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OPINION	:	No. 81-109
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of	:	<u>MAY 8, 1981</u>
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The Commission on Judicial Performance has requested an opinion on the following question:

Does the Judicial Council have the authority to adopt a rule specifying that unless “substantial and serious new facts” are proved in formal proceedings, the Commission on Judicial Performance may not recommend the censure, retirement, or removal of a judge after the commission has issued a notice of intended private admonishment and the judge has demanded an appearance or hearing?

CONCLUSION

The Judicial Council has the authority to adopt a rule specifying that unless “substantial and serious new facts” are proved in formal proceedings, the Commission on Judicial Performance may not recommend the censure, retirement, or removal of a judge after the commission has issued a notice of intended private admonishment and the judge has demanded an appearance or hearing.

## ANALYSIS

The Judicial Council of California (hereafter “Council”) is required under the Constitution to adopt rules concerning the retirement, censure, removal, and admonishment of judges. Section 18 of article VI states:

“(a) A judge is disqualified from acting as a judge, without loss of salary, while there is pending (1) an indictment or an information charging the judge in the United States with a crime punishable as a felony under California or federal law, or (2) a recommendation to the Supreme Court by the Commission on Judicial Performance for removal or retirement of the judge.

“(b) On recommendation of the Commission on Judicial Performance or on its own motion, the Supreme Court may suspend a judge from office without salary when in the United States the judge pleads guilty or no contest or is found guilty of a crime punishable as a felony under California or federal law or of any other crime that involves moral turpitude under that law. If the conviction is reversed suspension terminates, and the judge shall be paid the salary for the judicial office held by the judge for the period of suspension. If the judge is suspended and the conviction becomes final the Supreme Court shall remove the judge from office.

“(c) *On recommendation of the Commission on Judicial Performance the Supreme Court may (1) retire a judge for disability that seriously interferes with the performance of the judge’s duties and is or is likely to become permanent, and (2) censure or remove a judge for action occurring not more than 6 years prior to the commencement of the judge’s current term that constitutes willful misconduct in office, persistent failure or inability to perform the judge’s duties, habitual intemperance in the use of intoxicants or drugs, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute. The commission may privately admonish a judge found to have engaged in an improper action or a dereliction of duty, subject to review in the Supreme Court in the manner provided for review of causes decided by a court of appeal.*

“(d) A judge retired by the Supreme Court shall be considered to have retired voluntarily. A judge removed by the Supreme Court is ineligible for judicial office and pending further order of the court is suspended from practicing law in this State.

“(e) A recommendation of the Commission on Judicial Performance for the censure, removal or retirement of a judge of the Supreme Court shall be determined by a tribunal of 7 court of appeal judges selected by lot.

“(f) *The Judicial Council shall make rules implementing this section and providing for confidentiality of proceedings.*” (Italics added.)

Pursuant to this constitutional mandate, the Council has adopted California Rules of Court, rules 901-922.<sup>1</sup> In essence, these rules provide for the Commission on Judicial Performance (hereafter “Commission”) to make a preliminary investigation (rule 904), institute formal proceedings (rule 905) where evidence is received (rule 909) and the judge has the right to be represented by counsel (rule 910), after which the Commission admonishes the judge or recommends to the Supreme Court the judge’s censure, removal or retirement. (Rule 917.) A private admonishment is reviewable by the Supreme Court if four justices thereof so order. (Rule 920.)

Two of the Council’s rules were recently amended, effective January 1, 1981, and merit full quotation for our analysis of the question presented. Rule 904 provides:

“(a) The Commission, upon receiving a verified statement, not obviously unfounded or frivolous, alleging facts indicating that a judge is guilty of willful misconduct in office, persistent failure or inability to perform his duties, habitual intemperance in the use of intoxicants or drugs, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute, or that he has a disability that seriously interferes with the performance of his duties and is or is likely to become permanent, or that he has engaged in an improper action or a dereliction of duty, shall make a preliminary investigation to determine whether formal proceedings should be instituted and a hearing held. The Commission without receiving a verified statement may make a preliminary Investigation on its own motion.

“(b) The judge shall be notified of the investigation, the nature of the charge, and the name of the person making the verified statement, if any, or that the investigation is on the Commission’s own motion, and shall be afforded reasonable opportunity in the course of the preliminary investigation to present such matters as he may choose. Such notice shall be given by prepaid certified or registered mail addressed to the judge at his chambers and at his last known residence.

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<sup>1</sup> All references hereafter to specific rules are to the California Rules of Court.

“(c) If the preliminary investigation does not disclose sufficient cause to warrant further proceedings, the judge shall be so notified.

“(d) *If the preliminary investigation discloses good cause, the Commission may issue a notice of intended private admonishment to the judge by certified or registered mail. The notice shall include a statement of facts found by the Commission and the reasons for the proposed admonishment. The notice shall also contain advice as to the judge’s right to an appearance before the Commission or a hearing, and the requirement of a hearing prior to seeking review of the action in the Supreme Court.*” (Italics added.)

Rule 904.5 states:

*“Within 15 days after mailing of a notice of an intended private admonishment the judge may request either an appearance before the Commission or a hearing by filing a written demand therefor with the Commission. Thereupon the Commission may make further preliminary investigation or may institute formal proceedings as provided in rule 905, but shall not recommend the censure, retirement or removal of the judge unless substantial and serious new facts to justify such a recommendation are proved in the formal proceedings.”* (Italics added.)

We are asked whether rule 904.5 conflicts with the constitutional powers of the Commission as contained in subdivision (c) of section 18 of article VI. Specifically, does the standard of “substantial and serious new facts”<sup>2</sup> contained in the rule conflict with the Commission’s authority to recommend to the Supreme Court the censure, retirement or removal of a judge? We conclude that promulgation of the rule meets the test of “implementing” the constitutional provisions regarding the Commission’s duties and hence comes within the rule-making authority of the Council.

The Constitution provides a sharing of responsibility between the Commission and Supreme Court for the disciplining of judges. While the Supreme Court imposes the actual sanctions, it may only act upon the recommendation of the Commission. (*McComb v. Commission on Judicial Performance* (1977) 19 Cal. 3d Spec. Trib. Supp. 1, 8; *Spruance v. Commission on Judicial Qualifications* (1975) 13 Cal. 3d 778, 785, fn. 5; *Geiler v. Commission on Judicial Qualifications* (1973) 10 Cal. 3d 270, 275, fn. 5, 276.)<sup>3</sup>

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<sup>2</sup> A consideration of what would constitute “substantial and serious new facts” is not before us.

<sup>3</sup> Judicial disciplinary proceedings are not criminal in nature, but rather are directed at

The Commission has four distinct duties with respect to the discipline of judges. It investigates the facts, makes determinations with regard to the facts, recommends the sanction, and acts in an adversary capacity once its recommendations go before the Supreme Court. (See *Spruance v. Commission on Judicial Qualification*, *supra*, 13 Cal. 3d 778, 785, fn. 5; *McCartney v. Commission on Judicial Qualification* (1974) 12 Cal. 3d 512, 519, fn. 5; *Geiler v. Commission on Judicial Qualifications*, *supra*, 10 Cal. 3d 270, 275, *McComb v. Superior Court* (1977) 68 Cal. App. 3d 89, 97.)

We believe that the performance of these functions can be said to be “implemented” by rule 904.5 as required by the Constitution. In any particular proceeding, the Commission may recommend censure, retirement, or removal of the judge as authorized by the Constitution. The Constitution specifies nothing more; no unlimited right is expressly given to the Commission in making its recommendations.

Additionally, the rule does not have any application unless the Commission itself has procedurally chosen to issue a notice of intended private admonishment prior to holding a formal hearing on the matter.

The obvious purpose of the rule is to allow a judge to contest a “preliminary investigation” admonishment without fear that he will be arbitrarily disciplined for seeking such review.<sup>4</sup> While the judge does not risk a greater sanction for requesting review, the Commission is not precluded from recommending a more severe penalty should the appropriate facts be discovered.

The rule thus serves as a procedural safeguard for judges facing disciplinary action.<sup>5</sup> Rules 908, 909, and 910 are examples of other such safeguards. Undoubtedly, the Council’s rules may afford judges more procedural protection than is constitutionally required. (See *McCartney v. Commission on Judicial Qualification*, *supra*, 12 Cal. 3d 512, 519.)

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protecting “the judicial system and the public which it serves.” (*McComb v. Commission on Judicial Performance*, *supra*, 19 Cal. 3d Spec. Trib. Supp. 1, 9.)

<sup>4</sup> A private admonishment serves to warn a judge concerning improper action or dereliction of duty without attaching public stigma. Asserting a right to a hearing should not convert a private matter into a public proceeding without some additional support therefor.

<sup>5</sup> As such, it has support from principles of double jeopardy under the Fifth Amendment. (See *People v. Collins* (1978) 21 Cal. 3d 208, 216–217, *People v. Schueren* (1973) 10 Cal. 3d 553, 560–561; *People v. Hood* (1969) 1 Cal. 3d 444, 459, *People v. Ali* (1967) 66 Cal. 2d 277, 281; *People v. Henderson* (1963) 60 Cal. 2d 284, 295–297.)

We find nothing in the rule that is arbitrary, capricious, or unreasonable. (See 41 Ops. Cal. Atty. Gen. 140, 145 (1963).)

Finally, we are mindful that we should harmonize constitutional provisions (*Board of Supervisors v. Lonergan* (1980) 27 Cal. 3d 855, 866; *Serrano v. Priest* (1971) 5 Cal. 3d 584, 596), and that each exercise of the Council's constitutional mandate should be upheld if possible. (See *Department of Corrections v. Workers' Camp. Appeals Bd.* (1979) 23 Cal. 3d 197, 207; *Associated Home Builders, etc., Inc. v. City of Livermore* (1976) 18 Cal. 3d 582, 596; see also 41 Ops. Cal. Atty. Gen. 140, 146 (1963).)

We therefore conclude that the Council has the constitutional authority to adopt a rule specifying that unless "substantial and serious new facts" are proved in formal proceedings, the Commission may not recommend the censure, retirement, or removal of a judge after the Commission has issued a notice of intended private admonishment and the judge has demanded an appearance or hearing.

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