FILED

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Commission on
Judicial Performance

STATE OF CALIFORNIA

BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

Inquiry Concerning Justice J. Anthony Kline No. 151	DECISION AND ORDER OF DISMISSAL

This is a disciplinary matter concerning Justice J. Anthony Kline of the Court of Appeal, First Appellate District, Division Two. After considering the briefs filed by Justice Kline, the commission's trial counsel and the California Judges Association, as amicus curiae, the commission has concluded that the matter should be dismissed.

BACKGROUND

On December 2, 1997, the Court of Appeal, First District, Division Two, issued an opinion in *Morrow* v. *Hood Communications, Inc.* (1997) 59 Cal.App.4th 924, granting a motion for stipulated reversal. Justice Kline wrote a dissent in *Morrow* stating that he felt this was one of the "rare instances in which a judge of an inferior court can properly refuse to acquiesce in the precedent established by a court of superior jurisdiction," even though he acknowledged "that the opinion of the California Supreme Court in *Neary* [v. *Regents of University of California* (1992) 3 Cal.4th 273] ... requires that the motion before us be granted." Justice Kline clearly articulated his reasons for believing that the *Neary* decision was "analytically flawed and empirically unjustified" and that the doctrine of stipulated reversal was "destructive of judicial institutions." The penultimate paragraph in the dissent stated:

> While I will refuse to apply the *Neary* rule when asked to do so by litigants, I will of course comply with an order of the California Supreme Court to grant a particular request for stipulated reversal, a purely ministerial act.

Shortly after the issuance of the opinion and dissent in *Morrow*, the commission received a complaint concerning the dissent. After an investigation, the commission voted to institute formal proceedings, and a Notice of Formal Proceedings issued on June 30, 1998 charging that Justice Kline's "refusal to follow the law as established by the California Supreme Court was in violation of the Code of Judicial Ethics, canons 2A and 3B(2)."

Justice Kline filed a verified answer denying the allegations and at the commission's request the Supreme Court, on December 1, 1998, appointed special masters.[1]

On April 12, 1999, Justice Kline filed his prehearing brief and a letter requesting that the commission consider dismissing the pending charges on its own motion. At the same time, the California Judges Association (CJA) tendered a brief amicus curiae in support of Justice Kline.

On April 20, 1999, the commission issued an order staying proceedings before the special masters, filing the CJA's amicus brief, requesting that trial counsel file a brief responding to the briefs filed by Justice Kline and the CJA, and allowing Justice Kline to file a reply brief to trial counsel's responding brief. Trial counsel's brief and Justice Kline's reply brief were subsequently filed.[2]

On May 13, 1999, the Supreme Court issued its opinion in *Oberholzer* v. *Commission on Judicial Performance* (1999) 20 Cal.4th 371.

DISCUSSION

We recognize that appellate jurists deal with legal principles and ideas. It is fundamental to our system of jurisprudence that they feel free to break new ground, challenge existing assumptions, present novel legal reasoning and experiment with different approaches. In most instances they must be able to do so free from fear of discipline for the free expression of their ideas. Disagreement over interpretations of law are the essence of the work of appellate judges. We understand that appellate judges often write strong - even passionate - decisions on arcane matters of jurisprudence. Many of these involve questions regarding whether they have the authority to take certain actions. The answers are often far from obvious. To discipline a judge solely for the expression of ideas about legal questions is contrary to these principles.

These proceedings question whether there are some limits to what an intermediate appellate court justice may write. Justice Kline's dissent was unusual in that he did not seek to distinguish the precedent relied upon by the majority, but specifically recognized that the Supreme Court's opinion in *Neary* required that the motion for stipulated reversal be granted. He nevertheless reasoned that he was "constitutionally justified" in dissenting from the majority's decision to do so.

While the commission was considering this case, the Supreme Court decided *Oberholzer*. In its opinion, the Supreme Court noted that a defense of legal error does not necessarily preclude an investigation or even a finding of misconduct, reaffirmed that discipline must be based on clear and convincing evidence, and set forth the following standard for when a legal error may provide a basis for discipline:

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[1] The special masters were Justice Kenneth R. Yegan, Court of Appeal, Second Appellate District, Division Six (presiding), Justice Fred K. Morrison, Court of Appeal, Third Appellate District, and Judge Michael N. Garrigan, Superior Court of San Joaquin County.

[2] The CJA's motion to file a reply brief as amicus curiae is denied.

> In summary, a judge who commits legal error which, *in addition*, clearly and convincingly reflects bad faith (*Broadman* v. *Commission on Judicial Performance, supra,* 18 Cal.4th 1079, 1091-1092), bias (*Kennick* v. *Commission on Judicial Performance* (1990) 50 Cal.3d 297, 327-331), abuse of authority (*Spruance* v. *Commission on Judicial Qualifications* (1975) 13 Cal.3d 778, 786-795), disregard for fundamental rights (*Kloepfer* v. *Commission on Judicial Performance, supra,* 49 Cal.3d 826, 849-854), intentional disregard of the law (*Cannon* v. *Commission on Judicial Qualifications, supra,* 14 Cal.3d 678, 695-698), or any purpose other than the faithful discharge of judicial duty (*Ryan* v. *Commission on Judicial Performance* (1988) 45 Cal.3d 518, 545-546), is subject to investigation. (See generally, Shaman et al., Judicial Conduct and Ethics, §2.02, pp. 32-37.) Mere legal error, without more, however, is insufficient to support a finding that a judge has violated the Code of Judicial Ethics and thus should be disciplined.

As clarified by the Supreme Court's opinion in *Oberholzer*, in order for the commission to discipline Justice Kline it must find by clear and convincing evidence that his decision to file a dissent was legal error and that the decision was made in bad faith or for some improper motive.

Justice Kline has maintained that his dissent was ethical. The CJA in its amicus brief argued that Justice Kline's dissent:

> raised a purely legal issue: whether there is a narrow exception to the doctrine of stare decisis articulated in *Auto Equity Sales, Inc.* v. *Superior Court*, 57 Cal.2d 450 (1962) that would permit a lower court judge - here a justice of the Court of Appeal writing in dissent - to depart from otherwise controlling precedent in the circumstance presented in *Morrow*. Because that legal issue plainly presented a tenable claim for an exception to the stare decisis rule applicable in the circumstances presented in *Morrow*, and because that legal issue was itself a question of first impression in California, Justice Kline's dissent in *Morrow* did not violate established California decisional law and therefore cannot properly be the basis for disciplinary charges.

Trial counsel, in response to the briefs filed by Justice Kline and the CJA, contended that the circumstances of *Morrow* did not justify a departure from stare decisis.

The commission finds the CJA's approach particularly useful. The CJA notes that it believes "that lower court judges cannot refuse to follow higher court precedent merely because of personal disagreement, even if deeply felt." The CJA suggests, however, that Justice Kline could file a dissent in *Morrow* because of the confluence of three factors: (1) Justice Kline had a tenable belief that the precedent was "destructive of judicial institutions;" (2) since the decision in *Neary*, subsequent events, including the United States Supreme Court's decision in *U.S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 513 U.S. 18 (1994), provided good cause to urge reconsideration; and (3) "for procedural reasons, there would be no opportunity for the

Supreme Court to reconsider *Neary* unless a panel of the Court of Appeal declined to apply *Neary*."

None of the three factors cited by the CJA is in itself dispositive. As the CJA itself suggests earlier in it brief, a judge's sincerity is not necessarily sufficient to justify a failure to follow higher court precedent. The subsequent events, including the United States Supreme Court's decision and the general criticism of *Neary*, are not clearly persuasive. Justice Kline recognized that the doctrine of stipulated reversals was not an issue of constitutional law, but of common law, and it was clear that the Supreme Court was already aware of the United States Supreme Court's decision and the general criticism of its opinion in *Neary*. The suggestion that there was no vehicle for review is debatable in view of the practice of critical concurrences, such as Justice Kline's concurrence in *Krug* v. *Praszker* (1994) 22 Cal.App.4th 1814, and the Supreme Court's authority, which it exercised in *Morrow*, to review a decision on its own motion.

The commission, nonetheless, finds that in light of the CJA's brief and the confluence of these three factors, it cannot conclude that "the argument for a narrow exception to the stare decisis principle of *Auto Equity Sales* was so far-fetched as to be untenable." In other words, we cannot conclude under the *Oberholzer* standard that the dissent was improper (even though Justice Kline recognized that the Supreme Court's opinion in *Neary* was controlling). Accordingly, the first charge in the Notice of Formal Proceedings is dismissed.

In addition to charging Justice Kline for filing his dissent, the Notice of Formal Proceedings also charged him for stating that he "would continue to refuse to apply the law of *Neary* in future cases as well." We recognize that Justice Kline also stated that he would apply the *Neary* rule if specifically directed to do so by the Supreme Court. Although the arguments supporting his statement are more debatable than those supporting the issuance of a dissent, the commission finds, after considering all of the legal arguments presented by both sides, including the amicus brief by the judge's peers, that the *Oberholzer* standard is not met. The second charge in the Notice of Formal Proceedings is dismissed.

Justice Kline, the California Judges Association, and others have invited the commission to enunciate principles which govern cases alleging misconduct arising out of legal error and to reiterate our fundamental belief in the principle of judicial independence: we decline the former in light of the Supreme Court's opinion in *Oberholzer*. The Supreme Court has very recently carefully set forth the applicable standards and we see no reason to attempt to restate them here.

In conclusion, we readily reaffirm our fundamental belief in the principle of judicial independence. In our application of *Oberholzer* to this case, we endeavor to demonstrate that in exercising our mandate as conferred by the people, we appreciate the critical need for California judicial officers to act both independently and in conformity with the laws of the State, and we are sensitive to the substantial issues that arise when these principles clash. We recognize that Justice Kline asserts other substantive defenses as well, but in view of this decision, we need not consider them here.

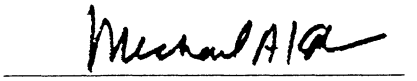
The commission's vote is 8 to 1. Ms. Bergthold, Mr. Farrell, Judge Flier, Mr. Kahn, Mr. Kelly, Judge Pichon, Ms. Ripston and Ms. Sommars voted to dismiss the proceedings. Dr. Vinson voted against dismissing the proceeding. Justice Hanlon and Mrs. Lui recused themselves from participating in this proceeding.

CONCLUSION

This proceeding is dismissed. This order shall be final forthwith.

Dated: August 19, 1999

For the Commission:



Michael A. Kahn