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8 THE HONORABLE FRED L. HEENE, JR.

FILED

APR 29 1999

Commission on
Judicial Performance

9 STATE OF CALIFORNIA
10 BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

11 INQUIRY CONCERNING JUDGE FRED L.
12 HEENE, JR., No. 153.

13) VERIFIED ANSWER TO NOTICE OF
14) FORMAL PROCEEDINGS
15)

16 This is Judge Fred L. Heene, Jr.'s Verified Answer to the Notice of Formal Proceedings filed
17 on February 16, 1999.

18 1. Judge Heene is a Judge of the San Bernardino County Superior Court, and has held
19 that position from December 1992 until the present. Judge Heene denies any willful misconduct in
20 office, conduct prejudicial to the administration of justice which may bring the judicial office into
21 disrepute, or improper action within the meaning of Article VI, section 18, of the California
22 Constitution.

23 2. At all times during his tenure in office, Judge Heene has attempted to act to the best
24 of his ability in a manner consistent with the proper and efficient administration of justice and in a
25 manner which is fair, non-prejudicial, and responsible to all litigants, to the people in San
26 Bernardino County, and to the people of the State of California.

27 **COUNT ONE**

28 3. Judge Heene presided over a preliminary hearing in *People v. Fullerton*, San
Bernardino County Municipal Court Case No. FCH-01977, on July 30, 1996. The case involved an
allegation of rape against the defendant.

1 4. The Commission's allegation that the alleged victim "testified inconsistently with
2 what she had told police" is true only in part. The phrase is not completely accurate in that it
3 seriously understates what occurred. The alleged victim undisputedly lied in this case. The only
4 question was, when did she lie? Under penalty of perjury during her trial testimony in Judge
5 Heene's courtroom, she stated that she lied by filing a false charge of rape against the defendant. If
6 it is true that the charge she filed was false, a gross injustice was done to the defendant. Under such
7 circumstances, he would have been falsely branded as a "rape defendant" and would have been
8 incarcerated (for some 18 days) before the preliminary hearing for a crime he did not commit. Plus,
9 he would have been in jeopardy of being convicted as a rapist, imprisoned, and branded as a sex-
10 offender upon release, if the alleged victim did not recant her false allegations. It appears from the
11 record that the only evidence against the defendant was the victim's report to police and others.

12 5. The alleged victim's court testimony under penalty of perjury went beyond just her
13 contention that she filed a false report of rape. She also testified that police had put falsehoods in
14 their reports regarding things the alleged victim supposedly said during interviews. Her trial
15 testimony in effect claimed that the police had lied and conspired to lie against the defendant.

16 6. The prosecutor in the case and a testifying police detective expressed opinions in the
17 hearing that the alleged victim was lying on the stand out of concern for the safety of her family and
18 possibly herself. The alleged victim denied this under oath. However, even if true that perjured
19 testimony was being given for reasons of safety, it was perjured testimony nevertheless — a felony.
20 Perhaps the worst part is that if the alleged victim's court testimony was a lie, then the charged
21 defendant would not only go unpunished for a serious felony, but would be free out in the
22 community, putting other women at serious risk.

23 7. The alleged victim was represented by an attorney at the hearing. When Judge Heene
24 recognized initially that the witness was beginning to recant or deny making an allegation against the
25 defendant, Judge Heene took precautions to protect the alleged victim. He summoned counsel to the
26 bench to discuss the matter and then had the following discussion with the alleged victim on the
27 record:

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THE COURT: Ms. Doe, it is very important that at this point in time that we understand two things about your testimony. First off, everybody in America has the right to remain silent, to say nothing, to do nothing. Do you understand that right?

THE WITNESS: Yes.

THE COURT: You cannot be required, okay, to testify against yourself. Do you understand that?

THE WITNESS: Yes.

THE COURT: You further have a right, ma'am, to understand that filing of a false police report is a crime in this State. Do you understand that?

THE WITNESS: Yes.

THE COURT: Further, if you are up here testifying and if you should be for some reason not telling the truth, then someone could file against you, ma'am, for something called perjury. Do you understand what that is?

THE WITNESS: Yes.

THE COURT: That is not telling the truth. Now I understand that you have a gentlemen with you today. Is he your attorney?

THE WITNESS: Yes he is.

THE COURT: Okay. Sir, what is your name?

MR. TAYLOR: Glen Taylor, your honor.

THE COURT: Mr. Taylor, have you been here before?

THE WITNESS: Yes.

THE COURT: Have you advised your client with regard to the right to remain silent?

THE WITNESS: Yes, I have.

1 THE COURT: And you further advised her of the right to -- with her
2 duty to tell the truth in this matter?

3 THE WITNESS: That's correct, your Honor.

4 THE COURT: Then based on those admonitions, ma'am, I'm going to
5 let the questioning. Sir, thank you very much, sir.

6 8. Upon the conclusion of the witness' testimony, Judge Heene announced that she was
7 not allowed to leave and ordered the bailiff to take her into custody, to set bail at \$25,000, and he
8 asked that charges be filed based on the fact that the witness had admitted in court to a crime.

9 9. The prosecutor then asked for a recess before the witness was taken into custody.
10 Judge Heene declined this request, but consented to the prosecutor's second request moments later
11 for a recess to discuss the matter further. The trial transcript infers that the witness was "in custody"
12 only for about five minutes until the hearing continued. Judge Heene wanted to discuss the matter in
13 open court; others complained that the preliminary hearing was not concluded and must continue.
14 The problem for Judge Heene was that all but the testifying witnesses had to be excluded from the
15 courtroom during the preliminary hearing — Judge Heene did not want the witness in question going
16 anywhere until the question of arrest was resolved, and that question was not resolved at that point.

17 10. During the hearing, there was a brief discussion between Judge Heene and Deputy
18 District Attorney Hansen. Mr. Hansen "expressed concerns about taking somebody into custody."
19 He told Judge Heene that he, in essence, had performed a citizen's arrest of the witness. Judge
20 Heene denied that, explaining that she was not free to leave because she had admitted to a crime, but
21 also that she could not stay in the preliminary hearing because "the courtroom is closed to witnesses"
22 except during their testimony. Mr. Hansen said that he had never seen a witness taken into custody
23 during a preliminary hearing before — "subject to the determination by the District Attorney's
24 Office whether a crime has been committed." The Commission's charge — that the District
25 Attorney's Office had not determined whether a crime had been committed in *this* case — is not
26 completely accurate, as Mr. Hansen did not directly address that point with reference to the alleged
27 victim.

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1 10. The problem was resolved when the witness' attorney agreed to watch her outside of
2 the courtroom until the preliminary hearing had been concluded, after which the new problem was
3 addressed. Immediately, the witness was released from the Marshal's custody. The witness was
4 never sent to jail.

5 11. After the alleged victim's release from her brief custody, she stayed at the courthouse
6 through her attorney's stipulation with the Court that she would do so. There then was a testimony
7 from one witness in the preliminary hearing, a lunch break, and then the alleged victim was brought
8 back before Judge Heene. Judge Heene ordered a transcript of the hearing to be reviewed by the
9 District Attorney's Office to see if charges should be filed. He announced an intention to order her
10 to appear in court again, but never actually issued that order in light of the prosecutor's
11 representation that, "I will assure that the report in conjunction with the transcript will thoroughly be
12 reviewed by the District Attorney's Office to see whether or not criminal charges should be filed."

13 12. Judge Heene told the alleged victim that she was "free to go . . . without any further
14 proceedings whatsoever."

15 13. Judge Heene had the power to order detention of the witness pursuant to Penal Code §
16 838:

17 MAGISTRATES MAY ORDER ARREST. A magistrate may orally order a
18 peace officer or private person to arrest any one committing or
19 attempting to commit a public offense in the presence of such a
20 magistrate.

21 14. The only limit on Section 838 is that the judge must observe a public offense being
22 committed. Judge Heene saw such an offense being committed — either admission to the filing of a
23 false report to police or perjury. Judge Heene had the authority to detain under a direct contempt
24 order (Code Civ. Proc. § 1211), but chose not to do so. Instead, Judge Heene used his lawful
25 authority under Section 838. Accordingly, Judge Heene denies that he improperly ordered the
26 witness into custody and violated ethical canons by doing so. To question Judge Heene's actions in
27 this regard unlawfully invades judicial independence.

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1 that she had completed half of her community service hours but needed an extension of time to
2 complete the rest. (Presumably, she had completed her 10 days of jail time.) She was given an
3 extension until December 13, 1997. December 13th came and went with no further appearances. On
4 December 30, 1997, Ms. Lopez filed a belated request for another extension. The request was sent
5 to Judge Heene for a hearing on January 8, 1998.

6 25. Judge Heene was faced with a defendant who had previously agreed to and had
7 served 10 days in actual custody despite being a mother. Judge Heene did not order the first
8 incarceration. Only half of the defendant's community service obligation had been performed
9 despite over a year to meet that commitment -- twice the normal time.

10 26. The transcript excerpt from January 8th hearing (quoted in the Notice of Formal
11 Proceedings) appears to be accurate.

12 27. The Notice of Formal Proceedings does not allege that anything is relevant in this
13 judicial misconduct claim about Ms. Lopez' claimed status as a woman who had just given birth.
14 The Notice does not allege that Ms. Lopez made truthful representations about that situation.
15 Accordingly, this Answer does not address those particular matters.

16 28. The Notice simply alleges that Judge Heene "failed to give the defendant proper
17 notice that [he was] conducting a violation of probation hearing" and that he "sentenced the
18 defendant to jail without affording due process." Under Commission Rule 119(c)(3), Judge Heene
19 does not at this time have sufficient information to admit or deny the Commission's legal allegation
20 in this regard, and on that basis denies it. The Notice is the first time Judge Heene and his counsel
21 have been made aware of such a legal contention by the Commission. (See First Affirmative
22 Defense below.) A reasonable inquiry has been made into the validity of the legal claim, yet we
23 conclude that full discovery is needed before admission or denial of that contention is possible.

24 29. If Judge Heene is determined to have committed a procedural error regarding the
25 notice of a violation of probation hearing or sentencing, his judicial act would have involved no bias
26 nor bad faith against the defendant, and thus, a conclusion of judicial misconduct is prohibited by
27 law.

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COUNT FIVE

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2 30. The factual allegations of this count are true. Judge Heene issued a citation regarding
3 the contempt order. As stated in that document, the juror was assigned to serve on a criminal matter,
4 *People v. Hillman*, MVA 01909. The jury was given its final charge on Friday, January 10, 1998.
5 They retired to deliberate at 2:00 p.m., and were discharged at 4:30 p.m. without reaching a verdict.
6 They were ordered to return on Monday, January 12, 1998, at 1:30 p.m. to continue deliberations.

7 31. The juror in question knew he was to return at 1:30 p.m. on January 12th. He called
8 Judge Heene's bailiff at 1:30 p.m., told the bailiff he was working in Victorville, and stated he could
9 not be in court for another hour and a half. The bailiff instructed him to come to court immediately.
10 Judge Heene personally observed the juror's failure to appear and had to discuss with the attorneys
11 in the case how to proceed. The attorneys stipulated to allow the alternate juror take the missing
12 juror's place and began deliberations anew. Judge Heene accepted the stipulation.

13 32. The jury returned its verdict at approximately 3:50 p.m. that day. The juror in
14 question arrived at court at about 4:00 p.m. on that day. Judge Heene researched his authority to
15 issue a direct contempt order under Code Civ. Proc. § 1211. He held a hearing on the matter on the
16 record and a transcript was generated. The juror in question explained that he thought he could
17 complete his work assignment and be at court by 1:30 p.m., but miscalculated due to an
18 overabundance of work. He did not dispute knowing of when he had been ordered to return. Judge
19 Heene found the juror to be in contempt of court and remanded him into custody.

20 33. Code Civ. Proc. § 1211 provides in part:

21 When a contempt is committed in the immediate view and presence of
22 the court, or of the judge in chambers, it may be punished *summarily*;
23 for which order must be made, reciting the facts as occurring in such
24 immediate view and presence, adjudicating that the person proceeded
25 against is thereby guilty of contempt and that he be punished as therein
26 prescribed. [Emphasis added.]

1 judicial misconduct. (*Spruance v. Commission on Judicial Qualifications* (1975) 13 Cal.3d 778,
2 799.) Canon 3C(4) expressly states, “[a] judge shall not make unnecessary court appointments.”
3 *Spruance* also recognizes that the *court* makes the final determination whether the defendant is
4 financially qualified for representation at county expense. (*Id.*)

5 46. Mr. Howell was arraigned for misdemeanor vandalism on February 2, 1998. A “not
6 guilty” plea was entered. Judge Heene asked Mr. Howell if he was employed. He responded that he
7 was. Judge Heene asked how much he made and Mr. Howell said he made \$14/hour. On that basis,
8 Judge Heene determined Mr. Howell did not qualify for a public defender. This determination has
9 not been challenged by the Commission in the Notice.

10 47. On February 17, 1998, Mr. Howell appeared again before Judge Heene. He again
11 asked Mr. Howell about his employment status. At that time, he was still employed. He speculated
12 that he was about to be terminated, but that had not happened yet. Judge Heene asked him why he
13 had not gotten an attorney yet and he replied, “I was planning on defending myself, but I decided to
14 go ahead and get a Public Defender if I can.” Yet Judge Heene again, based on the facts before him,
15 made a determination that Mr. Howell did not qualify for a Public Defender. Mr. Howell never tried
16 to submit any type of financial statement or evidence as to his ability to pay. He was still employed
17 at the time at a job that grossed more than an amount previously held in another case to be enough to
18 allow engagement of a private attorney. (*People v. Longwith* (1981) 125 Cal.App.3d 400, 411.)
19 Further, a non-indigent adult has no right to appointed counsel in a criminal case. (*Id.*, 125
20 Cal.App.3d at 410.) *Longwith* also affirmed that a trial judge is in the best position to determine
21 ability to pay.

22 48. Mr. Howell next appeared on March 24, 1998. (Exh. 10, pp. 5-12.) His first request
23 was not for an appointed lawyer, but for dismissal of his case. Judge Heene again asked Mr. Howell
24 if he was representing himself and Mr. Howell replied he was. Mr. Howell apparently knew in
25 general of rights regarding appointed counsel at that time, but made no request for legal
26 representation. The hearing ended, but then resumed a short time later.

1 he did so in this case. Yet, the transcript of the hearing, like in *Anderson*, does not reflect that those
2 advisements were given. If this defendant did not receive a proper advisement of rights, this also
3 was wrong.

4 54. If such a wrong occurred, we contend that it was due to mere negligence on Judge
5 Heene's part and does not constitute a basis for judicial discipline.

6 **FIRST AFFIRMATIVE DEFENSE**

7 **(Lack of Due Process Regarding Commission Investigation and Charging)**

8 55. Judge Heene asserts that the Commission has violated its own procedural rules and
9 Judge Heene's due process rights regarding the preliminary investigation of this matter and the
10 issuance of the Notice of Formal Proceedings. This claim includes, but is not limited to: (1)
11 informing Judge Heene that it was investigating *People v. Lopez* out of a concern that Judge Heene
12 was harsh and impartial in his treatment of the defendant, obtaining a response from Judge Heene
13 concerning the claimed "impartiality," and then issuing a charge related to *Lopez* not based on
14 "impartiality" but rather on lack of proper legal notice of the hearing; and (2) informing Judge Heene
15 that it was investigating *People v. Hellman* out of a concern that Judge Heene was harsh and
16 impartial in his treatment of the defendant and "failed to follow proper contempt proceedings,"
17 obtaining a response from Judge Heene concerning the claimed "impartiality" and conduct in the
18 proceedings, and then issuing a charge related to *Hellman* not based on "impartiality" but rather on
19 lack of proper legal notice of the hearing.

20 **SECOND AFFIRMATIVE DEFENSE**

21 **(Lack of Subject Matter Jurisdiction)**

22 56. Judge Heene asserts the Commission lacks subject matter jurisdiction to bring all or
23 some of the Counts or their sub-parts, as such concern matters of pure legal error or of purely
24 administrative matters exclusively reserved for the judicial branch of State government.

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1 **THIRD AFFIRMATIVE DEFENSE**

2 **(Failure to Allege Charges Involving Violations of Judicial Ethics)**

3 57. Judge Heene alleges that the charges brought against him, even if proven to be
4 factually correct, fail to allege violations of the Code of Judicial Ethics, California statutes, or
5 California constitutional provisions. As such, this inquiry constitutes an unlawful inquiry.

6 **FOURTH AFFIRMATIVE DEFENSE**

7 **(Vagueness of Charges)**

8 58. Judge Heene alleges that some or all of the charges or their sub-parts are vague to the
9 point of denying Judge Heene the opportunity to adequately defend against the charges. Moreover,
10 no pleading vehicle exists whereby Judge Heene may move for a more definite statement. This
11 violates Judge Heene's due process rights.

12 **FIFTH AFFIRMATIVE DEFENSE**

13 **(Violation of Due Process)**

14 59. Judge Heene alleges that the Commission's procedure whereby it investigates the
15 charges on its own motion, drafts the charges against the judge, determines if evidence supports the
16 charge, prosecutes the charge, and imposes discipline on the judge with the judge being given no
17 right of mandatory appellate review, violates federal and State due process guarantees. Judge Heene
18 furthers asserts that ex parte communications between the Examiners and the Commission and/or its
19 staff violate the investigated judge's due process rights. Judge Heene believes and thereon alleges
20 that a material witness in this case, a member of the Commission staff, has given testimony to the
21 Commission in secret, that not all aspects of this testimony have been produced to Judge Heene, and
22 that the fact of this testimony violates due process. Judge Heene further asserts that the
23 Commission's act of withholding any portion of its file on the investigated judge denies the judge
24 with an opportunity to fully defend against the charges and, accordingly, violates that judge's due
25 process rights. Judge Heene asserts that such denial of his constitutional due process rights is being
26 knowingly and willfully undertaken by the Commission, and not committed on the basis of mere
27 negligence.

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SIXTH AFFIRMATIVE DEFENSE

(Improper Denial of Discovery Rights)

60. Judge Heene alleges that the rules enacted by the Commission governing discovery in a judicial misconduct case are legally insufficient and discriminatory. He alleges the discovery procedures that are allowed are insufficient to permit an adequate opportunity to defend against the charges. He alleges such rules that give the Commission a "work product" privilege not available to the judge violate the equal protection clause of federal and State constitutions. He alleges that a listing of potential witnesses not interviewed during the investigation violates due process.

SEVENTH AFFIRMATIVE DEFENSE

(Violation of Separation of Powers Doctrine and "The Principle of Check")

61. Judge Heene alleges that rules giving the Commission (with its non-judge, non-lawyer majority) the power to discipline a judge, with the judge having no right of mandatory appellate review, violate the State separation of powers doctrine and the "principle of check."

EIGHTH AFFIRMATIVE DEFENSE

(Violation of State and Federal Workplace Statutes)

62. Judge Heene alleges that these proceedings, in whole or in part, violate his rights under state and federal workplace statutes including, but not limited to, Cal. Const., Art. I, § 8; Gov. Code §§ 12900, *et seq.*; and 42 U.S.C. § 12101, *et seq.*

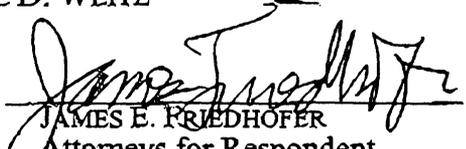
NINTH AFFIRMATIVE DEFENSE

(Mitigation)

63. Judge Heene alleges that other matters not pled as facts in the Notice of Formal Proceedings render the charges invalid and/or serve to mitigate against any act which could otherwise be characterized as judicial misconduct.

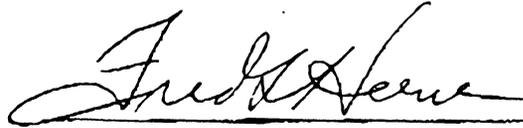
Dated: April 28, 1999

LEWIS, D'AMATO, BRISBOIS & BISGAARD LLP
JAMES E. FRIEDHOFER
ERIC D. WEITZ

By: 
JAMES E. FRIEDHOFER
Attorneys for Respondent,
THE HONORABLE FRED L. HEENE, JR.

VERIFICATION

I, Fred L. Heene, Jr., have read the foregoing Answer to Notice of Formal Proceedings in Inquiry No. 153 and know its content. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed at Chino Hills, California on April 27, 1999.

A handwritten signature in cursive script, reading "Fred L. Heene, Jr.", written over a horizontal line.

Fred L. Heene, Jr.
Judge of the Municipal Court

PROOF OF SERVICE

CASE NAME: INQUIRY CONCERNING JUDGE FRED L. HEENE, JR., NO. 153
CASE NUMBER: N/A
COURT: BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

I, the undersigned, am a citizen of the United States, over the age of 18 years, and not a party to or interested in the within action. I am an employee of the Law Offices of Lewis, D'Amato, Brisbois & Bisgaard LLP and my business address is 550 West "C" Street, Suite 800, San Diego, California 92101.

On April 28, 1999, I served the following document(s):

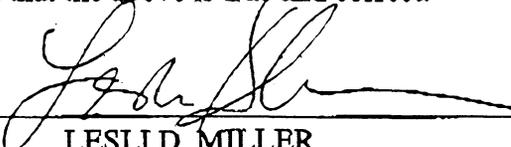
VERIFIED ANSWER TO NOTICE OF FORMAL PROCEEDINGS

addressed to:

Richard G.R. Schickele, Esq. *
COMMISSION ON JUDICIAL PERFORMANCE
455 Golden Gate Avenue, Suite 14400
San Francisco, CA 94102

- (BY MAIL)** I placed the original or a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid. I deposited said envelope in the United States Mail in the City and County of San Diego, California. I am readily familiar with our law firm's practice for collection and processing of correspondence for mailing with the United States Postal Service, that this mailing will be deposited with the United States Postal Service on this date in the ordinary course of business and that I sealed and placed each envelope for collection and mailing on this date following ordinary business practices.
- (BY FEDERAL EXPRESS)** I sent the original or a true copy thereof enclosed in a sealed envelope to be delivered to Federal Express for overnight service to the office(s) of the addressee(s).
- (BY TELECOPIER)** In addition to service by mail as set forth above, the counsel by whose name an asterisk is affixed on the attached service list were also forwarded a copy of said document(s) by telecopier.

Executed on April 28, 1999, at San Diego, California. I declare under penalty of perjury under the laws of the State of California that the above is true and correct.



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April 28, 1999

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JUDICIAL PERFORMANCE

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COMPANY: COMMISSION ON JUDICIAL PERFORMANCE

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COMMENTS: Hon. Fred L. Heene, Jr.

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