

Judges And Judiciary, California Supreme Court, California Courts Of Appeal
Jun. 4, 2019

Supreme removal

Here at Exceptionally Appealing, we assume that the appellate bar is a cut above the ordinary, and therefore far less likely to become embroiled in State Bar disciplinary proceedings. Infamous anecdotes to the contrary, we will persist in this belief simply because we choose to believe it and because it cannot be disproven: The attorney discipline records are not categorized by practice area to enable searches for appellate lawyer tragedies.



BENJAMIN G. SHATZ

Manatt, Phelps & Phillips LLP

Benjamin is a certified specialist in appellate law who co-chairs the Appellate Practice Group at Manatt in the firm's Los Angeles office.



Shutterstock

EXCEPTIONALLY APPEALING

Let's be honest and admit that we love train wrecks. It's simply antithetical to human nature to turn away from a disaster. Thus, for lawyers, few calamities are more irresistible than a good tale about a faceplanting attorney invoking the ire of the bench and incurring humiliating sanctions. This same schadenfreude compels us to read the discipline reports. Practice long enough and within that cavalcade of catastrophe you'll see names you know: law school classmates, former colleagues, opposing counsel, and acquaintances of all stripes. Of course here at Exceptionally Appealing, we assume that the appellate bar is a cut above the ordinary, and therefore far less likely to become embroiled in State Bar disciplinary proceedings. Infamous anecdotes to the contrary, we will persist in this belief simply because we choose to believe it and because it cannot be disproven: The attorney discipline records are not categorized by practice area to enable searches for appellate lawyer tragedies.

When it comes to judicial tribulations, however, there is a way to separate the justices from the judges. Let's begin with the assumption that California's appellate bench is composed of outstanding justices drawn from the ranks of outstanding lawyers and judges. Focusing on our highest court, the justices of the California Supreme Court should be, and are, the *crème de la crème*. These are not the sorts of folks who get themselves into trouble. At least not in the modern age. Back in the days of the Wild West, the fourth chief justice of California, David S. Terry, engaged in mayhem that presumably would have merited some form of discipline. For instance, in 1859 he killed a United States senator in a duel. In 1889, Terry slapped United States Supreme Court Justice Stephen J. Field (formerly the fifth chief justice of California) in the face, provoking Field's bodyguard to shoot Terry dead. (How's *that* for an anti-slap defense?) This incident gave rise to *In re Neagle*, 135 U.S. 1 (1890), holding that the U.S. attorney general could appoint U.S. marshals as bodyguards to protect Supreme Court justices, and that such appointments superseded state law regarding the conduct of those bodyguards. (The original doctrine of Field preemption?) So much for rollicking fun in the old frontier.

Skipping ahead to more contemporary times, 1960 saw the establishment of California's [Commission on Judicial Performance](#) (formerly the Commission on Judicial Qualifications), an independent state agency within the judicial branch, responsible for investigating judicial misconduct and judicial incapacity, and for disciplining judges. The CJP's mandate is to protect the public, enforce rigorous standards of judicial conduct and maintain public confidence in the integrity and independence of the judicial system. The CJP has constitutional authority to retire, remove, censure or admonish a judge, and to disqualify a judge during the pendency of formal proceedings, subject to review by the California Supreme Court. Cal. Const., art. VI, Sections 8, 18(d); *see also* Govt. Code Sections 68701-68756; *and see* [Eicherly v. CJP](#), A151723 (April 10, 2019) (recent case describing the CJP and its functions).

The CJP has jurisdiction over all judges of California's superior courts and all justices of the Courts of Appeal and Supreme Court. (The commission also has jurisdiction over former judges for conduct prior to retirement or resignation.) The CJP has [11 members](#): one Court of Appeal justice (currently Justice William Dato) and two superior court judges appointed by the Supreme Court; two attorneys appointed by the governor; and six lay citizens, two appointed by the governor, two appointed by the Senate Committee on Rules, and two appointed by the speaker of the Assembly.

In accord with its public service mission, the CJP has a robust website containing a wealth of information and statistical data. Of particular interest to the appellate bar is that its online [Public Decisions Database](#) allows searches targeted to "Court Level," covering all five historical and existing judicial strata in California, from the obsolete Justice and Municipal Courts, through the Superior Court, Court of Appeal, and Supreme Court. Running such a search at the Supreme Court level returns only one result, dated May 2, 1977. Over 40 years ago, something truly exceptional in the appellate realm happened, and it happened to a sitting Supreme Court justice named Marshall McComb. Old-timers know where this is heading. But much of the practicing bar was licensed (or born!) long after what [Wikipedia](#) calls "a rather sad end" to a "distinguished judicial career." See State Bar [Licensee Demographics](#) (showing the average age of an active California lawyer is 49); and see State Bar 2017 [demographic survey](#) (noting that 12.3 percent of practitioners identify "appellate" as an aspect of their practice).

Marshall Francis McComb was born in 1894. He graduated from Stanford in 1917, served in the Navy during WWI, and graduated from Yale Law School in 1919. Admitted to the California Bar in 1920, he practiced law in Los Angeles (representing the Hearst Corporation) and taught political science at UCLA from 1920 to 1927, when he was appointed to the Los Angeles County Superior Court. He had an interest in judicial administration, was chosen as presiding judge of the court, and developed the Master Calendar System, credited with effectively addressing the growing backlog of civil litigation. In 1937 he was elevated to the [2nd District Court of Appeal](#), Division 2. He taught at UCLA, USC, Southwestern and Loyola law schools. Based on his stellar credentials (and having been a school chum of Gov. Goodwin Knight), he was appointed to the California Supreme Court in 1955.

On the Supreme Court he was known for writing very short decisions and for dissenting. He wrote more dissenting opinions (339) than majority opinions (314) and dissented from many classic decisions including *Dillon v. Legg*, 68 Cal. 2d 728 (1968) (creating tort of negligent infliction of emotional distress), *People v. Anderson*, 6 Cal. 3d 628 (1972) (death penalty is unconstitutional), and *Tarasoff v. U.C. Regents*, 17 Cal. 3d 425 (1976) (creating a duty to protect intended victims). Justice McComb was something of an arch conservative who rarely asked questions at oral argument. See Roger M. Grace, "Justice

Marshall F. McComb: A Tribute," 5 Sw. U. L. Rev. 221, 223, 225-26 (1973); see [Wikipedia's photo](#) of Justice McComb swearing in Ronald Reagan as governor in 1967.

Over the decades, however, Justice McComb began acting inappropriately. Allegations were brought [charging](#) him with falling asleep on the bench, reading a magazine on the bench during oral argument, failing to prepare for and participate in the Supreme Court's weekly conferences, allowing his chambers staff to direct his voting and prepare his opinions, publicly brandishing a riot stick, and using state vehicles and personnel for personal uses.

In 1976 the CJP instituted formal proceedings to inquire into his ability to perform his duties as a justice. Justice McComb did not go gentle into that good night, refusing to cooperate with the investigation. He was found guilty of contempt of court for refusing to be deposed. *McComb v. Superior Court (CJP)*, 68 Cal. App. 3d 89 (1977).

In 1977 the CJP submitted its findings to the Supreme Court, recommending that Justice McComb -- who had served as a judge for over 50 years and was 82 years old -- should be retired or removed from office because his senility was detrimental to the performance of his judicial duties. The CJP found that he had willfully and persistently failed to perform his judicial duties and had engaged in conduct that was prejudicial to the administration of justice and brought the judicial office into disrepute. Justice McComb challenged the CJP's decision, so a special tribunal of appellate court justices had to undertake an independent investigation of the evidence.

The Supreme Court confirmed that the "record establishes specific instances of bizarre behavior by Justice McComb which, if viewed in isolation, would support discipline," yet the court humanely exonerated him from charges of willful misconduct and disgracing his office, viewing his unusual conduct "as symptomatic" of his dementia. The court concurred in the CJP's finding that he was "suffering from a disability (chronic brain syndrome, senile dementia)" and therefore ordered his retirement. *McComb v. CJP*, 19 Cal. 3d Spec.Trib.Supp. 1, 564 P.2d 1, 138 Cal. Rptr. 459 (1977). Although the Supreme Court opinion graciously concluded that Justice McComb "shall be considered to have retired voluntarily," the CJP's website [characterizes](#) the "discipline/determination" to have been "involuntary retirement."

Four years after his forced removal from the Supreme Court, Justice McComb died at age 87. A memorial service for him appears at [38 Cal. 3d 981 \(1986\)](#). Naturally, all of the encomiums focused on his character and accomplishments. None mentioned the circumstances surrounding his retirement. Justice Mildred Lillie remarked that his

memory would "long live in the annals of California judicial history." Without doubt, his story is exceptional.