

STATE BAR COURT OF CALIFORNIA  
HEARING DEPARTMENT – LOS ANGELES

In the Matter of	)	Case No.: <b>09-V-10466-RAP</b>
	)	
<b>KELLY ANN WALLS MacEACHERN,</b>	)	<b>DECISION AND RECOMMENDATION</b>
	)	<b>TO SUPREME COURT</b>
<b>Member No. 94069,</b>	)	
	)	
<u>A Member of the State Bar.</u>	)	

**I. INTRODUCTION**

The issue in this case is whether petitioner **Kelly Ann Walls MacEachern** (“petitioner”) has demonstrated, by a preponderance of the evidence, her rehabilitation, present fitness to practice, and present learning and ability in the general law, such that this court may recommend to the Supreme Court that petitioner’s suspension from the practice of law be terminated. (Cf. Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.4(c)(ii).)<sup>1</sup>

For the reasons stated below, this court finds that petitioner has shown, by a preponderance of the evidence, that she is rehabilitated, presently fit to practice law, and has present learning and ability in the general law. The court will therefore recommend to the Supreme Court that petitioner’s suspension from the practice of law be terminated.

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<sup>1</sup> All further references to standard(s) are to this source.

## **II. PROCEDURAL HISTORY**

On June 26, 2008, petitioner was removed from judicial office by the Commission on Judicial Performance following a hearing. The order also resulted in petitioner's suspension from the practice of law in this state. (See Cal. Const., art. VI, § 18, subd. (e).)<sup>2</sup>

Consequently, petitioner thereafter filed a petition for relief from actual suspension from the practice of law with the Supreme Court. On January 28, 2009, the Supreme Court issued an order<sup>3</sup> transferring this matter to the State Bar Court "for consideration and recommendation based on petitioner's rehabilitation, present fitness to practice, and present learning and ability in the general law." (Cf. Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.4(c)(ii).)

On February 5, 2009, the State Bar Court issued an Order to Show Cause as to why the court should recommend to the Supreme Court that petitioner be relieved from actual suspension.

On March 16, 2009, petitioner filed with the State Bar Court a Response to Order to Show Cause and Response for Recommendation to the Supreme Court that Applicant [sic] Kelly A. MacEachern Should Be Relieved of Actual Suspension, seeking this court's recommendation to the Supreme Court that petitioner be relieved from her suspension on the grounds that she is rehabilitated, presently fit to practice law, and has present learning and ability in the general law. The State Bar of California, Office of the Chief Trial Counsel ("State Bar") filed a response in opposition on April 30, 2009. Petitioner was represented by attorney Ellen A. Pansky. The State Bar was represented by Supervising Trial Counsel Kevin B. Taylor and Deputy Trial Counsel Agustin Hernandez.

This matter was ultimately heard by the State Bar Court on June 10, 2009, and was taken under submission on that same day.

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<sup>2</sup> Pursuant to Evidence Code section 452, subdivision (h), the court takes judicial notice of the State Bar's membership records pertaining to petitioner which reflect that petitioner's suspension was effective December 10, 2008.

<sup>3</sup> Pursuant to Evidence Code section 452, subdivision (h), the court takes judicial notice of the Supreme Court's January 28, 2009 order.

### **III. JURISDICTION**

Petitioner was admitted to the practice of law in California on December 16, 1980. In January 2003, petitioner became a judge of the Orange County Superior Court, where she served as a Superior Court judge until June 2008. Prior to January 2003 and after June 26, 2008, petitioner was a member of the State Bar of California.<sup>4</sup> Since December 10, 2008, petitioner has not been entitled to practice law in this state pursuant to her removal from the bench.

### **IV. FINDINGS OF FACT**

#### **A. Petitioner's Underlying Judicial Disciplinary Proceeding**

##### **1. Discipline Imposed**

On August 13, 2006, the Commission on Judicial Performance ("the Commission") initiated formal proceedings against petitioner. Petitioner was charged with committing willful misconduct in office, within the meaning of article VI, section 18, subdivision (d) of the California Constitution, by making false and misleading statements regarding her registration and attendance at the Continuing Judicial Studies Program ("CJSP") in San Diego, which was held on Monday through Friday, July 31, 2006, through August 4, 2006, and requesting reimbursement for expenses.

The Supreme Court appointed three special masters to hold an evidentiary hearing and report to the Commission. Commencing on January 14, 2008, a two-day hearing was held before the special masters with oral arguments following in March 2008.

The special masters presented their report to the Commission on March 17, 2008. In their report, the special masters found, by clear and convincing evidence, that petitioner engaged in unjudicial conduct by wrongfully seeking reimbursement for her own pecuniary gain or personal interests (her family vacation) and also violated judicial ethical canons by submitting a false and misleading e-mail regarding her attendance at the CJSP in San Diego in the summer of 2006. In addition, petitioner was found to have acted in bad faith and abused her judicial

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<sup>4</sup> An individual admitted and licensed to practice law in California is not a member of the State Bar while he or she is holding office as a judge of a court of record. (Cal. Const., art. VI, § 9.)

authority by involving innocent persons in her wrongdoing. Among aggravating factors were the following: (1) petitioner's testimony was found to be not credible; (2) her remorse was qualified and limited to only the trouble her false e-mail caused; and (3) she perpetuated her lies by making false and misleading statements to the Commission. In mitigation, the masters found that (1) petitioner's husband was in the hospital in grave condition in September 2006, and petitioner was distraught, nervous, and upset when she met with Judge Stock as a result of his serious medical condition; (2) petitioner was on medical leave from early May 2006 to June 16, 2006; (3) petitioner's honesty and integrity as a jurist and former deputy district attorney were well-known in the community; (4) petitioner was a hard-working and ethical judge; and (5) petitioner had no prior record of discipline.

On June 26, 2008, the Commission issued its decision. The Commission adopted the special masters' findings of fact, but reached its own legal conclusions based on its independent review of the record and the law. The Commission found petitioner's misconduct to be willful misconduct, the most serious basis for censure or removal. The Commission also found that petitioner's conduct was manifestly unjudicial; that she acted in bad faith with a haughty sense of entitlement; and that petitioner was acting in her judicial capacity.

The Commission found particularly troubling petitioner's willingness to lie under oath to the three special masters appointed by the Supreme Court to make factual findings critical to its decision. In addition to her lack of veracity, the Commission found other aspects of petitioner's conduct failed to comport with the high standards to which the judiciary is held. When told she could not attend classes, petitioner attempted to circumvent AOC's rules and flagrantly disregard staff instructions; she involved unwitting and innocent persons in her misconduct; and she failed to alter her request for educational leave and meal reimbursement for those days she was not in class until urged to by Judge Stock.

The Commission also found that petitioner repeatedly deflected responsibility for her actions. However, at her oral presentation, petitioner told the Commission that she now recognizes that she had been arrogant and slow to appreciate the seriousness of her misconduct.

However, the Commission held that “[c]ontrition at her last opportunity has limited impact in comparison with well over a year of misrepresentations and excuses.”

## **2. Nature of the Underlying Judicial Misconduct**

Briefly summarized, the misconduct found by the Commission that formed the basis for its decision to remove petitioner from the bench, was as follows:

The Commission found that petitioner made intentionally and false misleading statements in her August 16, 2006, e-mail to court travel coordinator Rick Valadez by: (1) suggesting that there had been “a mix up” with her CSJP registration, as she actually knew in advance which courses she had and had not been approved to attend, and she knew which courses she was enrolled in before she arrived at the CSJP conference; and (2) her use of the phrase “sat in” to describe her visitation of CSJP courses in which she was not enrolled was intentionally misleading. The Commission also found that petitioner did not act ethically in seeking reimbursement for expenses incurred for days in which she did not attend courses in which she was not actually enrolled. The Commission concluded that petitioner’s explanations were contrived, that she was haughty, and rejected her contention that the choice of her words used in the e-mail was careless. The e-mail statements were made in bad faith because their purpose was improper.

In an attempt to cover-up her wrongdoing, petitioner lied not only about the intent of her words, but also about her presence in certain classes.

The Commission found that petitioner willingly lied to the three special masters appointed by the Supreme Court to make factual findings and she continued to make misrepresentations before the Commission.

## **The Commission’s Findings in Mitigation**

Notwithstanding its decision to remove petitioner, the Commission considered in mitigation numerous character witnesses, presented by letter and testimony before the special masters, including fellow judges and attorneys, who described petitioner as a conscientious, knowledgeable, and fair jurist. However, the Commission found that petitioner’s “reputation in

the community cannot redeem the seriousness of her wrongdoing and its negative impact on the reputation of the judiciary.”

## **B. Petitioner’s Rehabilitation and Present Fitness to Practice Law**

### **1. Petitioner’s General Background**

Petitioner was admitted to the practice of law in December 1980 and began her legal career as a prosecutor with a short stint in Long Beach. Petitioner was then hired as a prosecutor in the Orange County District Attorney’s Office, where she spent the next 22 years prosecuting cases in various courthouses until appointed to the bench in 2003. In her later years in the Orange County District Attorney’s Office, petitioner prosecuted domestic violence cases.

### **2. Character Evidence**

Petitioner presented two declarations and 39 letters regarding her character. Both of the declarants and the 39 letter writers expressed high regard for petitioner’s work ethic and integrity, notwithstanding her misconduct. Some of the letter writers also attested to her remorse for her misconduct on the bench. Favorable character testimony and reference letters from attorneys are entitled to considerable weight in mitigation. (*Feinstein v. State Bar* (1952) 39 Cal.2d 541, 547.) Letters of character were written on behalf of petitioner by 12 judges and 23 attorneys. This evidence is entitled to great weight.

All of the letters and declarations speak glowingly of petitioner’s ability as a prosecutor and judge and to her reputation for honesty and integrity. Many of the letters speak to the issue of petitioner’s misconduct as being out of character to the person they know and respect.

### **3. Petitioner’s Remorse and Recognition of Wrongdoing**

At the hearing on this matter, petitioner acknowledged her misconduct and was remorseful.<sup>5</sup> Petitioner believes that her misconduct resulted from her arrogance and feeling of entitlement as a judge. As to her misconduct at her master’s hearing, petitioner testified that she was scared and defensive and thought she had to fight the charges. Although at her hearing the Commission gave her admission of misconduct little weight in mitigation, petitioner realized, perhaps for the first time, that it was her conduct that brought about her removal from the bench.

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<sup>5</sup> The court finds petitioner’s testimony to be credible.

Petitioner now understands that her actions constituted unacceptable behavior and accepts the consequences. As she testified, it was “my fault”.

Petitioner sought counseling after she was removed from the bench. She met with a therapist weekly for about six months and met with a medical doctor who prescribed medication. Due to her therapy sessions, petitioner was able to come to terms with her misconduct and the personal character traits that caused her to commit misconduct, i.e., her sense of entitlement and arrogance.

Petitioner is a mediation volunteer in Orange County and has mediated about six to seven cases, volunteering about 30 hours to the mediations.

Petitioner donates blood about every six weeks because of her universal blood type and has done so for about 15 years.

Petitioner participated in a Children’s Hospital fundraiser by being part of a musical production and selling tickets. The fundraiser raised over one million dollars. Petitioner has recently volunteered to be a bedside reader at the hospital.

Petitioner has publically admitted her misconduct when talking with other members of the legal profession.

Petitioner testified to her love for the law, and how she wanted to be a lawyer at an early age. Petitioner wanted to be an attorney to help people and finds the practice of law to be an honorable profession.

The State Bar argues that petitioner has not shown rehabilitation because she has not completely accepted responsibility for her misconduct. The court disagrees. While the evidence demonstrates that petitioner committed serious misconduct and should have accepted responsibility for her actions at an earlier stage of the court’s investigation of the reimbursement claim, the evidence shows that petitioner is now fully aware that her conduct, and her conduct alone, was the reason for her removal from the bench. Although late in coming, this court accepts petitioner’s acknowledgment of her responsibility for her misconduct.

While the court can never be certain of a petitioner’s future conduct, several factors in the present case lead the court to believe that petitioner’s misconduct is unlikely to be repeated.

First, the role of a judge is considerably different than that of an attorney. Contrary to her experience as a judge, petitioner has demonstrated, over a significant period of time, the ability to practice law within the requisite ethical confines. Second, the court finds that petitioner's understanding and acceptance of her judicial misconduct decreases the odds of recidivism. And third, petitioner already paid a steep price for her judicial misconduct. She has lost her job and her livelihood for nearly a year. During this time, petitioner has been able to reflect upon and appreciate the privilege of practicing law. Her attitude and showing of remorse lead the court to believe that she will take all the precautions necessary to avoid future misconduct.

### **C. Petitioner's Present Learning and Ability in the General Law**

Petitioner was removed from the bench by order filed June 26, 2008, less than one year prior to the date of the hearing in this matter and has been suspended from the practice of law for only six months. Prior to her appointment to the bench, she spent over 20 years as a prosecutor. Letters and declarations submitted on petitioner's behalf spoke glowingly of her ability as a prosecutor and as a judge. She is currently a mediation volunteer and has mediated about six to seven cases. There is no evidence that her legal learning and ability in the law has ever been in question.

## **V. DISCUSSION**

In order for this court to recommend the termination of petitioner's suspension, petitioner has the burden of proving, by a preponderance of the evidence, that she is rehabilitated, has present fitness to practice and present learning and ability in the general law.

To establish rehabilitation, the court must first consider the prior misconduct from which petitioner seeks to show rehabilitation, including the aggravating and mitigating circumstances surrounding the misconduct and any other circumstances of misconduct. (*In the Matter of Murphy* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 571, 578.) The amount of evidence of rehabilitation varies according to the seriousness of the misconduct at issue. Second, the court must examine petitioner's actions since the imposition of her discipline to determine whether her actions, in light of her prior misconduct, sufficiently demonstrate rehabilitation by a preponderance of the evidence. (*Id.* at p. 581.)



The misconduct that gave rise to petitioner's suspension included willful misconduct which is described as unjudicial conduct that is committed in bad faith by a judge acting in his or her judicial capacity by fraudulently seeking reimbursement from the court for her own pecuniary or personal interest; by making false and misleading statements in an e-mail concerning a travel reimbursement claim she submitted to the court travel coordinator; and by giving false testimony before a masters hearing investigating her alleged misconduct. The Commission concluded that petitioner's actions reflected acts of willful misconduct. This misconduct had a negative impact on the judicial system, in that it undermined the integrity and respect for the judiciary and therefore weakened the constitutional foundation of the system of justice.

Since her removal from the bench and suspension from the practice of law, petitioner has taken great strides toward rehabilitation. Petitioner testified that her removal from the bench has made her realize that she was responsible for the conduct that led to her removal and through therapy now has a better understanding of the personality traits that led to her sense of entitlement and arrogance as a judge which led to her acts of misconduct. She acknowledges that her removal was justified, and that she is remorseful for her misconduct.

The evidence before the court demonstrates that petitioner no longer lacks recognition or understanding of the ethical and legal principals underlying her misconduct. Petitioner was ordered removed from the bench approximately one year ago. Since that time, petitioner has been able to reflect on her misconduct as a jurist; thereby utilizing her time away from the law to learn from her mistakes.

In addition, 35 of petitioner's peers offered declarations and letters in support of her petition for relief from actual suspension. Almost all of these declarations and letters were authored by judges and seasoned attorneys, based on their observations regarding petitioner's integrity, demeanor, and competence. In these writings, the declarants and writers expressed high regard for petitioner's work ethic and integrity. Many also attested to her remorse and level of understanding regarding the misconduct that led to her removal.

Based on petitioner's recognition and understanding of her misconduct, her community service work, and her favorable character evidence, the court finds that petitioner has demonstrated, by a preponderance of the evidence, her rehabilitation and present fitness to practice law.

The court also finds that petitioner has demonstrated, by a preponderance of the evidence, that she has present learning and ability in the general law. Given the very short period of time since petitioner's removal from the bench and her suspension from the practice of law; her recent mediation work; her many years as a prosecutor; and her ability as a judge and prosecutor, as noted by many character witnesses in letters and declarations, the court finds that petitioner has demonstrated, by a preponderance of the evidence, that she has present learning and ability in the general law.

## **VI. CONCLUSION**

Based on the foregoing, the court finds that petitioner has established, by a preponderance of the evidence, her rehabilitation, present fitness to practice, and present learning and ability in the general law. Accordingly, the court recommends to the Supreme Court that petitioner's suspension from the practice of law be terminated. The Clerk of the State Bar Court is directed to transmit the record of the proceedings in State Bar Court Case No. 09-V-10466 to the Supreme Court for further action as the Supreme Court deems appropriate in light of this court's recommendation.

Dated: June 17, 2009.

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RICHARD A. PLATEL  
Judge of the State Bar Court