge Krep told plaintiff’s counsel, “You might want to try to settle this matter.” (Exhibit 140, CJP 3371, 3373) Ms. Coyne had appeared before Judge Krep numerous times and testified it was not odd for Judge Krep to ask her a question about a case she was not handling; similar occurrences had happened in the more than 26 years she had been representing landlords. (RT 1492-1493, 1496)

In another case, during a hearing on a demurrer, Judge Krep asked attorney Mark Feinberg, who was in Judge Krep’s courtroom to oppose a demurrer in a different case, whether an order overruling a demurrer should state that the defendant had five days to “respond” or five days to “answer.” (RT 339-340) Mr. Feinberg opined that the order should give the defendant five days to answer. (RT 340) Judge Krep adopted Mr. Feinberg’s suggestion. (RT 340-342) Later, in Mr. Feinberg’s case, Judge Krep overruled a demurrer and gave the defendant five days to answer. (RT 340-342) Like Ms. Coyne, Mr. Feinberg had been practicing for decades and appeared before Judge Krep many times. (RT 332-334, 337, 342-344) There had been another instance in which Judge Krep asked Mr. Feinberg for his legal opinion in a case Mr. Feinberg was not handling. (RT 332-334, 337, 342-344) And on one or two other occasions, Mr. Feinberg saw Judge Krep ask attorneys for their legal opinion in cases they were not handling. (RT 342-343) Mr. Feinberg testified he had occasionally seen other judges make similar inquiries of lawyers in their courtrooms even when the lawyer did not represent a party in the case. (RT 348-349) Mr. Feinberg said such inquiries were usually made by a judge who was new to the unlawful detainer department or was a visiting judge. (RT 349)

Judge Krep likewise testified he had seen other judges ask attorneys for their

legal opinions regarding cases they were not handling. (RT 1210) Judge Kreep said he only did that in unlawful detainer cases and only in his first year in the unlawful detainer department. (RT 1210-1211) According to Judge Kreep, he discontinued the practice after he was counseled about it in January or February 2015. (Answer p. 33; Judge's prehearing brief p. 28)

2. Conclusions of Law.

According to the witnesses in this case, Judge Kreep's conduct was not unusual in unlawful detainer courts. But the fact that it may be a common practice does not necessarily excuse inappropriate conduct. Consider this: in the *Gelb Revocable 2010 Trust* case, the parties were represented by counsel. And yet Judge Kreep turned to an attorney sitting in the courtroom who was not involved in the case and solicited advice on how he should handle the matter. The attorneys who were actually involved in the case might rightly be concerned about such a turn of events.

Moreover, the other individuals who would be appearing in the cases for which Ms. Coyne and Mr. Feinberg were actually retained might also be concerned. They could see that Judge Kreep thought so highly of Ms. Coyne's and Mr. Feinberg's advice that he called on them in cases they were not handling.

Judge Kreep's conduct could raise questions in the mind of an objective observer about whether he was impartial and whether the attorneys he singled out (both of whom represented landlords) were in a special position to influence him. His conduct violated canons 1, 2, 2A and 2B(1) of the California Code of Judicial Ethics [a judge shall not convey or permit others to convey the impression that any individual is in a special position to influence the judge] and constituted prejudicial misconduct. (*McCartney*, *supra*, 12 Cal.3d at pp. 529, 532-533.)

IX. COUNT NINE

Offering option not to decide case.

The Notice charged Judge Krep with violating canons 1, 2, 2A, 3B(5) and 3B(8) of the California Code of Judicial Ethics by giving the plaintiff in *Sleea v. Brown* the choice of either (1) dismissing his small claims case and filing it as a limited or unlimited civil case, or (2) having Judge Krep decide the case based on evidence which Judge Krep told the plaintiff was insufficient to support his claim for \$10,000 in damages. (Notice of Formal Proceedings p. 14) The Examiner argued Judge Krep's conduct constituted prejudicial misconduct. (Examiner's prehearing brief p. 102)

1. Findings of Fact.

Sleea v. Brown, a small claims action, was before Judge Krep on January 8, 2015. (Exhibit 145, 146 (CJP 1775), 147; RT 1288-1289) Plaintiff Juhar Sleea sought \$10,000 in damages for "stolen property, occasional hotel fees, food charges, clothing expenses, [and] hospital expenses." (Exhibit 145, CJP 3374; Exhibit 146, CJP 1777) Mr. Sleea was present when the case was called but the defendant did not appear. (Exhibit 145, CJP 3374)

Judge Krep questioned Mr. Sleea about his claim for damages. (Exhibit 145) Mr. Sleea said he rented a room from defendant but eventually defendant filed a restraining order against him and kept Mr. Sleea's belongings. (Exhibit 145, CJP 3374-3378) Mr. Sleea said he incurred hotel, food, and medical expenses as a result of the defendant's conduct. (Exhibit 145, CJP 3376, 3379, 3383-3385)

Mr. Sleea presented Judge Krep with receipts to support a portion of his damages claim. (Exhibit 145, CJP 3375-3376, 3379, 3383) In addition, he said defendant kept Mr. Sleea's bedroom furniture, tricycle, small refrigerator, cash, passport, and jewelry. (Exhibit 145, CJP 3375-3376, 3378-3379)

When Judge Krep said Mr. Sleea had to present evidence of the cash and the

value of the stolen jewelry, Mr. Slea responded that he wrote down the value of the cash and jewelry. (Exhibit 145, CJP 3380) Judge Krep replied, “Just writing it down is meaningless. I could say you stole \$10,000 from me. You have to give me some evidence, sir.” (Exhibit 145, CJP 3380) Mr. Slea asked how he would give evidence of cash. (Exhibit 145, CJP 3380) He pointed to a police report indicating he told the police the defendant took \$10,000 in cash and \$5,000 in jewelry from him. (Exhibit 145, CJP 3380) Mr. Slea explained he worked as a cab driver and he hid his cash in the room he rented from the defendant because he was divorcing his wife and did not want to put money in the bank. (Exhibit 145, CJP 3380-3381) Judge Krep did not swear Mr. Slea in. (Exhibit 145)

Judge Krep pressed Mr. Slea for some evidence that he had \$10,000 in cash in his room and for receipts for the allegedly stolen jewelry. (Exhibit 145, CJP 3380-3381) Mr. Slea said he got the jewelry “from the Holy Land” and the receipt “was in Arabic and it was [a] long time [ago.]” (Exhibit 145, CJP 3381) Judge Krep responded, “I can only give you damages for what you can prove to me. And without some appraisal or estimate or receipt for the jewelry, you have no idea what it’s worth, sir. I have no idea what it’s worth, sir. I can’t give you damages based on speculative values. That’s the law.” (Exhibit 145, CJP 3381)

Mr. Slea said he knew the jewelry was worth \$5,000 because he showed a photograph of the jewelry to a “jewelry owner” who told him so. (Exhibit 145, CJP 3381) But Judge Krep refused to accept Mr. Slea’s statement about the value of the jewelry, inquiring instead whether Mr. Slea had a witness or a statement from a jeweler. (Exhibit 145, CJP 3381-3382) Judge Krep said Mr. Slea’s representation that someone told him the jewelry was worth \$5,000 was not admissible evidence. (Exhibit 145, CJP 3382; Exhibit 149, CJP 3386, 3402) Judge Krep added that if defendant had “taken all this stuff” from Mr. Slea, Mr. Slea should have brought an

unlimited civil action and not sued in small claims court. (Exhibit 145, CJP 3382) Mr. Slea explained that even though his damages exceeded \$10,000 he filed a small claims action because he did not have the money to file an unlimited civil action.⁵ (Exhibit 145, CJP 3382)

Judge Kleep told Mr. Slea: “Here’s your options, sir, you can dismiss this case, uh, and file it in limited civil or unlimited civil. Or I can rule on the evidence you’ve given me. That’s your choices. Which right now is looking -- from what you’ve -- all I’ve seen here in damages is two or three thousand dollars. It’s what I’ve got [unintelligible], sir. If you have, if you have more receipts or something there, show them to me.” (Exhibit 145, CJP 3383) Judge Kleep later repeated, “Sir, here’s your options, okay, you can either dismiss this case and file it in limited civil or unlimited civil. There are attorneys who may take it on a contingency basis. I don’t know. If you have no income, you may be able to get a fee waiver. In fact, you got a fee waiver for this case. If you can get a fee waiver for this case, you can get a fee waiver for limited civil or unlimited civil.” (Exhibit 145, CJP 3383-3384)

When Mr. Slea said he had no money to pay an attorney, Judge Kleep responded, “Sir, third time, here are your options, you dismiss this case and take it into limited civil or unlimited, or I rule on the evidence that you have given me so far, plus whatever other damage evidence. But doctors’ bills, just because you could not pay them, unless this man physically attacked you and the doctors’ bills are as a result, the doctors’ bills are not relevant to this proceeding. So, what’s your choice? You want me to rule on what you’ve given me? Or do you want to dismiss this and try to get more money in another court?” (Exhibit 145, CJP 3384) Mr. Slea elected to dismiss his action but protested, “I don’t think this is fair, Your Honor.” (Exhibit 145, CJP

⁵ Except in circumstances not shown to be applicable here, the jurisdictional limit for a small claims action brought by a natural person is ten thousand dollars (\$10,000). (Code Civ. Proc., § 116.221.)

3384) Judge Krep dismissed the action without prejudice. (Exhibit 145, CJP 3385)

Judge Krep testified he did not give Mr. Slea the opportunity to provide sworn testimony because Mr. Slea was talking about the value of jewelry and, in addition, Judge Krep had no idea how to value a stolen passport. (RT 1194) Judge Krep maintains that Mr. Slea's statement that he bought jewelry in another country for a certain price was not "concrete evidence" because Mr. Slea had no receipts to prove what he paid. (RT 1194-1195) Judge Krep believed he had authority to dismiss Mr. Slea's case without prejudice. (RT 1195, 1289-1290) According to Judge Krep, it was not inappropriate to give plaintiff the option of dismissing the case without prejudice or accepting a ruling. (RT 1195)

2. Conclusions of Law.

We do not base our findings and conclusions on any legal error Judge Krep may have made. But here the problem goes beyond any legal error. Judge Krep made it clear to plaintiff that he did not accept plaintiff's representations regarding damages, even though Judge Krep did not give plaintiff the opportunity to testify under oath and would not accept hearsay evidence in a small claims case in which defendant had not appeared. The matter was essentially a prove-up hearing but Judge Krep was dismissive of plaintiff's assertions and indicated he would not accept plaintiff's unopposed proof. Under the circumstances, the "choice" Judge Krep offered the indigent plaintiff was not much of a choice at all.

Mr. Slea was still required to prove his case to recover damages even though the defendant failed to appear for trial. (Civ. Proc. Code, § 116.520, subd. (b).) However, "[t]he hearing and disposition of . . . [a] small claims action shall be informal, the object being to dispense justice promptly, fairly, and inexpensively." (Civ. Proc. Code, § 116.510.) The parties have the right to offer evidence by witnesses at the hearing or at another time with the permission of the court. (Civ. Proc. Code, § 116.520, subd.

(a.) “While there are obviously some limits beyond which the court should not go, the statutes are clearly designed to afford both the parties and the court considerable flexibility in presenting their cases and ascertaining the truth.” (*Houghtaling v. Superior Court* (1993) 17 Cal.App.4th 1128, 1135 (*Houghtaling*).)

The rules of evidence do not apply to small claims court proceedings. (*Sanderson v. Niemann* (1941) 17 Cal.2d 563, 573.) Consequently, hearsay evidence is received in small claims proceedings, subject to the trial court’s power under Evidence Code section 352 and the law of privileges (Evid. Code § 930 et seq.). (*Houghtaling, supra*, 17 Cal.App.4th at pp. 1138-1139.) Unless the evidence is inadmissible because of privilege or Evidence Code section 352, and no such claim is made here, the trial court should “listen patiently, even if it is mentally classifying the evidence as improbable, incredible, or preposterous.” (*Houghtaling*, at p. 1137; Cal. Judges Benchguides: Small Claims Court (rev. 2016) § 34.32, p. 34-27 [“In most instances, the judge should admit all of a party’s evidence, including hearsay evidence and evidence offered through witnesses, and thereafter determine its weight and trustworthiness.”].) In addition, the trial court may conduct independent investigation and consult witnesses informally, with or without notice to the parties. (Civ. Proc. Code, § 116.520, subd. (c).)

“The obligation of a judge to dispose of matters promptly and efficiently must not take precedence over the judge’s obligation to dispose of the matters fairly and with patience. For example, when a litigant is self-represented, a judge has the discretion to take reasonable steps, appropriate under the circumstances and consistent with the law and the canons, to enable the litigant to be heard.” (Cal. Code Jud. Ethics, canon 3B(8), Advisory Com. commentary; see generally Code Civ. Proc., § 116.530 [except in circumstances inapplicable here, the parties in a small claims action are unrepresented].)

The Examiner argued Judge Kreep accorded Mr. Slea special treatment which created the appearance of favoritism and lack of impartiality, by commenting on the insufficiency of his evidence and giving him the option to dismiss his case without prejudice and refiling in limited or unlimited jurisdiction civil court. (Examiner's prehearing brief pp. 101-102; Examiner's post-hearing brief p. 144) We disagree that Judge Kreep's conduct created the appearance of favoritism and lack of impartiality. We conclude instead that it was improper for Judge Kreep to openly disparage Mr. Slea's claim and then offer him a "choice" to dismiss so that he could file a new unlimited civil action that Mr. Slea said he had already considered and rejected because it was something he could not afford.

Judge Kreep claims his conduct was legal and appropriate under Code of Civil Procedure section 581. (Judge's post-hearing brief p. 111) But that is a legal argument beyond our purview. Our concern is with his conduct. Rather than simply listening to Mr. Slea or giving him an opportunity to present testimonial evidence, Judge Kreep argued with Mr. Slea and disparaged his lack of evidence before offering him an option to dismiss. A disinterested observer in the courtroom might think Judge Kreep was working hard to avoid making a decision. Judge Kreep may have been trying to help Mr. Slea by giving him a way out of an adverse ruling, but Mr. Slea thought it was unfair, and we agree.

Judge Kreep's conduct violated canons 2A and 3B(8) of the California Code of Judicial Ethics [a judge shall manage the courtroom in a manner that provides all litigants the opportunity to have their matters fairly adjudicated in accordance with the law] and constituted improper action. The Examiner has not shown that Judge Kreep acted with bias or prejudice or that his conduct would reasonably be perceived as bias or prejudice. (Notice of Formal Proceedings p. 13 [alleging violation of canon 3B(5)])

X. COUNT TEN

Comments about personal background and experience.

The Notice charged Judge Kreep with violating canons 1, 2, 2A, 3B(3), 3B(4) and 3B(5) of the California Code of Judicial Ethics by repeatedly interjecting views based on his personal experience during a small claims hearing in *Clenendin v. Pacific West Home Mortgage, LLC*. (Notice of Formal Proceedings pp. 14-15) The Examiner argued Judge Kreep committed prejudicial misconduct. (Examiner's prehearing brief p. 107)

1. Findings of Fact.

Judge Kreep heard *Clendenin v. Pacific West Home Mortgage, LLC*, a small claims action, on February 11, 2015. (Exhibits 148-150 (CJP 1459) Plaintiff William Clendenin was present at the hearing. (Exhibit 149, CJP 3386-3387) Stephen Niednagel appeared as the representative for defendant Pacific West Home Mortgage, LLC (Pacific West). (Exhibit 149, CJP 3386) Mr. Clendenin and Mr. Niednagel were sworn and answered Judge Kreep's questions about the matter. (Exhibit 149, CJP 3386)

Pacific West bought the subject property, rehabilitated it, and sold it to Mr. Clendenin, who lived at the property for three years before he discovered damage to the subfloors in two rooms. (Exhibit 149, CJP 3387-3388, 3393) Mr. Clendenin claimed damages for Pacific West's failure to disclose there was damage to the subfloors when it sold him the property. (Exhibit 149, CJP 3387; Exhibit 150, CJP 1468, 1470)

Mr. Niednagel denied that the subfloor was in the condition shown in the photographs presented by Mr. Clendenin when the property was sold to him. (Exhibit 149, CJP 3389-3390) Mr. Niednagel said Pacific West replaced the carpet before the property was sold and Mr. Niednagel would have known about damage to the subfloor when the carpet was replaced. (Exhibit 149, CJP 3388) As Mr. Niednagel was

explaining why he thought the subfloor could not have been in the condition shown in Mr. Clendenin's photographs, Judge Kreep interjected that he had "bought and sold houses," was a landlord, and had "commercial and residential realty." (Exhibit 149, CJP 3389-3390) Judge Kreep also offered that he had "replaced carpets" and had done a lot of construction and reconstruction to fix and sell property. (Exhibit 149, CJP 3390) He said, "So, although I don't claim to be a builder, I'm not a virgin when it comes to these types of matters." (Exhibit 149, CJP 3390) He then proceeded to question Mr. Niednagel. (Exhibit 149, CJP 3390)

Mr. Niednagel said, in response to Judge Kreep's query, that his testimony was based on what other people told him. (Exhibit 149, CJP 3391) Judge Kreep replied, "Alright. So, 'cause I've seen some pretty strange -- I was an attorney for over 37 years, sir, and I was involved in some lawsuits over houses that I don't ever even know how they got approved by code -- brand new houses that were sold that people walked in them and fell right through the floor. And they've been approved by code, okay. Just before selling, so, I mean strange things happen is the only point I'm making." (Exhibit 149, CJP 3391)

After reviewing photographs, Judge Kreep prefaced his questions to Mr. Clendenin by stating, "I'm not an expert, I'm not a developer, I'm not a contractor, but I've been involved in real estate a little bit." (Exhibit 149, CJP 3392-3393)

Later in the proceeding, Mr. Niednagel presented a statement from the Vice President of Operations for Pacific West's carpet installation contractor, stating that Mr. Clendenin's photographs did not depict the condition of the subfloor when the carpet was installed in 2011. (Exhibit 149, CJP 3400) Judge Kreep commented that the statement was double hearsay. (Exhibit 149, CJP 3400) He continued, "[L]et's put it this way, I've been in enough lawsuits as an attorney, fortunately not as a party, to know that sometimes the truth gets left out when people are trying to cover their butts."

(Exhibit 149, CJP 3400) Judge Kreep remarked that the installer was not present to testify. (Exhibit 149, CJP 3400) He ultimately awarded Mr. Clendenin \$2,500, plus costs. (Exhibit 149, CJP 3411)

Judge Kreep testified he disclosed he was a landlord so the parties could file a Code of Civil Procedure section 170.6 challenge against him if they wished. (RT 1197) He said he did not think it was inappropriate to disclose his experience in small claims matters that were before him because a judge can use his own prior life experience in adjudicating such matters. (RT 1197-1198)

2. Conclusions of Law.

Judge Kreep's statements about his prior experience go beyond disclosing that he was a commercial landlord so that the parties could disqualify him if they wished. (RT 1667) And in any event, he did not make the comments at the beginning of the proceeding, he made them after the proceeding had commenced and sprinkled them throughout the proceeding.

A small claims judge should not articulate his prior experience in a way that suggests he or she is not neutral or is not open to considering the evidence presented. Judge Kreep's repeated comments gave the appearance that he discredited defendant's evidence based on his prior experience in real estate and as an attorney. He suggested Mr. Niednagel was not credible because Judge Kreep had "seen some pretty strange" things happen with houses; he also suggested the statement by the Vice President of Operations was not trustworthy because in Judge Kreep's experience as an attorney, "the truth gets left out when people are trying to cover their butts." (Exhibit 149, CJP 3391, 3400) Judge Kreep's comments suggested bias or prejudice and further suggested he would decide the case based on his own experience and not on the evidence presented.

Judge Kreep's conduct violated canons 2 , 2A and 3B(5) of the California Code

of Judicial Ethics and constituted improper action. (*Public Admonishment of Moruza, supra*, at pp. 7, 9 [judge's comments about her personal experience of domestic violence, her own views of how animals experience pain, and a personal experience involving a deer hit by a car, along with a remark that her son might have reacted in a similar way as the defendant, violated canons 2A, 3B(4) and 3B(5)]; Com. on Jud. Performance, Ann. Rept. (2014), Advisory Letter 28, p. 24 [judge who referenced a similar personal experience as a crime victim while sentencing the defendant created the appearance of bias and prejudgment]; see also *Inquiry Concerning Velasquez, supra*, 49 Cal.4th CJP Supp. at pp. 201, 204.)

XI. COUNT ELEVEN

Alleged Ex Parte Communication.

The Notice charged Judge Kreep with violating canons 1, 2, 2A, 3B(7) and 3B(8) of the California Code of Judicial Ethics by engaging in an ex parte communication in *REO Group v. Newman*. (Notice of Formal Proceedings pp. 15-16; RT 1641) The Examiner argued Judge Kreep's conduct constituted prejudicial misconduct. (Examiner's prehearing brief p. 110)

1. Findings of Fact.

Plaintiff REO Group filed a motion for summary judgment and/or summary adjudication in *REO Group v. Newman*, a postforeclosure unlawful detainer action. (RT 1500-1502; Exhibit 152, CJP 2392, 2396) REO Group's motion was set to be heard in Department 7 on July 29, 2015. (RT 1502; Exhibit 155, CJP 2480) (All dates referenced in connection with Count Eleven occurred in 2015.) Judge Kreep sat in Department 7 at that time. (RT 491-492)

George W. Newman, doing business as Ramona Classic Car Wash, was one of the named defendants in the action. (Exhibit 152, CJP 2392) Acting in pro per, Mr. Newman filed and served a notice on July 24, stating that he was unable to attend the

July 29 hearing because of a scheduled deposition in another case. (RT 1502; Exhibit 152, CJP 2396; Exhibit 153, CJP 2477-2478) Judge Kreep continued the July 29 hearing to August 5, based on Mr. Newman's notice of unavailability and after courtroom clerk Tina Curry obtained agreement from the attorney for REO Group to the new hearing date. (Exhibit 154, CJP 2479; Exhibit 155, CJP 2480; RT 493-495, 1502-1503) The trial court informed the parties of the changed hearing date. (RT 495, 1502-1503)

On July 27, Ms. Curry asked Jennifer Freedman, counsel for REO Group, if she would agree to a further continuance to August 12 because Mr. Newman was now unavailable on August 5. (Exhibit 155, CJP 2480; RT 1503) Ms. Newman opposed a further continuance of the hearing. (RT 496, 1503) Later that day, Ms. Freeman sent the court a letter stating that Mr. Newman's July 29 deposition date had been changed; Ms. Freeman asked that the hearing date for REO Group's motion be changed back to July 29. (Exhibit 155, CJP 2480; RT 1505) Ms. Curry did not accept Ms. Freedman's letter because it was hand-delivered to Department 7 without a proof of service showing service of the letter on Mr. Newman. (RT 491-492, 497-498, 1512) A process server redelivered Ms. Freedman's letter later that day with a proof of service showing that a copy of Ms. Freedman's letter to the court was sent to Mr. Newman by mail on July 27, two days before the date Ms. Freedman sought for the hearing. (RT 499, 1512; Exhibit 155, CJP 2480-2482)

Ms. Curry discussed the content of Ms. Freedman's letter with Judge Kreep. (RT 499) Judge Kreep instructed Ms. Curry to move the hearing date back to July 29 and to notify the parties. (RT 500, 1207-1208; Exhibit 152, CJP 2398) Ms. Curry called Ms. Freedman to inform her of the changed hearing date. (RT 494, 500, 1507, 1512-1513; see also Exhibit 170, CJP 2024) Ms. Curry also called Mr. Newman but did not speak with him. (RT 494, 500; see also Exhibit 170, CJP 2024) She left Mr. Newman a

voicemail message about the changed hearing date. (RT 500) Ms. Curry did not send the parties written notice of the changed hearing date because she said there was insufficient time for the parties to receive the notice in the mail before the July 29 hearing. (RT 500) Judge Krep never spoke with Ms. Freedman or Mr. Newman about the scheduling of REO Group's motion. (RT 1204-1205, 1508)

Judge Krep heard REO Group's motion on July 29. (Exhibit 152, CJP 2398; Exhibit 157, CJP 2489) Mr. Newman did not appear at the hearing. (RT 501, 1508; Exhibit 157, CJP 2489) Judge Krep granted summary judgment to REO Group and awarded it possession of the subject premises. (RT 501, 1508; Exhibit 152, CJP 2398; Exhibit 157, CJP 2489)

Mr. Newman subsequently filed a motion for reconsideration. (RT 1209, 1508-1509) Ms. Freedman and Mr. Newman appeared at the hearing for that motion and presented arguments in relation to REO Group's summary judgment motion. (RT 1509) Judge Krep again ruled in favor of REO Group. (RT 1209, 1509)

2. Conclusions of Law.

In general, it is improper for a judge to permit or consider ex parte communication, that is, any communication to or from the judge outside the presence of the parties concerning a pending proceeding. (Cal. Code Jud. Ethics, canon 3B(7); *Haluck, supra*, 151 Cal.App.4th at p. 1002; *Nguyen, supra*, 150 Cal.App.4th at p. 1013, fn. 2.) Here, however, the Examiner failed to establish that Judge Krep engaged in ex parte communication.

The Examiner alleged that the ex parte communication was Ms. Freedman's letter to the trial court requesting that the hearing date be reset to July 29. (RT 1641-1642; Examiner's prehearing brief p. 110) But Ms. Freedman served Mr. Newman with a copy of that letter. (RT 499, 1512; Exhibit 155, CJP 2480-2482) (*Nguyen, supra*, 150 Cal.App.4th at p. 1013, fn. 2 [letter from real party in interest to the court was not

ex parte communication where it was served on petitioner's counsel].) Ms. Freedman's letter is not an ex parte communication. Mr. Newman may have been prejudiced by the timing of the communications to him, but that was a procedural issue for which he had legal remedies and it did not amount to misconduct.

ADDITIONAL FACTORS

A. FACTORS IN MITIGATION.

1. Judge Kreep acknowledged wrongdoing with regard to the acts charged in Count One paragraphs E and F, Count Two paragraphs A (with regard to the comment about not deporting Ms. Hernandez), B, D, K and M (with regard to the comment to Ms. Song), and Count Seven. (Judge's prehearing brief pp. 16-17; RT 1151-1152, 1156-1157, 1158-1159, 1168, 1173-1174, 1176, 1192, 1246)

2. He changed his behavior when some of the charged impropriety was brought to his attention and he ultimately ceased some of his inappropriate conduct. For example, he stopped calling attorneys who appeared before him by nicknames after Judge Trentacosta urged him not to use nicknames. (RT 1148, 1151, 1223) He eventually stopped speaking Spanish in the courtroom, although not until Fall of 2013 after Judge Trentacosta repeatedly counseled him. (Answer p. 26; RT 1223) He stopped asking attorneys who were not handling the matter before him for their legal opinion. (Answer p. 33; Judge's prehearing brief p. 28)

3. Although he misstated that he was chairman of the Beat Obama PAC on his March 5, 2012 Statement of Economic Interests, Judge Kreep disclosed he received income from the Beat Obama PAC.

4. Attorneys who appeared in front of Judge Kreep in the unlawful detainer department testified favorably regarding his demeanor and judicial performance. According to attorney Mark Feinberg, Judge Kreep prepares for his calendar and has been doing a good job in the unlawful detainer department. (RT 338, 355-356, 619,

1222) Mr. Feinberg said Judge Krep is respectful of attorneys and litigants who appear before him. (RT 353) Attorney Richard Alter testified he appeared before Judge Krep about 300 times in the unlawful detainer department and Judge Krep did not make racially insensitive or sexist comments. (RT 1514-1515, 1524) Department 7 courtroom clerk Tina Curry testified Judge Krep is friendly and respectful of the people in his courtroom. (RT 491, 503) Commissioner Peter Doft likewise testified he had never seen Judge Krep behave in a disrespectful manner to anyone in his courtroom or at meetings related to his role as a judge. (RT 611) Judge Krep testified he tries to be patient with attorneys who appear before him and is patient with his staff. (RT 1223) Mr. Alter and attorney Patricia Coyne, who appeared before Judge Krep in the unlawful detainer department, agreed that Judge Krep is a patient judge. (RT 1493, 1498, 1514-1515, 1524) Mr. Feinberg said Judge Krep makes pro per litigants feel they have been heard, he does not discourage argument, and he makes rulings he believes are required under the law and the facts. (RT 353-355; see also RT 1316) Mr. Alter and Ms. Coyne said Judge Krep has been fair and has not favored one side over the other. (RT 1498, 1524)

5. Deputy Public Defender Jose Orozco testified Judge Krep paid attention to the law and arguments made by both sides, listened to each case, and adjudicated cases fairly. (RT 1376)

6. Judge Krep works hard, arriving at work between 7:30 and 8:00 a.m. and often staying until 5:00 or 5:30 p.m. (RT 338, 355-356, 619, 1222)

7. He has completed over 180 units of continuing judicial education since 2013. (RT 1220; Exhibit 185)

8. He also serves on the education committee for the San Diego County Superior Court, is involved in community outreach, has volunteered for the high school moot court and Inn of Court, has participated in community service events and retreats for

superior court judges, and volunteers for extra work. (RT 1220-1222, 1453-1454, 1456) He has also helped reduce the backlog on default matters at the superior court. (RT 1222)

We mentioned in the beginning of this report that this was a case involving contrasts, and it bears discussing whether the environment in Department 3, including the dynamic between the deputy city attorneys and the deputy public defenders, should be a factor in mitigation. Ultimately we conclude it does not mitigate Judge Kreep's misconduct. Department 3 may have been a difficult assignment for a new judge given its high volume, but perhaps no more difficult than new judges around the state are expected to handle. Regarding the relative perceptions in the courtroom, it is certainly striking that deputy city attorneys were offended and upset by Judge Kreep's behavior while deputy public defenders testified they found nothing wrong with his conduct. We credit this difference to a number of factors, such as that the deputy city attorneys were more experienced and were more sensitive to such behavior, while the deputy public defenders were relatively inexperienced (they were essentially new lawyers in 2013) and were more tolerant of such behavior. (RT 85-86, 761-763) Ultimately, however, as we have explained, the evidence of Judge Kreep's specific conduct is, except where noted, undisputed or proven.

B. FACTORS IN AGGRAVATION.

1. Judge Kreep's argument that his May 14, 2012, May 31, 2012, and June 18, 2012 letters on behalf of USJF did not oppose former President Obama's 2012 reelection effort is disingenuous. (Answer pp. 12-14; Judge's prehearing brief pp. 10, 12-14)

2. He was an experienced attorney who had practiced for decades and had appeared in different courts before becoming a judge. (RT 938-944, 955) He also received substantial guidance and training when he became a judge. (RT 200, 204-205,

207-212, 281, 378-380, 385-390, 394-403, 405-407, 409-410, 443-460, 468-470, 949-959, 958, 960, 1134, 1284, 1304-1306; Exhibits 41, 173)

3. He initially responded with anger when a supervising deputy city attorney complained to him in August 2013 about inappropriate comments he had made. (RT 256; Exhibit 42, CJP 1199-1200; see also Exhibit 173, CJP 1148; Exhibit 192, CJP 1215-1216)

4. Judge Kreep continued to engage in improper conduct in 2013 and 2014, including the remark charged in Count Seven, even after receiving repeated warnings from Presiding Judge Trentacosta, Assistant Presiding Judge Daniels, and Supervising Judge Walsh, and advice from Deputy Sheriff Paulk and Supervising Deputy Public Defender Melvin Epley. (RT 204-205, 207, 388, 402-403, 470, 1561, 1588)

5. Judge Kreep fails to acknowledge wrongdoing in the conduct charged in Count One paragraphs A, C, D, and G; Count Two, paragraphs E, G, H, I, J, L, M (although he agrees he made crude remarks and used inappropriate language with reference to Ms. Song and says he ceased making such remarks), N and O; and Counts Four, Five (he denied he made the charged remark), Nine, and Ten. (Answer pp. 3-11, 13, 19-30, 34-36; Judge's prehearing brief pp. 4-6, 8-15, 18-19, 23-25, 28-29; RT 1176, 1249-1251) He does not recognize that his statements about the physical attractiveness of female attorneys who appeared before him, remarks to Ms. Stroud about her pregnancy, sharing with someone in his courtroom a story containing intimate details, inquiring about irrelevant matters, calling a man in his 20s "little boy," unnecessarily referencing a person's ethnicity or national origin, calling someone "Mr. Insurance Man," and conduct in response to the blanket challenge by the City Attorney's Office are inappropriate and that his statements in *Clendenin v. Pacific West* about his personal experience exceeded what was required to disclose potential grounds for

disqualification and could reasonably be perceived as suggesting prejudgment of the case and a lack of impartiality. (RT 1667-1668; Answer pp. 18-22, 27)

6. In his Answer, Judge Kreep suggested he has been singled out with a campaign of harassment and intimidation. (Answer, p. 1) To the extent he was referring to the complaints of inappropriate behavior, our report validates most (but not all) of the complaints. The record also shows that many people attempted to help, warn, counsel, train and guide Judge Kreep. To his credit, however, he has not argued or asserted since the filing of his Answer that there is a campaign against him.

CONCLUSION

The Examiner did not prove the Count Three charge by clear and convincing evidence. And although the Examiner proved the material facts alleged in Counts Six and Eleven, the Examiner did not prove those facts constituted misconduct. However, the Examiner proved the other charges alleged in the Notice by clear and convincing evidence. In addition, the Examiner proved that Judge Kreep committed willful misconduct, prejudicial misconduct, and improper action. We conclude Judge Kreep committed willful misconduct in connection with Count Four; committed prejudicial misconduct in connection with Count One D, E, and F, Count Two A through I, K, and N, Count Five, and Count Eight; and committed improper action in connection with Count One A, B, C, G, and H, Count Two J, L, M, and O, Count Seven, Count Nine, and Count Ten.

Dated: April 20, 2017

/s/
Hon. Dennis A. Cornell
Presiding Special Master

/s/
Hon. Louis Mauro
Special Master

/s/
Hon. Randy Rhodes
Special Master