

Oct. 3, 2023

Queasy as ABC (Appellate Bias Committee)

Raising issues of judicial or court bias is understandably uncomfortable, especially for those who have to continue to live and work in the appellate courts. But that's no reason to keep quiet.



BENJAMIN G. SHATZ

Partner, Manatt, Phelps & Phillips LLP

Appellate Law (Certified), Litigation

Email: bshatz@manatt.com

Benjamin is a certified specialist in appellate law who co-chairs the Appellate Practice Group at Manatt in the firm's Los Angeles office. Exceptionally Appealing appears the first Tuesday of the month.

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Americans seem a bit uneasy these days, unhappy with many things, including their courts. Law.com recently published an article noting how judicial conduct bodies across the country received record numbers of misconduct allegations against judges in 2022. Furman, "Judicial Conduct Complaints Spiked Across the Country in 2022" (Law.com May 22, 2023). In addition to intense scrutiny of the federal courts, confidence in state courts is down, and bias complaints against judges are up. *Id.* In California, the Commission on Judicial Performance 2022 Annual Report noted over 1,200 complaints against judges last year. The top three types of conduct resulting in judicial discipline were demeanor/decorum issues; bias or appearance of bias (not directed toward a particular class); and decisional delay. Number ten on the list was bias or appearance of bias directed toward a particular class.

Appellate lawyers will be especially interested in pages 25-27 of the report, regarding the public admonishment of now-retired Administrative Presiding Justice Vance Raye of the Third District Court of Appeal for "delay in deciding approximately 200 appellate matters over a 10-year period" and "failing to properly exercise his authority as administrative presiding justice to prevent chronic delays in cases assigned to other justices on the court." As a result of Jon Eisenberg's charges of delay in the Third District, the Judicial Council adopted a new rule (the "Eisenberg Rule") effective Sept. 1, 2023, that is designed to promote the efficient, effective, and proper administration of the Courts of Appeal by increasing the accountability of administrative presiding justices and presiding justices. See Eisenberg, "Why I did it the way I did it: Going public on the Third District Court of Appeal," 36:2 Cal. Litigation 8-11 (Sept. 2023).

This new rule, California Rules of Court, rule 10.1014, allows anyone to submit a "contention" (anonymously, if submitted by snail mail to the Judicial Council), alleging that an APJ or PJ "has not properly addressed or managed an important matter related to the administration of a Court of Appeal or a division of a Court of Appeal." The group of six APJs (or five, if the contention is directed to an APJ) will then "review" that "contention" and "may take appropriate remedial action."

The Eisenberg Rule thus has at least created a procedure to raise and address certain appellate-court management problems. But what about just regular allegations of bias in the courts (and appellate courts in particular)?

Some snippets of history help set the stage. In 1982, the New Jersey Supreme Court formed a Gender Bias Task Force. Over time, 40 other states formed similar task forces. In 1987, the Judicial Council adopted California Standards of Judicial Administration section 1, stating that judges have a duty to ensure that courtroom proceedings are conducted fairly and impartially, to refrain from any conduct (and prohibit others in the courtroom from engaging in conduct) that exhibits bias, and to ensure that all decisions are free of bias. In 1987 and 1988, two successive Chief Justices (Bird and Lucas) appointed Judicial Council Advisory Committees on Gender Bias in the Courts. This accorded with a resolution by the Conference of Chief Justices in 1988 urging all chief

justices to establish task forces devoted to studying "(1) gender bias in the court system and (2) minority concerns as they related to the judicial system."

In 1992, the California Judges Association adopted canons imposing affirmative duties on judges to perform all judicial duties without bias or prejudice and to require those under a judge's direction to similarly refrain from such conduct. The following year, the Conference of Chief Justices urged further efforts toward equal justice by "establishing task forces to remedy any discrimination," and the Commission on the Future of the California Courts designated gender fairness as a high priority. Also in 1993, the Judicial Council amended Standard §1 to recommend that courts create local bias committees and adopt informal complaint procedures.

In 1997, the Judicial Council amended Standard §1 to specify that bias is prohibited on the basis of "disability, gender, race, religion, ethnicity, and sexual orientation." A decade later, Standard §1 was renumbered as Standard §10.20.

Jumping to 2020, Justice Jeffrey Johnson of the Second District was removed for misconduct based on disrespectful treatment of women, and the Supreme Court issued a Statement on Equality and Inclusion in the wake of George Floyd's murder. There were also a number of reports and articles pointing out that very few courts were actually complying with §10.20. E.g., Mach, "22 Counties Not Complying With Bias Committee Recommendation," Daily Journal July 6, 2020; Mach, "Bias Committees Are Enigmas, Attorneys Say," Daily Journal Aug. 3, 2020; Mach, "Court Leaders Developing Judicial Guidelines," Daily Journal Sept. 1, 2020.

In November 2020, the Chief Justice appointed a Work Group to Enhance Administrative Standards Addressing Bias in Court Proceedings to identify improvements and amendments for §10.20. The following year, that Work Group issued a report with many recommendations, e.g., to emphasize that courts should "prevent" bias, rather than simply "prohibit" bias; that the Standard should be broadened to apply to all court interactions (not just what happens inside a courtroom); to update the list of protected classifications; to define and outline the roles for local or regional bias committees; and to ensure that court users can access information about how they can submit bias complaints about court employees and judicial officers.

With that history, where are we today? In March of this year, Chief Justice Patricia Guerrero appointed a Supreme Court and Courts of Appeal Bias Prevention Committee, chaired by Supreme Court Justice Martin Jenkins, and composed of justices from each appellate district, a court administrator, and appellate attorneys from around the state covering a variety of practice areas. On July 27, the website for each district posted the name of its representative and the Committee's full roster (i.e., Justices Fujisaki, Bendix, Bouleware Eurie, Do, Peña, and Lie). The Committee's mission statement provides: "Pursuant to Standards of Judicial Administration, standard 10.20, the Supreme Court and Courts of Appeal Bias Prevention Committee aims to support the integrity and

impartiality of the judicial system and promote an appellate court environment free of bias and the appearance of bias."

The committee will focus on how bias manifests in various court interactions, with a goal of identifying practical objectives and programs aimed at the prevention of bias in the appellate courts. To do this, however, the committee needs information and ideas. In a very real sense, every appellate lawyer in the state is part of this journey toward making the appellate courts as fair and unbiased as possible. Raising issues of judicial or court bias is understandably uncomfortable, especially for those who have to continue to live and work in the appellate courts. But that's no reason to keep quiet. If you have something to share, reach out to a Committee member in any way that seems appropriate (including an anonymous letter). It's important--and easy, so don't feel queasy. The Committee wants to hear what you have to say.

Benjamin G. Shatz *co-leads the Appellate practice at Manatt, Phelps & Phillips, LLP in Los Angeles. He serves on the Supreme Court and Courts of Appeal Bias Prevention Committee. Exceptionally Appealing appears the first Tuesday of the month.*