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CHIN-LI MOU  
4141 Boneso Circle  
San Jose, CA 95134  
Plaintiff – Pro Se

FILED

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EDWARD LAWRENCE  
CLERK U.S. DISTRICT COURT  
SAN JOSE, CALIF.

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION**

CHIN-LI MOU,  
  
Plaintiff,  
  
vs.  
  
CITY OF SAN JOSE, et al.,  
  
Defendants.

) Case Number: C 07-5740 JF  
)  
) **PLAINTIFF'S REPLY TO DEFENDANT'S**  
) **MEMORANDUM OF POINTS AND**  
) **AUTHORITIES ON AWARD OF**  
) **COSTS**  
)  
) Honorable Judge Jeremy Fogel

**PROCEDURAL OVERVIEW**

Defendant City of San Jose ("Defendant") filed a bill of costs in the amount of \$1,029.90 against Plaintiff Chin-Li Mou ("Plaintiff"). On October 22, 2009, the Clerk of the Court taxed Plaintiff for the foregoing amount. On April 13, 2010, the Court overruled Plaintiff's objections to the bill of costs. However, Plaintiff sent the Court a letter on April 19, 2010, which the Court treated as a motion for reconsideration of the bill of costs, and ordered Plaintiff to appear for a Debtor's Examination. Plaintiff complied and a Debtor's Examination was held on September 1, 2010. Shortly after the debtor's examination, plaintiff filed another letter with the court, which was treated as a subsequent motion for reconsideration. Plaintiff filed the letter as a result of discovering case law relevant to her position, which is addressed herein. Thereafter the Court set a briefing schedule for the matter. On November 15, 2010 Defendant filed its memorandum of points and authorities. Plaintiff now files this reply brief and supporting declarations.

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## LEGAL STANDARD

Fed. R. Civ. P. 54(d)(1) provides that "costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs." "By its terms, the rule creates a presumption in favor of awarding costs to a prevailing party, but vests in the district court discretion to refuse to award costs." *Ass'n of Mexican-American Educators v. Cal.*, 231 F.3d 572, 591 (9th Cir. 2000). As addressed in this case, there are multiple factors for denying costs, including, but not limited to the following: (1) whether the losing party has limited financial resources; (2) whether an award of costs would chill future civil rights litigation; and (3) whether the prevailing party has engaged in misconduct *Id.* at 592. Moreover, the Ninth Circuit has ruled that the economic disparity between Plaintiff and Defendant is another relevant factor. *Id.* at 592.

Although the Defendant's brief focuses only Plaintiff's economic status, and more specifically, Plaintiff's failure to qualify as indigent, Plaintiff feels it is important to address the other factors, listed above, which are relevant to the denial of costs.

## DISCUSSION

### 1. Plaintiff's Limited Financial Resources

The court may deny costs when the non-prevailing party has limited financial resources. *National Org. for Women v. Bank of Cal.*, 680 F.2d 1291, 1294 (9th Cir. 1982). Additionally, the Ninth Circuit has found that "[d]istrict courts should consider the financial resources of the plaintiff and the amount of costs in civil rights cases." *Stanley v. Univ. of S. Cal.*, 178 F.3d 1069, 1079-80 (9th Cir. 1999). Furthermore, this case held that it is not necessary to find that a plaintiff is currently indigent in order to deny costs. *See Id.*

Plaintiff meets this standard because Plaintiff does not have the resources to pay for the costs claimed by Defendant. In Judge Fogel's order, dated April 26, 2010, he stated that "[t]he tax return appears to show that Plaintiff's income is insufficient to permit her to pay costs." Defendant responded by stating that Plaintiff owned a condominium. However, Defendant failed to cite any law disqualifying a person who owns a condominium but who otherwise has limited resources.

1 Even though Plaintiff owns a condominium, it is Plaintiff's only residence, the assets  
2 in the condominium cannot be easily liquidated and, given Plaintiff's current  
3 unemployed status, Plaintiff desperately relies on her residence. See Declaration of  
4 Chin-Li Mou in Support of Plaintiff's Motion to Deny Bill of Costs ("Mou Declaration"),  
5 Exhibit A, ¶ 4. Furthermore, Plaintiff's income level is less than \$10,000, which places  
6 her below the 100% poverty level. *Id.* at ¶ 5. Plaintiff has a limited budget because she  
7 does not have a job and has no monthly income. *Id.* at ¶ 5,8,9. Plaintiff's ex-husband  
8 has been helpful in paying her monthly expenses, including homeowners' association  
9 fees, property taxes, some food expenses, and books. *Id.* at 6,7; see also Declaration  
10 of Steven Yang in Support of Plaintiff's Motion to Deny Bill of Costs ("Yang Declaration"),  
11 Exhibit B, ¶ 2. Although she does own a condominium, it is of limited value in today's  
12 marketplace. As a result, if the court does not deny Defendant's bill of costs it will  
13 present a severe financial burden for Plaintiff.

14 Defendant unreasonably relies on an argument that Plaintiff lost a fee waiver request  
15 in an unrelated state court litigation matter before Superior Court Judge McBride, who  
16 was admonished by the California Commission on Judicial Performance and has  
17 arrested by police. See Exhibit C. When Judge McBride denied Plaintiff's fee waiver  
18 request he did so based on evidence of Plaintiff's monthly expenses, in an amount of  
19 \$1,500, without taking into account the fact that Plaintiff's ex-husband paid those  
20 expenses on her behalf. Mou Declaration, ¶ 6; Yang Declaration, ¶ 2. Although Plaintiff  
21 lost this one fee waiver, Plaintiff has been deemed eligible for fee waivers in other  
22 litigation. Mou Declaration, ¶ 10,11.

23 Finally, Defendant argues that "Courts have even found that it can be appropriate  
24 to award costs against indigent litigants who proceed in forma pauperis." City of San  
25 Jose's Memorandum of Points and Authorities on Award of Costs ("City of San Jose's  
26 Memorandum"), p. 3, ¶ 15-16. However, Defendant inappropriately relies on  
27 unpublished opinions, in violation of Fed. R. App. P. 32.1. Therefore, defendant's use of  
unpublished opinions is inappropriate and cannot be used to support defendant's  
position.

1 Even if the Court relies on these cases, case law indicates that a district court  
2 does not abuse its discretion when considering plaintiff's limited budget. *National Org.*  
3 *for Women*, 680 F.2d at 1294. In this case the prevailing party moved to recover fees  
4 and costs. *See id.* The district court denied the costs and the Ninth Circuit upheld the  
5 decision, stating that the district court did not abuse its discretion when considering the  
6 plaintiffs' limited budget. *Id.*

7 Moreover, in one of the cases relied on by Defendant, *Royse v. Lehman*, the court  
8 reduced the bill of the costs from \$31.40 to \$11.40 due to the lack of evidence for one of  
9 the itemized costs. 1994 U.S. App. Lexis 21256 (9th Cir. 1994). The Northern District  
10 Court of California holds that "[t]he bill must state separately and specifically each item  
11 of taxable costs claimed." N.D. Cal. Civ. R. 54-1(a). Defendant filed a bill of costs in  
12 the amount of \$1,029.90 but failed to itemize it. Plaintiff respectfully requests that the  
13 court consider these same factors in her situation and deny costs based on her low-  
14 income status.

## 15 **2. The Chilling Effect on Civil Rights Litigation**

16 Two relevant Ninth Circuit cases address the importance of avoiding costs when  
17 such costs may have the unfortunate effect of chilling civil rights litigation. In *Rivera v.*  
18 *NIBCO*, 701 F. Supp. 2d 1135, 1145 (9th Cir. 2010) the Court addressed the issue of  
19 how the imposition of costs may create a chilling effect on civil rights litigation. In that  
20 case, the threat of a \$ 3,600 bill of costs to a low wage-worker represented  
21 approximately 14% of that worker's annual income. *See id.* Such an award, the court  
22 found, would result in a significant disincentive to pursue civil rights litigation. *Id.*

23 Additionally, in *Ass'n. of Mexican-American Educators*, 231 F.3d at 593, the court  
24 stated: "[W]e note that divesting district courts of discretion to limit or refuse such  
25 overwhelming costs in important, close, but ultimately unsuccessful civil rights cases  
26 like this one might have the regrettable effect of discouraging potential plaintiffs from  
27 bringing such cases at all...".

28 Plaintiff's circumstances are similar. The bill of costs sought by Defendant is  
29 more than 100% of Plaintiff's annual income. Mou Declaration, ¶ 5. If costs are  
30 imposed on Plaintiff it will set a precedent that deters both Plaintiff and future litigants

1 from filing a lawsuit when they feel they have been treated wrongly in similar situations.  
2 Therefore, Plaintiff respectfully requests that the court consider the same factor in her  
3 situation and deny costs due to the chilling effect it may have on future civil rights  
4 litigation.

### 5 **3. Defendant's misconduct**

6 "Misconduct on the part of the prevailing party is one factor that might render a case  
7 extraordinary." *Ass'n. of Mexican-American Educators*, 231 F.3d at 593. Defendant  
8 engaged in misconduct throughout the course of litigation. Plaintiff is a Pro Se litigant  
9 and has taken great efforts to learn and follow the Federal Rules of Civil Procedure and  
10 this Court's local rules. However, Plaintiff's attempts to abide by both the Federal and  
11 Local Rules have been met with resistance.

12 The Federal Rules of Civil Procedure allow costs to be awarded for violation of  
13 discovery rules. Fed. R. Civ. P. 37. This may include failing to cooperate in discovery.  
14 Although Plaintiff is not currently seeking an award of costs, this standard is persuasive  
15 in illustrating that Defendant's misconduct is sufficient to deny costs.

16 First, Defendant failed to cooperate in a "meet and confer" prior to the  
17 commencement of discovery, as required by Fed. R. Civ. P. 26. Mou Declaration, ¶ 12.  
18 During a subsequent case management conference Defendant misled the Court by  
19 indicating that it was Plaintiff's failure that had stalled discovery. This Court, after  
20 hearing both sides, recognized it was Defendant's failure and ordered Defendant to  
21 meet and confer by a certain date.

22 When Plaintiff finally was able to meet and confer, Defense counsel was on vacation  
23 and Plaintiff had to meet with substitute counsel, who had not been informed by original  
24 counsel, Mr. Burchfield, that it was his fault that a meet and confer had not yet taken  
25 place. *Id.* at ¶ 12. As a result, substitute counsel treated Plaintiff very poorly. *Id.* at ¶13.

26 Most recently Defendant misled the court when he stated that "Ms. Mou is continuing  
27 to file civil lawsuits against public entities such as West Valley College...". *City of San  
Jose's Memorandum*, 2, ¶ 19-20. However, Plaintiff is not currently engaged in any  
other litigation. *Id.* at ¶ 14. Plaintiff did sue West Valley but that case has been settled.

1 *Id.* at ¶ 14. Moreover, Plaintiff previously filed a lawsuit in superior court; however that  
2 case did not name any public entities as defendants. *Id.* at ¶ 14.

3 Finally, Defendant has filed two proofs of service with the Court that indicate that  
4 Defendant served Plaintiff with documents by both e-mail and mail. However,  
5 Defendant has never served Plaintiff via e-mail. For the foregoing reasons Plaintiff  
6 respectfully requests that the court deny costs.

#### 6 **4. Economic Disparity**

7 The financial disparity between the parties is also a relevant consideration. *Rivera v.*  
8 *NIBCO*, 701 F. Supp. 2d at 1144. See also *Ass'n. of Mexican-American Educators*, 231  
9 F.3d at 592 (denial of costs appropriate where there exists, *inter alia*, a great economic  
10 disparity between plaintiffs and defendants).

11 In this case, Plaintiff is an individual with a disability and without any income, and  
12 Defendant is the City of San Jose. The breadth of Defendant's resources, in  
13 comparison to Plaintiff's limited resources, is best illustrated by the fact that Defendant  
14 was willing to spend a good amount of money to hold the Debtor's Examination, the  
15 cost of which was probably equal to, if not greater than, the amount of costs it currently  
16 seeks from Plaintiff. Defendant also paid RealQuest for a summary of Plaintiff's  
17 condominium without even considering using a free service such as Redfin. See City of  
18 San Jose's Memorandum, Exhibit 5.

19 Defendant also misled the Court with respect to the value of Plaintiff's condominium  
20 by failing to provide the Court with a complete listing of similar and higher end units, in  
21 proximity to Plaintiff's unit, which recently sold for a similar or lower price than that  
22 shown in Defendant's Exhibit 5. See Mou Declaration, ¶ 3; See also Exhibit D. Plaintiff  
23 respectfully requests that the court consider the same factors in this case and deny  
24 costs based on the economic disparity between Plaintiff and Defendant.

### 24 **CONCLUSION**

25 For the foregoing reasons, Plaintiff respectfully requests that the Court deny  
26 Defendant the costs taxed. In the alternative, if the Court does not see fit to deny all  
27 costs, Plaintiff respectfully requests the Court reduce the costs as it sees appropriate.

1 Date:

2 Dec 6, 2010

3 Chin-Li Mou

4 CHIN-LI MOU - Pro Se

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**EXHIBIT A**



1 CHIN-LI MOU  
2 4141 Boneso Circle  
3 San Jose, CA 95134  
4 Plaintiff – Pro Se

5 **UNITED STATES DISTRICT COURT**  
6 **NORTHERN DISTRICT OF CALIFORNIA**  
7 **SAN JOSE DIVISION**

8 CHIN-LI MOU,  
9 Plaintiff,  
10 v.  
11 CITY OF SAN JOSE, et al.,  
12 Defendants.

Case Number: C07-05740 JF

**DECLARATION OF CHIN-LI MOU IN  
SUPPORT OF PLAINTIFF'S MOTION  
TO DENY BILL OF COSTS**

Judge: Hon. Jeremy Fogel

13  
14 I, Chin-Li Mou, declare the following:

- 15 1. I am the plaintiff in this case.
- 16 2. I have attached, as Exhibit C , a true and correct copy of news concerning  
17 Judge McBride from San Francisco County Superior Court. According to this news,  
18 this judge was admonished by the California Commission on Judicial Performance and  
19 was arrested for three counts of spousal battery and one count of witness intimidation.
- 20 3. I have also attached, as Exhibit D, a true and correct copy of the Redfin  
21 (www.redfin.com) Professional Property Value Comparison for the property located at  
22 4141 Boneso Circle, in San Jose, California, which was built in 1993. See ¶ 15 and  
23 16 for additional detail.
- 24 4. I own a condominium located at 4141 Boneso Circle, San Jose, California,  
25 95134. I cannot easily sell my condominium, as I rely on it as my only residence.
- 26 5. Currently I have no employment and no income.
- 27 6. My ex-husband does not pay any alimony to me but pay most of my monthly  
28 expenses, which amount to \$1,500. My ex-husband pays these expenses directly to the  
third-party creditors.

1 7. I do not have any money for groceries. In some instances my husband buys  
2 groceries for me but when he does not I go to my local church for donated food.

3 8. Because I am low-income, my tuition for my schooling is waived.

4 9. Because I am low-income, I receive discounts from PG&E and AT&T.

5 10. Because I am low-income, I have also received a fee waiver from San  
6 Francisco appellate court for an appeal of the summary adjudication and San Francisco  
7 Superior Court mandatory court mediation program.

8 11. Because I am low-income, I received a free transcript, without request, from  
9 Judge Mason in San Francisco County Superior Court.

10 12. I attempted to meet and confer with Defendant on various occasions but  
11 received no response. After the Court ordered Defendant to meet and confer with me by  
12 a certain date, Defendant finally complied.

13 13. When I engaged in the meet and confer, counsel Burchfield was on vacation  
14 and I spoke with substitute counsel instead. I was treated very poorly by the substitute  
15 counsel.

16 14. I previously filed a lawsuit against West Valley College but that case has been  
17 settled. I have filed other litigation in state court but that litigation did not name any public  
18 entities as defendants. I am not currently engaged in any other litigation outside this  
19 matter.


20 15. Defendant's comparison between incompatible properties is misleading.  
21 First, City of San Jose's Declaration of Robert B. Burchfield lists two condominium  
22 units that are not in my condominium community and which are much newer than  
23 my community. Therefore the prices for the condominiums in the new community  
24 are higher than the value of my condominium, which is located in a much older  
25 community. The Declaration also lists another condominium with a lot size almost  
26 twice as big as mine. Third, defendant appears to have calculated the average price of a  
27 condominium by averaging the sale prices of the condominiums included in his exhibit.  
28 This is not appropriate given the fact that my condominium is smaller and older than the  
those cited by Defendant.

16. Attached in Exhibit B are two condominium comparisons I have found. The first  
comparison ("comparable a") shows a unit more similar in size to my unit. This unit  
recently sold for \$395,000. The second comparison ("comparable "b) sold for \$420,000,

1 which is what Defendant claims my property is worth. However that unit has 3 bedrooms,  
2 3 bathrooms and 1,325 square feet. My unit has 3 bedrooms and 2.5 bathrooms and is  
3 approximately 1,000 square feet.

4 I declare under penalty of perjury that the foregoing is true and correct and that this  
5 declaration was executed on Dec. 6, 2010, at San Jose.

6  
7 Date: Dec 6, 2010

8 Signature: 

9 Printed name: Chin-Li Mou

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**EXHIBIT B**

1 Chin-Li Mou  
2 4141 Boneso Circle  
3 San Jose, CA 95134

4 In Propria Persona

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6 **UNITED STATES DISTRICT COURT**  
7 **NORTHERN DISTRICT OF CALIFORNIA**  
8 **SAN JOSE DIVISION**

9 CHIN-LI MOU,  
10  
11 Plaintiff,  
12 v.  
13 CITY OF SAN JOSE, et al.,  
14 Defendants.

Case Number: C07-05740 JF

**DECLARATION OF STEVEN YANG IN  
SUPPORT OF PLAINTIFF'S MOTION  
TO DENY BILL OF COSTS**

Judge: Hon. Jeremy Fogel

15 I, Steven Yang, declare the following:

- 16 1. I am over 18 years old and I am not a party to this case.  
17 2. I pay Plaintiff's expenses, which include a monthly home owners  
18 association fee, county property tax, medical insurance premium, and  
19 utilities. I pay these expenses directly to the third parties, not to the  
20 Plaintiff.  
21 3. Some months I also assist Plaintiff with grocery expenses. However I do  
22 not provide her with financial assistance for groceries every month.

23 I declare under penalty of perjury that the foregoing is true and correct and that this  
24 declaration was executed on December 6, 2010, at San Jose.

25  
26 Date: 12-06-2010

Signature: \_\_\_\_\_

27 Printed name: Steven Yang  
28

**EXHIBIT C**

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# Four Charges Against S.F. Judge / Estranged wife claims battery, intimidation

May 05, 1999 | By Jaxon Van Derbeken, Chronicle Staff Writer

(05-05) 04:00 PST San Francisco — **1999-05-05 04:00:00 PST San Francisco** -- A San Francisco Superior Court judge was charged yesterday with four misdemeanor counts after his arrest during the weekend in a confrontation with his estranged wife.

Judge James McBride, 47, faces three counts of spousal battery and one count of witness intimidation, for allegedly trying to keep his wife, Elaine, from calling police and reporting the incident early Saturday at their Sunset District home. One of the spousal-battery counts stems from another incident April 23 in which James McBride allegedly bruised his wife.

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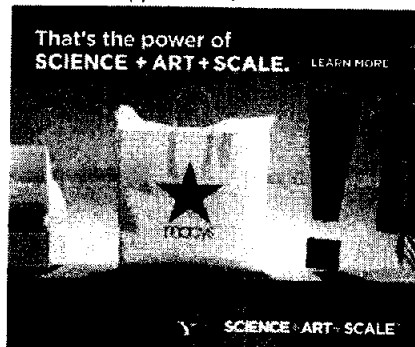
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McBride, an appointee of former Governor Pete Wilson who has been on the bench for five years, originally was booked early Sunday on a felony count of spousal abuse. He was released on \$25,000 bail.

If convicted, he could be sentenced to as long as two years in prison or as little as probation. He will not preside over trials until his case is resolved, officials said.

"The actions themselves led to the charges; we filed what we thought was warranted," said Clarence Johnson, spokesman for District Attorney Terence Hallinan.

"The judge has always maintained his conduct is not criminal and has not been criminal," said James Collins, McBride's attorney. "He intends to vindicate himself, and will do whatever is necessary to vindicate himself in a court of law."

The police report states that the couple began quarreling Saturday after James McBride came to the house to pick up belongings. He moved out recently, about the time his 44-year-old wife filed for divorce.

Elaine McBride says that her husband slammed her hand into a door jamb when she tried to retrieve a family cell phone from his backpack. He later used his open hand on her face to push her away, she told police.

The judge told investigators that the altercation started when his wife accused him of taping their conversation. When he tried to leave, he said, she blocked his path and kept him in the room against his will for more than an hour.

"He said they collided with each other when Elaine McBride suddenly reached into his backpack in an attempt to get the tape recorder," according to the police report.

"He said Elaine McBride hurt her hand during the collision. He denied pushing her in any way and said he simply tried to (fend) her off of him."

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# Abuse Case Against S.F. Judge Suspended / Deal hinges on McBride undergoing counseling

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October 14, 1999 | By Jaxon Van Derbeken, Chronicle Staff Writer

(10-14) 04:00 PST San Francisco — **1999-10-14 04:00:00 PST San Francisco** -- A San Francisco judge who has been charged with domestic violence has agreed to a settlement under which the entire case would be dropped if he completes a yearlong anger-management program, authorities said yesterday.

Superior Court Judge James McBride and his wife, Elaine, clashed in May, and the judge was arrested and ultimately charged with four misdemeanor counts. Three of the counts were domestic violence-related.

Under the deal reached Tuesday, the domestic violence cases will be put off in exchange for an agreement that would allow McBride to withdraw his not guilty plea to a count of witness intimidation.

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- Domestic Violence
- James McBride

completes the anger-management program, all the charges will be dismissed.

Domestic violence offenders are not entitled to such "diversion" deals under a 1996 law. However, McBride's deal was for a separate witness intimidation charge and not the three counts of domestic violence.

"I believe this is a fair disposition, considering all the elements in this case," said Joyce Blair, the supervising deputy attorney general in San Francisco who handled the case. "And the judge (overseeing the case) agreed with us."

She declined to discuss the specifics in the case. But she said that in general, factors reviewed include concerns by the victim, welfare of the family and the status of the marriage.

One critic denounced the "creative" deal that allowed McBride to avoid prosecution.

Rosario Navarrette, assistant director for the Commission on Status of Women, a city department, said the arrangement amounted to taking advantage of a "loophole" in the law.

"It is something that needs to be addressed legislatively, so that we will eliminate the possibility of batters continuing to be diverted," she said.

"Victims deserve justice. This loophole doesn't provide that, necessarily," she said. "It is important that as a society, we not collude or deny that when someone has a problem of violence that it be confronted."

As part of a hearing Tuesday, the McBrides also settled community property and child custody rights issues and agreed to communicate only by e-mail.

James Collins, James McBride's criminal attorney, said he could not comment on the case, citing a gag order imposed by the court for the next three years.

District Attorney Terence Hallinan asked the state to handle the case because his prosecutors appear before McBride.

Elaine McBride said her husband slammed her hand into a doorjamb when she tried to retrieve a family cell phone from his backpack. He later used his open hand on her face to push her away, she told police.

James McBride contended that the two collided after his wife suddenly reached into his backpack in an attempt to get a tape recorder, according to the police report.

He said she hurt her hand during the collision, and he denied pushing her, saying he was trying to fend her off.

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Judiciary

## San Francisco Judge Reprimanded for Putdowns, PD Dismissals

Posted Nov 19, 2008 7:23 AM CDT

By [Debra Cassens Weiss](#)

A San Francisco jurist slated to become presiding judge of the superior court has been reprimanded for poor treatment of lawyers.

Judge James McBride was admonished for making sarcastic and rude comments to lawyers, abruptly dismissing public defenders from several cases, and advancing a trial date without counsel's consent, report the [San Francisco Chronicle](#) and [Daily Journal](#) (sub. req.). Most of the misconduct cited involves cases from 2006 and 2007 when McBride was a supervisor in criminal court. He was transferred out of the job following complaints, according to the Daily Journal story.

McBride's lawyer, James Murphy, told the Daily Journal that the California Commission on Judicial Performance had ignored important facts concerning the weightiest charge of advancing a trial date. Murphy said the defendant, who was charged with a minor offense, had been jailed, and McBride was worried he would remain there over Christmas.

Murphy also told the publication that his client would be the first to admit he used sarcasm in court. Murphy said the job of judge requires a lot of strength to keep cases moving, and sometimes it's very stressful.

The [decision](#) (PDF) cited several sarcastic comments made by McBride. In one case, McBride commented on a defendant on probation arrested for impersonating a police officer. "So we have a misdemeanor running around as a cop holding people hostage, right? That's good," McBride told the prosecutor. "And somebody just woke up and decided to file a motion to revoke, huh?"

In one case in which McBride dismissed an assistant public defender from five cases, McBride appeared to be "acting out of pique" because the public defender had not shown up in court a few days before as she prepared for a misdemeanor trial, the commission said. The public defender's supervisor had instead appeared for her. In another case, he removed a different assistant public defender from a case after she had failed to show up in court, citing a calendaring error.

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Metropolitan News-Enterprise

Wednesday, November 19, 2008

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**San Francisco Superior Court Assistant Presiding Judge Publicly Censured**

By a MetNews Staff Writer

The Commission on Judicial Performance yesterday publicly admonished the assistant presiding judge of the San Francisco Superior Court for improperly advancing trial dates and substituting counsel.

Following a contested hearing on Oct. 21, the CJP found that Judge James McBride, 57, had engaged in improper conduct while presiding over the master criminal calendar in several cases in late 2006 and early 2007.

McBride—responding to the commission's investigation—acknowledged having advanced trial dates in multiple criminal cases in which the defendants had not waived their right to a speedy trial, but claimed that he did so to avoid the possibility that the case would be dismissed if it were not tried by the speedy trial deadline.

He further contended that he had the judicial authority as supervising judge of the criminal courts to manage the criminal trial docket and advance cases when a courtroom became available, but the commission, in a decision by its chair, Orange Superior Court Judge Frederick P. Horn, determined that McBride's advancement of trial dates was contrary to fundamental principles of fairness and due process.

Horn detailed two instances where deputy public defenders had matters scheduled for hearings in McBride's court but were unavailable to appear and McBride removed the attorneys from their cases. Absent any evidence of a conflict of interest, or indication that the attorneys' representation was inadequate or that defense counsel's absence had impaired court proceedings, he explained, McBride's conduct amounted to unlawful interference with the attorney-client relationship.

The judge's conduct also created the appearance that he was acting out of pique and for the purpose of punishing the deputy public defenders for not appearing in his court, Horn wrote, noting various other instances where McBride made "rude," "condescending," "sarcastic," and "denigrating comments" to attorneys before him in violation of Canon of Judicial Ethics 3B(4), which requires judges to be patient, dignified and courteous to those with whom they deal in an official capacity.

Presiding Justice Judith D. McConnell of the Fourth District Court of Appeal's Div. One, attorneys Peter Flores and Marshall Grossman, and public members Barbara Schraeger, Maya Dillard-Smith, Sandra Talcott and Nathaniel Trives voted

with Horn in favor of public admonishment. San Francisco Superior Court Judge Katherine Feinstein and public member Lawrence Simi were recused, while public member Samuel A. Hardage did not participate.

The commission has not previously disciplined McBride publicly, but the jurist has faced criminal charges in the past. In 1999, he avoided prosecution for three misdemeanor counts of spousal abuse and one of witness intimidation for allegedly preventing his wife from making a police report by consenting to undergo a year of domestic violence counseling.

McBride, a former police officer, served as an assistant district attorney and maintained a private civil practice before being appointed to the San Francisco Municipal Court in 1994 by then-Gov. Pete Wilson.

He was elevated by unification in 2000, and has been honored by the San Francisco Trial Lawyers Association and the San Francisco Bar Association's Barrister Club as Judge of the Year. On Jan. 1, he will succeed current Presiding Judge David Ballati.

Among his notable cases, McBride presided over the lawsuit regarding ownership of Barry Bonds' record-setting 73rd home run ball.

A San Francisco native, McBride attended college at U.C. Berkeley, and graduated from the university's law school in 1979.

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STATE OF CALIFORNIA  
BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

IN THE MATTER CONCERNING  
JUDGE JAMES J. McBRIDE

DECISION AND ORDER IMPOSING  
PUBLIC ADMONISHMENT

This disciplinary matter concerns Judge James J. McBride, a judge of the San Francisco County Superior Court. Judge McBride and his attorney, James A. Murphy, appeared before the commission on October 21, 2008, to contest the imposition of a public admonishment, pursuant to Rule 116 of the Rules of the Commission on Judicial Performance. Having considered the written and oral objections and argument submitted by Judge McBride and his counsel, and good cause appearing, the Commission on Judicial Performance issues this public admonishment pursuant to article VI, section 18(d) of the California Constitution, based on the following statement of facts and reasons.

STATEMENT OF FACTS AND REASONS

Judge James J. McBride was appointed to the San Francisco County Municipal Court in 1994, and elevated to the San Francisco County Superior Court in December 1998 upon unification of the trial courts. His current term began in 2003. Based on the facts set forth below, the commission finds that while presiding over the master criminal calendar in Department 22, Judge McBride improperly advanced a trial date without notice to, or the consent of, the attorney assigned to the case, thereby abusing his judicial authority in violation of canon 1 (a judge shall uphold the integrity of the judiciary), canon 2A (a judge shall respect and comply with the law), and canon 3B(2)

(a judge shall be faithful to the law). The commission also finds that Judge McBride improperly relieved the public defender and appointed new counsel for the defendant in several cases, in violation of canons 1, 2A and 3B(2). The commission further finds that Judge McBride made discourteous and disparaging remarks to attorneys appearing in court before him, contrary to canon 3B(4), which requires judges to be patient, dignified and courteous to lawyers with whom they deal in an official capacity.

**I. Advancing the trial date without adequate notice or counsel's consent**

At the defendant's arraignment in the misdemeanor case of *People v. Dennis Ogg* on November 27, 2006, the case was set for trial on December 22, 2006. Mr. Ogg had not waived his statutory right to a speedy trial, so the last day his trial could be held was December 27, 2006.

On December 20, 2006, while presiding over the master calendar in San Francisco County Superior Court, Judge McBride ordered the *Ogg* case assigned out to trial (two days before the originally scheduled trial date). Mr. Ogg's trial attorney, Deputy Public Defender (DPD) Michelle Tong, was not present in Judge McBride's court at the time. At his appearance before the commission, Judge McBride stated that there was no objection to the trial assignment. The transcript from the proceeding before Judge McBride on December 20, 2006, reflects that DPD Rebecca Young, the calendar DPD in Judge McBride's court, stated she "could not accept a trial assignment on behalf of Miss Tong." Nevertheless, Judge McBride instructed DPD Young to "get her [DPD Tong] up here" and assigned the matter to a trial department.

The matter appeared back before Judge McBride the following day, December 21, 2006, because the defense filed a peremptory challenge against the judge who was assigned the trial. Judge McBride assigned the case to another courtroom for trial over the objection of DPD Young who stated that DPD Tong would be ready to try the case the next day – the originally scheduled trial date. When Young objected to having the trial date advanced, Judge McBride told her that it was his prerogative to advance the case for trial.

Judge McBride contends that he advanced the trial date based upon his presumption that Mr. Ogg wanted a disposition of his case before Christmas, and the judge wanted to avoid the dismissal of the case for violating the defendant's right to a speedy trial if the case was not tried within the statutory timeframe.

In his response to the commission's investigation, Judge McBride acknowledged that while presiding over the master criminal calendar, he advanced the trial date in a few other criminal cases in which the defendants had not waived their right to a speedy trial and a courtroom became available before the originally set trial date. Judge McBride contends that he advanced the trial dates in those cases to avoid the possibility that the case would have to be dismissed if it had not been tried by the speedy trial deadline. Judge McBride also contends that, in his role as supervising judge of the criminal courts, he had the judicial authority to manage the criminal trial docket for the proper and orderly administration of justice, and that he therefore had the authority to advance a case to trial when a courtroom became available. Judge McBride cites no legal authority for this position.

The commission finds that Judge McBride's advancement of trial dates in disregard of the due process rights of the parties involved in the cases constituted an abuse of his judicial authority and warrants discipline. Advancing a trial date before the scheduled trial date – especially with notice of the new trial date being given that same day – is contrary to fundamental principles of fairness and due process. The attorney assigned to the *Ogg* case received notice that Judge McBride had advanced the trial date on the morning of the advanced trial date. Judge McBride expected the attorney to be available for trial and the defendant to be present to commence trial even though they had not been notified of the new trial date. Moreover, witnesses had not been subpoenaed for that date.

Judge McBride's actions violated canon 1 (a judge shall uphold the integrity of the judiciary), canon 2A (a judge shall respect and comply with the law), and canon 3B(2) (a judge shall be faithful to the law). Judge McBride's conduct was, at a



minimum, improper action within the meaning of article VI, section 18, subdivision (d)(3), of the California Constitution.

## **II. Improperly relieving the public defender**

On Friday, December 1, 2006, Judge McBride presided over the master criminal calendar in Department 22. He learned that Deputy Public Defender (DPD) Maria Lopez was not present in his courtroom that day for her assigned cases. DPD Lopez was in trial on another misdemeanor matter which was in recess that Friday, and DPD Lopez had been preparing for that trial in her office. Judge McBride contended that if DPD Lopez's trial was not actually in session on December 1, 2006, she should have been present in his courtroom. The deputy public defender appearing on DPD Lopez's behalf informed Judge McBride that DPD Lopez was to resume trial the following Monday, December 4, 2006, and she would not be available to start trial in new cases until that trial concluded.

One of DPD Lopez's matters that had been scheduled for Friday, December 1, 2006, was a motion to suppress in the matter of *People v. Magno*. The prosecutor in that case was present in court on Friday morning with a law enforcement officer witness and represented to the court that DPD Lopez had told him she would be available that morning for the hearing on the motion. Judge McBride was understandably displeased that DPD Lopez was not present in court for the hearing on the motion to suppress and that the motion had to be continued.

The following Monday, December 4, 2006, Judge McBride called the matter of *People v. Maxwell*, to which DPD Lopez was assigned. Mr. Maxwell had waived his speedy trial rights. DPD Nicole Solis appeared on behalf of the public defender's office and told the judge that the case was trailing for trial that day. Judge McBride responded as follows:

THE COURT: The Court's custom is to relieve the Public Defender if the Public Defender's incapable of handling the Public Defender's obligations. On *Maxwell*, the Public Defender is relieved. As your last act, you will have your client in here so we can appoint new counsel and turn the file over. Thank you.

While he continued to preside over the master criminal calendar on December 4, 2006, Judge McBride called other cases to which DPD Lopez was assigned that were also trailing for trial until there was an available courtroom. DPD Solis told him that DPD Lopez was in trial in a different department that day but that she would stand by and the case could trail or, if no courtroom was available, other options were available, including continuing the trial date. Judge McBride responded by relieving the public defender over DPD Solis's objection and appointing new counsel for Mr. Maxwell. Judge McBride then relieved the public defender and appointed conflicts counsel or private counsel on four additional cases that had been assigned to DPD Lopez on which she had not appeared the preceding Friday, but on which another deputy public defender had appeared on her behalf (*People v. Gaines*, *People v. Ramirez*, *People v. Ginn*, and *People v. Evans*).

In another matter, *People v. Black*, Judge McBride relieved the public defender because the deputy public defender assigned to the case, DPD Stephanie Wargo, also had not been present in court the preceding Friday. When DPD Wargo appeared in court on the Monday, December 4, 2006 calendar, she informed the court that her absence the preceding Friday was due to what she described as a calendaring error by her office. DPD Wargo objected to Judge McBride's relieving the public defender in the *Black* case, and told the judge that she was present and ready to serve her client. Judge McBride responded:

THE COURT: The Public Defender serves at the pleasure of the Court. If the Public Defender cannot serve the Court and the client on the day appointed, the Public Defender is relieved. Thank you.

Although a judge has the discretion to relieve counsel on the court's own motion over the objection of defense counsel, "this discretion has been severely limited by California decisions." *People v. McKenzie* (1983) 34 Cal.3d 616, 629, overruled in part on other grounds by *People v. Crayton* (2002) 28 Cal.4th 346, 365.

Courts should “exercise their power to remove defense counsel with great circumspection.” (*Id* at p. 630.) See also *People v. Daniels* (1991) 52 Cal.3d 815, 846-847 [stating that strict rules limit a court’s power to remove counsel]. A trial court may relieve counsel over the objection of defense counsel “to eliminate potential conflicts, ensure adequate representation, or prevent substantial impairment of court proceedings.” *People v. Cole* (2004) 33 Cal.4th 1158, 1187. “The involuntary removal of any attorney is a severe limitation on a defendant’s right to counsel and may be justified, if at all, only in the most flagrant circumstances of attorney misconduct or incompetence when all other judicial controls have failed.” *Cannon v. Commission on Judicial Qualifications* (1975) 14 Cal.3d 678, 697-698 [conduct of the deputy public defenders was not so flagrant as to justify the court’s abrupt substitution of counsel without the prior concurrence of the attorneys and defendants involved; the judge’s conduct amounted to unlawful interference with the attorney-client relationship].

In these matters, the commission finds that there was no indication of any conflict or that the attorneys’ representation was inadequate, or that the impairment of court proceedings caused by DPD Lopez’s unavailability and DPD Wargo’s absence the preceding Friday was substantial enough to warrant the removal of the public defender’s office from their cases. The commission further finds that Judge McBride’s action in relieving the public defender in all of these cases created the appearance that he was acting out of pique and for the purpose of punishing the deputy public defenders for not appearing in his court the preceding Friday, December 1, 2006. Judge McBride’s relieving of the public defender in these cases violated canons 1, 2A and 3B(2) and constituted improper action at a minimum.

### **III. Improper demeanor**

#### **A. *People v. Darryl Vaughn***

Defendant Vaughn was in custody when he appeared in court on December 20, 2006, having been arrested for impersonating a police officer while in a drug treatment

program. When the prosecutor said he was planning to file a motion to revoke probation, Judge McBride remarked in open court:

THE COURT: *So we have a misdemeanor running around as a cop holding people hostage, right? That's good. [¶] And somebody just woke up and decided to file a motion to revoke, huh?*

Later in the proceeding, when a probation officer asked that a supplemental report be ordered for January 23, 2007, Judge McBride made the following remarks:

THE COURT: That's a little difficult since he's got a right to have a jury [trial] on the new case before that. [¶] *I'm going to suggest that the district attorney get their act together by two o'clock this afternoon. How about that? Is that too much to ask? You either decide what the basis of the motion is, or not file a motion, or don't or I'll send this back for trial to Department 16.*

[PUBLIC DEFENDER]: Mr. Vaughn indicates he wants it to go to trial with [DPD] Razzaq.

THE COURT: That would be a great thing to do, but –

[PUBLIC DEFENDER]: Is that right, sir?

THE DEFENDANT: Yes.

THE COURT: *Now that the district attorney's had the benefit of everybody explaining everything to them, maybe they'll figure out what they want to do. Two o'clock?*

[Italics added for emphasis.]

Judge McBride's sarcastic and denigrating comments violated canon 3B(4), which requires judges to be patient, dignified and courteous to those with whom they deal in an official capacity. Sarcastic, demeaning or belittling comments toward counsel are not consistent with the conduct required by canon 3B(4). (See, e.g., *Kennick v. Commission on Judicial Performance* (1990) 50 Cal.3d 297, 323-327.)

B. *People v. Germaine Glenn and Winford Battle*

Co-defendants Germaine Glenn and Winford Battle, husband and wife, were on probation for felony theft. Judge McBride called their cases together during the December 20, 2006 criminal calendar. Ms. Glenn's attorney asked that the two cases be severed and that Ms. Glenn be permitted to go to drug court. Although one of the prosecutors handling the case initially agreed to allow Ms. Glenn to go to drug court, a supervising prosecutor opposed severing the cases, which would have prohibited Ms. Glenn from going to drug court because of a guideline for drug court that the cases of both defendants must be resolved before either defendant can attend drug court. When Judge McBride granted the defense motion to sever, the following exchange occurred:

THE COURT: Motion to sever is granted.

[THE PEOPLE]: Your Honor, it's part and parcel of the same transaction, one's handing the other the money from the transaction.

THE COURT: Then why are you agreeing that she should go to drug court?

[THE PEOPLE]: Well, your Honor, I am not punitive in nature, but if that's the case, and the Court is intending to sever, maybe we won't send her to drug court because the purposes of the [Memorandum of Understanding regarding drug court] are frustrated.

THE COURT: *A little light on this subject always reveals the truth. Motion to continue is granted. I'm so glad the public has a district attorney who's not punitive and really sees the light here.*

[Italics added for emphasis.]

Judge McBride's remark in open court was sarcastic and denigrating to the prosecutor in violation of canon 3B(4).

C. *People v. Mark Speilman*

On January 5, 2007, while Judge McBride was presiding over the master criminal calendar, *People v. Speilman* was called, and DPD Young advised the

court that the defendant's assigned public defender was in trial. A discussion of whether the defendant wanted to keep his attorney and go to trial later ensued; the defendant told Judge McBride that he did not want a new lawyer. DPD Young told the court that three weeks remained before the deadline for the defendant to receive a speedy trial, and requested that the matter be continued for one week. The following exchange occurred in front of the defendant:

THE COURT: I'm going to ask him now.

[DPD] YOUNG: Well, he may not need to waive time. [The assigned public defender] Mr. Luce is in trial.

THE COURT: He's not waiving time, Ms. Young, *if you understand the doctrine.*

[DPD] YOUNG: I do you (sic) understand the doctrine.

THE COURT: He is balancing his right to a statutory limit to a speedy trial against his right –

[DPD] YOUNG: I understand.

THE COURT: -- to the lawyer who has been appointed and works with him. [¶] I'm asking him now if he wants to find another lawyer or not?

[DPD] YOUNG: I am merely saying I would like him not to waive his last day yet.

THE COURT: *I don't know if you have any business in it, but thank you for your* – now I'm going to ask your clients. Do you want to come back and have me try and find you a lawyer, or Mr. Luce if possible –

THE DEFENDANT: No, I don't want to waive no time.

THE COURT: You don't want to waive time. [¶] Then we're back here on the 8th. We're going to look for a lawyer.

[DPD] YOUNG: He said he doesn't want to look for a lawyer. If the court reporter can read it back.



**EXHIBIT D**





comparable #a



Sold on 01/08/10

\$395,000

Source: Public Records

4040 RIO Ct  
San Jose, CA 95134

Photo(s) available. In order to see photos for this home, MLS rules require that you register and verify your email address

We're sorry! We'd love to show you the sold MLS listing for this home, but unfortunately MLS rules require that you first register and verify your email address. Registration is free, no obligation, and we'll never spam you.

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Public Facts for 4040 RIO Ct

BEDS: 2  
BATHS: 2.0  
FINISHED SQFT: 1,130  
UNFINISHED SQFT: -  
TOTAL SQFT: 1,130  
FLOORS: 2  
LOT SIZE: 871

STYLE: Townhouse  
YEAR BUILT: 1993  
YEAR RENOVATED: 1994  
COUNTY: Santa Clara County  
APN: 09774056  
LAST UPDATED: August 26, 2010

Property Tax

	Taxable Value
Land	\$90,848
Additions	\$168,933
Total	\$259,782
Tax (2009)	\$3,409

These facts may not match MLS-provided listing facts. Learn more.  
Source: Public Records



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Views of 4040 RIO Ct, San Jose, CA 95134



Comparable # b

Sold on 04/15/2010  
\$420,000

10 TORREGATA Loop  
San Jose, CA 95134

BEDS: 3  
BATHS: 3  
SQ. FT.: 1,325  
\$/SQ. FT.: \$317  
LOT SIZE: 871 Sq. Ft.  
PROPERTY TYPE: Townhouse  
VIEW: Neighborhood  
YEAR BUILT: 1993  
COMMUNITY: Santa Clara  
COUNTY: Santa Clara  
MLS#: 81011141  
SOURCE: MLSListings  
STATUS: Sold



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