PUBLIC ADMONISHMENT OF JUDGE NANCY POLLARD

The Commission on Judicial Performance has ordered Judge Nancy Pollard publicly admonished pursuant to article VI, section 18(d) of the California Constitution and commission rule 115, as set forth in the following statement of facts and reasons found by the commission:

STATEMENT OF FACTS AND REASONS

Judge Pollard has been a judge of the Orange County Superior Court since 1997. Her current term began in January 2009.

1. *Forline v. Chenier*

On April 30, 2009, Judge Pollard presided over a hearing on a petition for a restraining order filed by Kathy Forline against her former boyfriend, Blake Chenier. Forline alleged in her petition that Chenier had engaged in acts of violence during their relationship such as throwing rocks at her, spitting on her, choking her, and throwing protein powder, and that he had destroyed some of her property. The defense position was that Forline had fabricated the allegations and filed the petition because she was angry with Chenier for breaking up with her, and for being intimate with her roommate in her house after their relationship had ended.

The hearing began with testimony by Forline, who was questioned by Judge Pollard (with her counsel's consent) about some of the allegations in her declaration. Shortly after this questioning began, Judge Pollard addressed Chenier's attorney as follows:

> **The Court:** You know, Counsel, I have a question. [¶] May I address your client?
>
> **Mr. English:** Sure.
>
> **The Court:** Where were you born?
>
> **Mr. Chenier:** Newport Beach, California.
>
> **The Court: I'm concerned about the throwing of the rocks and the spitting. I've been doing domestic violence now for 14 years. Usually that is the kind of behavior I see in Middle Eastern clients, but almost -- if I read a declaration where they say, "He spit on me, he threw rocks at me," almost always it's a Middle Eastern client. If the declaration says, "He drags me around the house by the hair," it's almost always a Hispanic client.**

(R.T. at 10:11-25, bold added.)

A little later, when Forline was being cross-examined by Chenier's attorney but before Chenier testified or presented any testimony on his own behalf, Judge Pollard asked the attorney to explain the relevance of a question about how long Forline and Chenier had been broken up as of the night of the specific incident (an altercation involving Chenier, Forline, and Forline's roommate) giving rise to the petition. This exchange followed:

> **Mr. English:** I think she is angry my client broke up with her is what I think.
>
> **The Court:** She very (*sic*) may be. That is not the issue. **The issue is he spit on her, he choked her, he pushed her, he threw protein powder all over the room, and he destroyed a lot of expensive property.**
>
> **Mr. English:** It goes to bias, Your Honor, for filing this order. It goes to credibility, absolutely.
>
> **The Court: Well, for whatever reason she has -- and she certainly may feel betrayed in her love life, but that doesn't mean that that gives him the right to destroy the property, to choke her, to throw powder all over her room.**
> **Mr. English:** Of course not. It goes to her bias for filing this petition.

(R.T. 24:4-20, bold added.)

After Forline's attorney interjected that it was "harassment" for Chenier to come into Forline's house and be intimate with another woman there, the following occurred:

> **The Court:** Well, I don't even consider that. He can sleep with anybody he wants. He can sleep with anybody in her family. **The point is he does not get to choke her. He does not get to spit on her. He doesn't get to threaten her.**
>
> **Mr. English:** Of course not.
>
> **The Court: He doesn't need to destroy property.**

(R.T. 25:4-11, bold added.)

Following these remarks, the attorney commented, "By the way, that didn't happen. I'll be clear when I question my client." (R.T. 25.)

At the end of the hearing Judge Pollard issued a five-year restraining order and ordered Chenier to pay restitution of more than $4,500.

Chenier appealed. In an unpublished opinion filed in August 2010, the Court of Appeal affirmed Judge Pollard's orders, finding that her "inappropriate statement concerning Middle Eastern and Hispanic males did not evidence a bias against Chenier," since he is neither Middle Eastern nor Hispanic, and that there was no evidence that the judge was generally biased against males.

Although the appellate court rejected Chenier's claim of bias, it took the opportunity, in a separate section of its opinion entitled "Warning," to "caution the trial judge to be more thoughtful in her comments concerning her previous cases and statements concerning her perceptions of race, ethnicity, or gender." The court continued:

> Such comments suggest ethnic stereotyping that is inconsistent with the fair, impartial, and dispassionate administration of justice. As we explain above, the trial judge's statements did not evidence a bias against Chenier. But in the future, the trial judge's statements about ethnic propensities of past litigants could compel the conclusion that the judge prejudged a case based on ethnicity. A trial judge should refrain from comments that suggest he or she has decided a credibility contest based on some matter outside the record. Such statements do not inspire public trust and confidence in our courts.

(*Forline v. Chenier* (Aug. 2, 2010, G042242) [nonpub. opn. at p. 7].)

The Court of Appeal went on to find that the trial court properly excluded evidence that Chenier broke up with Forline and started dating her roommate, citing evidence that the termination of the relationship was mutual and testimony by Forline that she was relieved that Chenier was no longer in her life; the appellate court also stated that evidence about "when they terminated their relationship and who he was currently dating was of no relevance" to the issue of whether Chenier posed a threat to Forline. Finally, the Court of Appeal rejected Chenier's claim that the evidence was insufficient to support issuance of the five-year restraining order.

The commission found that Judge Pollard's remarks about Hispanic and Middle Eastern men were contrary to canon 3B(5), which provides, in pertinent part: "A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, engage in speech, … or other conduct that would reasonably be perceived as (1) bias or prejudice, including but not limited to bias or prejudice based upon race … [or] national origin… ." Judge Pollard's remarks articulated stereotypes about two ethnic groups and their propensity to engage in certain types of domestic violence. As the Court of Appeal pointed out, these comments suggest ethnic stereotyping that is inconsistent with the fair, impartial and dispassionate administration of justice; the remarks do not inspire public trust and confidence in the courts. (See *In re Stevens* (1982) 31 Cal.3d 403, 404-405.) Judge Pollard has admitted that her remarks were inappropriate.

The commission also found that Judge Pollard made statements suggesting that she had prejudged the facts before she heard any testimony offered by respondent Chenier, contrary to canons 2A and 3B(5). The judge's comments during the cross-examination of Forline, quoted above, gave the appearance that she had already accepted Forline's version of events before hearing any testimony offered by Chenier, despite the fact that this was a hearing at which both sides were entitled to present evidence before a decision was made.

2. *Blumenthal v. Blumenthal*

On November 18, 2005, Judge Pollard declared a mistrial in the family law case of *Blumenthal v. Blumenthal*, which had been pending before her for approximately four years, because the trial did not end within a five-hour period she had set for its completion and she was to be transferred from a family law assignment to a domestic violence assignment about six weeks later; she took this action although only a few more hours of anticipated testimony remained.

According to a chronology provided by Judge Pollard, the petition for dissolution in *Blumenthal* was filed in November 1999. The case was designated a long-cause matter in January 2000, following the filing by petitioner's counsel of an at-issue memorandum giving a trial estimate of two days. After the parties entered into a written stipulation, and a partial judgment settling the majority of the issues was entered, the case was assigned to Judge Pollard around October 2001.

In November 2001, Judge Pollard set the case for trial on March 19 and 20, 2002. She subsequently denied a motion filed by respondent to set aside the previously entered partial judgment, and continued the trial to July 11 and 12, 2002. On July 11, 2002, the judge continued the trial to allow the petitioner to consider a settlement offer, and because the respondent had failed to provide certain financial information. The judge also appointed an expert to determine respondent's controllable cash flow. She ordered the parties to cooperate with the expert and return in September 2002. In September, the matter was continued to November 2002 because the expert had not completed his evaluation. In November, the trial was continued to February 19, 2003 because the respondent had not given necessary documents to the expert; a mandatory settlement conference was set for January 30, 2003.

On January 30, 2003, Judge Pollard reset the mandatory settlement conference for February 19, 2003 and continued the trial to May 6, 2003. When she called the case on May 6, 2003, the judge said she had received notice that respondent had filed a lawsuit against the court's expert for breach of contract and malpractice, and expressed concern that he had filed this suit to delay the proceedings. The judge continued the trial because counsel had not received the expert's report ten days before the trial date. In choosing a new date for trial, Judge Pollard asked counsel to give a time estimate; after the attorneys said that the testimony of the three witnesses (the court's expert and the two parties) could be heard within three to four hours, the trial was continued to August 20, 2003.

On August 20, 2003, Judge Pollard called the case for trial and for a hearing on an order to show cause regarding support that had been filed by the petitioner. After the two parties were sworn in as witnesses, respondent's counsel asked to continue the trial because the court's expert had prepared an updated report that had not been provided ten days before the trial date. Judge Pollard suggested a date the next week, but the petitioner was scheduled to have surgery, so trial was continued to January 14, 2004. A temporary support order was made.

On January 14, 2004, the case was called for trial. The court's expert testified. Because respondent's counsel had not completed cross-examination of the expert, Judge Pollard ordered the parties to return on April 30, 2004. However, due to the court's unavailability, the trial date was continued to August 17 and 18, 2004. The court's expert was ill on August 17, so trial was continued to January 11 and 12, 2005.

On January 10, 2005, respondent moved ex parte to continue the trial date due to the unavailability of an expert he had retained. Judge Pollard granted the request, reset trial for May 10, 2005, and made orders concerning the report of respondent's expert. On May 10, 2005, the trial date was continued again, at respondent's request. Trial was reset for October 25 and 31, 2005.

On October 25, 2005, Judge Pollard called the case for trial. After discussion between the judge and counsel, it was determined that trial would continue on October 31, 2005. On that date, the court's expert and the petitioner testified. Since trial had not been completed, Judge Pollard set the matter to continue from 9:00 a.m. to 3:00 p.m. on November 18, 2005, stating "we will finish," "we are getting done," and "the very last important question is going to be asked and answered at three o'clock."

On November 18, 2005, respondent's expert testified. When he finished testifying, Judge Pollard expressed concern that the trial would not be completed that day. Respondent's counsel said that her client needed to testify, and that his testimony would probably take several hours. Judge Pollard said that the case would be mistried. She explained that she was going to the domestic violence department at the end of the year, and did not have a couple of hours on her calendar before the end of the year. The judge opined that the parties had "spent more time on $101,165 than is worth $101,165," and expressed the view that there had been "an inordinate amount of objections." A mistrial was declared.

A writ petition was filed in the Court of Appeal. The appellate court ultimately issued the writ and set the matter for completion of trial back before Judge Pollard, regardless of her reassignment to a different court. (*Blumenthal v. Superior Court* (2006) 137 Cal.App.4th 672.) The appellate court noted that neither party had requested the mistrial, which was ordered over the objection of both parties "for reasons peculiar to the judge's own calendar." The appellate court stated, "The abuse of discretion in granting this mistrial is manifest." (*Id.* at 685, 687.)

In the commission's investigation, Judge Pollard expressed the view that the Court of Appeal's decision was based on incomplete information, because the petitioner did not provide the appellate court a copy of the transcript of the May 2003 hearing at which counsel gave an estimate of three to four hours to complete the trial. Judge Pollard argued that the case was converted from a long-cause matter to a short-cause matter when the attorneys, at a hearing that took place more than two years before the mistrial was declared, gave an estimate of three to four hours to complete the trial, and that she therefore had discretion to declare a mistrial when they did not finish within that period. In addition, Judge Pollard reported that she was specifically instructed by her supervising judge not to keep the matter when she transferred to her domestic violence assignment. She expressed the view that if the Court of Appeal had known about this, the impression that her action was arbitrary and capricious would not have been created.

The commission found that even assuming that a long-cause matter can be converted to a short-cause matter when the attorneys, at some point during the proceedings, give an estimate of five hours or less to complete the trial, the records of the *Blumenthal* case show that the estimate of three to four hours was superseded by later events, and that the court and counsel continued to treat the case as a long-cause matter. On four occasions after May 6, 2003, the court set the trial to take place on two days: it was set for August 17 and 18, 2004; for January 11 and 12, 2005; for May 10 and 11, 2005; and for October 25 and 31, 2005. A minute order issued May 10, 2005, setting the matter along with an order to show cause filed by petitioner for two days in October, and a minute order issued October 25, 2005, both designate the matter as "trial-long cause non-jury." Moreover, the transcript of the hearing held January 14, 2004, where the court's expert testified, shows that the judge asked counsel to identify "the reserved issues on the long cause trial." (R.T. 68.) At the end of this hearing, respondent's counsel, when asked for a time estimate, said that it would take about another half hour to finish her cross-examination of the court's expert, and that an expert for respondent (who had not been retained in May 2003) would testify, for "probably as much time as it took to examine [the court's expert]." (R.T. 132:21 – 133:2.) The judge and the parties thus were aware that the previous estimate of three to four hours, which was based on the assumption that only the court's expert and the parties would be testifying, was obsolete.

Since the court records of events subsequent to May 6, 2003 show that the *Blumenthal* case remained a long cause case and that the estimate of three to four hours to complete the trial was no longer valid, it appears that the transcript of the hearing held May 6, 2003, would not have given the appellate court a basis to conclude that the matter had been converted to a short-cause case. Even assuming the Court of Appeal agreed with Judge Pollard that a long-cause matter can be converted to a short-cause matter when attorneys provide an estimate of less than five hours to complete a trial, and that this gives the trial judge discretion to declare a mistrial if the estimate is exceeded, there were no grounds for finding that *Blumenthal* had become a short-cause case.

Regarding Judge Pollard's argument that she properly followed the instructions of her supervising judge, and that the Court of Appeal would not have found her actions arbitrary and capricious if it had known that her supervising judge had instructed her not

to take the case with her to her domestic violence assignment, the commission noted that the supervising judge stated, in a declaration submitted by Judge Pollard, that she had represented to him that *Blumenthal* "started the trial with an estimate of about three hours." The commission also noted that in his declaration, the supervising judge described his actions as "suggesting" that Judge Pollard declare a mistrial. Even assuming that the supervising judge's discussions with Judge Pollard about how she might handle the *Blumenthal* case could be considered instructions, it does not appear that such instructions would legitimize Judge Pollard's actions if they were based on incorrect information she had given to the supervising judge.

The commission found that Judge Pollard's conduct in declaring a mistrial in *Blumenthal* constituted an abuse of authority and failure to hear and decide a matter assigned to her, contrary to canon 3B(1).

The commission concluded that Judge Pollard's conduct in the matters above was, at a minimum, improper action and dereliction of duty.

Commission members Hon. Judith D. McConnell, Mr. Anthony P. Capozzi, Ms. Nanci E. Nishimura, Mr. Lawrence Simi, Ms. Maya Dillard Smith, Ms. Sandra Talcott, Mr. Adam N. Torres, Mr. Nathaniel Trives, and Hon. Erica R. Yew voted to impose a public admonishment. Commission member Hon. Frederick P. Horn was recused from this matter. Commission member Ms. Barbara Schraeger did not participate.

Dated: July 13, 2011