

## ARGUING JUDICIAL BIAS ON APPEAL

by Staff Attorney Anna L. Stuart

“Bias” is defined as “a preference or inclination that inhibits impartial judgment; prejudice.” (American Heritage Dict. (new college ed. 1980) p. 128, col. 2.) Google’s definition: “prejudice in favor of or against one thing, person, or group compared with another, usually in a way considered to be unfair.”<sup>1</sup>

“Whatever disagreement there may be in our jurisprudence as to the scope of the phrase ‘due process of law,’ there is no dispute that it minimally contemplates the opportunity to be fully and fairly heard before an impartial decisionmaker.”  
(*Catchpole v. Brannon* (1995) 36 Cal.App.4th 237, 245.)<sup>2</sup>

Judicial bias falls under the umbrella of judicial misconduct, but approaching a claim of judicial bias on appeal requires a more in depth analysis. For a summary of the law and a suggestion of how to approach a claim of judicial bias on appeal, skip down to Part VII, *infra*. For a more detailed version, read the article in order.

### I. Judicial Bias Legal Principles.

A criminal defendant has a due process right to an impartial judge under both the state and federal Constitutions. (U.S. Const., 14<sup>th</sup> Amend.; Cal. Const., art. I, §§ 7, 15; *People v. Guerra* (2006) 37 Cal.4th 1067, 1111.) “A fair trial in a fair tribunal is a basic requirement of due process.” (*In re Murchison* (1955) 349 U.S. 133, 137.)

This “most basic tenet of our judicial system helps to ensure both the litigants’ and the public’s confidence that each case has been adjudicated by a neutral and detached arbiter.” (*Hurles v. Ryan* (2014) 752 F.3d 768, 788.) Although fairness “requires an absence of actual bias in the trial of cases,” it is “endeavored to prevent even the probability of unfairness.” (*Murchison, supra*, 349 U.S. at p. 136; see also *Greenway v. Schriro* (9th Cir. 2011) 653 F.3d 790, 806 [“[a] showing of judicial bias requires facts sufficient to create actual impropriety or an appearance of impropriety”].)

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<sup>1</sup> See <https://www.lexico.com/en/definition/bias> (as of June 6, 2020).

<sup>2</sup> Full citation: *Catchpole v. Brannon* (1995) 36 Cal.App.4th 237, 245, overruled on other grounds by *People v. Freeman* (2010) 47 Cal.4th 993, 1006, fn. 6.)

A trial court judge has a duty to “assure that a criminal defendant is afforded a bona fide and fair adversary adjudication.” (*People v. McKenzie* (1983) 34 Cal.3d 616, 626.) To that end, the trial court judge “should not only be fair in fact, but it should also *appear to be fair*. And where the contrary appears, it shocks the judicial instinct to allow the judgment to stand.” (*Pratt v. Pratt* (1903) 141 Cal. 247, 252, emphasis added.)

The inquiry into judicial bias is an objective one that does not require proof of actual bias. “[D]ue to the sensitivity of the question and inherent difficulties of proof as well as the importance of public confidence in the judicial system,” it is not required that actual bias be proved. (*Catchpole v. Brannon, supra*, 36 Cal.App.4th at p. 246.) “A judge’s impartiality is evaluated by an objective, rather than subjective, standard.” (*Hall v. Harker* (1999) 69 Cal.App.4th 836, 841, disapproved on another ground in *Casa Herrera, Inc. v. Beydown* (2004) 32 Cal.4th 336.) Establishing a due process violation requires a “heightened showing of a probability, rather than the mere appearance, of actual bias to prevail.” (*Freeman, supra*, 47 Cal.4th at p. 1006; see also *Caperton, supra*, 556 U.S. at p. 872 [a “probability of actual bias on the part of the judge or decisionmaker [that] is too high to be constitutionally tolerable”].) Such a case requires “extreme facts,” because “[l]ess extreme cases—including those that involve the mere appearance, but not the probability, of bias—should be resolved under more expansive disqualification statutes and codes of judicial conduct.” (*Freeman, supra*, 47 Cal.4th at p. 1006.)

## **II. Standard of Review: Independent.**

An appellate claim of judicial bias is grounded in the argument that the defendant was denied the constitutional due process rights to an impartial judge and a fair trial. (See e.g., *People v. Cowan* (2010) 50 Cal.4th 401, 402 [a fair trial in a fair tribunal is a basic requirement of due process and a criminal defendant has due process rights under both the state and federal constitutions to be tried by an impartial judge].) Accordingly, an appellate court applies the independent standard of review. (*People v. Cromer* (2001) 24 Cal.4th 889, 901.) Whether or not judicial misconduct has occurred is evaluated on a case-by-case basis. (*People v. Sanders* (1995) 11 Cal.4th 475, 531-532.)

In reviewing a claim of judicial bias or misconduct, the appellate court’s role “is not to determine whether the trial judge’s conduct left something to be desired, or even whether some comments would have been better left unsaid. Rather, we must determine whether the judge’s behavior was so prejudicial that it denied [the defendant] a fair, as opposed to a perfect, trial . . . We make that determination on a case-by-case basis, examining the context of the court’s comments and the circumstances under which they occurred . . . Thus, the propriety and prejudicial effect of a particular comment are judged by both its content and the circumstances surrounding it.” (*People v. Abel* (2012) 53 Cal.4th 891, 914.)

### **III. Arguing Judicial Bias on Appeal.**

#### **A. Overcoming forfeiture.**

Claims of judicial bias are often, if not usually, accompanied by a need to address forfeiture. This is particularly true when the form of bias to be challenged concerns the trial court judge’s comments or gestures. If trial counsel failed to object at the time the expression of bias was made, appellate counsel should anticipatorily argue against forfeiture in the opening brief.

Say, for instance, the trial court judge makes a comment during voir dire that might cause “a reasonable [person] [to] entertain doubts concerning the judge’s impartiality.” (*Catchpole v. Brannon, supra*, 36 Cal.App.4th at p. 246.) At the time of the comment, however, defense counsel remained silent. Was an objection required? What if the trial court judge made a number of questionable rulings and comments throughout the trial proceedings that reasonably appear to be based not on law or evidence, but on bias or prejudice? Is defense trial counsel required to make a record? The answer to both is perhaps.

The general rule is that “a specific and timely objection to judicial misconduct is required to preserve the claim for appellate review.” (*People v. Seumann* (2015) 61 Cal.4th 1293, 1320.) But there are a number of potential ways to counter the forfeiture claim.

1. **Claim that it would be unfair to expect an objection in the circumstances.** “Few more daunting responsibilities could be imposed on counsel than the duty to confront a judge with his or her alleged gender bias in presiding at trial. The risk of offending the court and the doubt whether the problem could be cured by objection might discourage the assertion of even meritorious claims. Requiring the issue to be raised at trial would therefore have the unjust effect of insulating judges from accountability for bias.” (*Catchpole v. Brannon, supra*, 36 Cal.App.4th at p. 244.)
2. **Argue that the trial court’s actions and comments reveal actual bias and constitute structural error that affected appellant’s substantial rights.** (See *Chapman v. California* (1967) 386 U.S. 18, 23, fn. 8. [evidence of a partial judge is structural error].) In such a case, the reviewing court may address the error despite the absence of an objection in the trial court. (*People v. Abbaszadeh* (2003) 106 Cal.App.4th 642, 649-650 [where an error affects the substantial rights of the defendant, the integrity of the judiciary, and the structural integrity of the trial are implicated, such that it would be a miscarriage of justice to allow the conviction to stand].)
3. **Argue public policy.** “As Witkin has observed, the rule that an appellate court will not consider points not raised at trial does not apply to “[a] matter involving the public interest or the due administration of justice.” (9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 315, p. 326.) The issue of judicial gender bias obviously involves both a public interest and the due administration of justice. (*Catchpole v. Brannon, supra*, 36 Cal.App.4th at p. 244.)
4. **Remind the court that more than the instant defendant’s rights are at stake.** Judicial disqualification statutes are “not solely concerned with the rights of the parties before the court but [are] also ‘intended to ensure public confidence in the judiciary.’” (*Freeman, supra*, 47 Cal.4th at pp. 1000-1001, citing *Curle v. Superior Court* (2001) 24 Cal.4th 1057, 1070.) To that end, the appellate courts should reach the merits of a claim of judicial bias in order to promote confidence in the judiciary for the public at large.
5. **Appeal to the Justices’ inherent authority:** “[t]he fact that a party, by failing to raise an issue below, may forfeit the right to raise the issue on appeal does not mean that an appellate court is precluded from considering the issue.” (6 Witkin & Epstein, Reversible Error, § 36, p. 497.) “Generally, whether or not an appellate court should excuse the lack of a trial court objection is entrusted to its discretion.” (*Abbaszadeh, supra*, 106 Cal.App.4th at p. 649, internal citation omitted.)

6. **Argue that the California Supreme Court** has “reached the merits of similar claims notwithstanding the defendant’s failure to object” where the issue on appeal challenges the fairness appellant’s right to a fair trial. (*People v. Whalen* (2013) 56 Cal.4th 1, 28.)
  
7. **Argue that even with an objection, the trial court’s admonition may not always cure the harm.** (See *People v. Sturm* (2006) 37 Cal.4th 1218, 1244 [“[i]n any case, even were the jury properly admonished, it would be highly improbable that such admonishment could prevail over the manner in which the trial judge conducted himself throughout the penalty phase trial”]; *People v. Santana* (2000) 80 Cal.App.4th 1194, 1207 [repeated admonition could not cure the impression given to the jury that the trial judge found the defense case to be weak]; *People v. Burns* (1952) 109 Cal.App.2d 524, 542 [“While it is true that from time to time the judge admonished the jury that they were the sole judges of the evidence and that they must draw no conclusions as to guilt or innocence from the court's remarks, it is difficult to understand how these admonitions could have overcome the evident attitude of the judge throughout the trial”].)
  
8. **Argue futility:** “[T]he evident hostility between the trial judge and defense counsel left defense counsel in the fundamentally unfair position of either objecting to the judicial misconduct and risking retaliation against his client or sacrificing the claim on review. (*Sturm, supra*, 37 Cal.4th at p. 1237.)
  
9. **Argue that there is precedent for reaching an issue of bias on appeal even when it not mentioned until oral argument.** See *In re Marriage of Iverson* (1992) 11 Cal.App.4th 1495, 1504, disapproved on other grounds in *Freeman, supra*, 47 Cal.4th at p. 1006, fn. 4 [the issue of gender bias was raised for the first time at oral argument].)

**B. Backup: Ineffective Assistance of Counsel.**

As with almost any claim where a forfeiture problem is anticipated based on defense counsel’s silence, it is important to include a claim that counsel’s failure to object (or seek recusal) constituted constitutionally ineffective performance under the Constitution. The Sixth Amendment to the United States Constitution “guarantees not only the right to the assistance of counsel but also the right to the effective assistance of counsel.” (*People v. Hernandez* (2012) 53 Cal.4th 1095, 1103-1104.) To establish ineffective assistance, a defendant must show that counsel’s performance was deficient because it

fell below an objective standard of reasonableness under prevailing professional norms and that the defendant was prejudiced as a result. (*Strickland v. Washington* (1984) 466 U.S. 668, 687; see Part V, *infra* [strategy for arguing ineffective assistance of counsel on direct appeal and via habeas].)

**C. Legal Points and Authorities to Support an Argument of Bias or Prejudice Based upon Race, Sex, Gender, Gender Identity, Gender Expression, Religion, National Origin, Ethnicity, Disability, Age, Sexual Orientation, Marital Status, Socioeconomic Status, or Political Affiliation, Etc.**

The infamous case of *In re Marriage of Iverson*, *supra*, 11 Cal.App.4th at pages 1501 to 1502, held that the trial court judge's gender-based preconceptions deprived the female litigant of a fair trial in a marital dissolution case. *Iverson* is instructive as to the manner in which gender bias may be shown and the nature of the showing that will warrant reversal.

In finding against the wife on several issues, including the validity of a premarital agreement and the determination as to which party had initiated the marriage, the trial judge in *Iverson* made a number of derogatory comments concerning the wife, including that she was a "lovely girl," who had "nothing going for her except for her physical attractiveness." (*In re Marriage of Iverson*, *supra*, 11 Cal.App.4th at p. 1498.) In holding the trial court committed misconduct, the *Iverson* court noted that the trial court's "reasoning appears to have been that 'lovely' women are the ones who ask wealthy men who do not look like 'Adonis' to marry, and therefore [the wife] was not credible when she testified [that the husband] asked her to marry him." (*Id.* at p. 1500.) Based on the trial court judge's comments, the court of appeal found the trial judge had not only used language indicating gender bias but had also rendered judgment on the basis of gender-based stereotypes. (*Ibid.*) The court concluded that the judge showed a "predetermined disposition" to rule against the wife based on her status as a woman. (*Id.* at p. 1501.) The judgment was reversed. (*Id.* at p. 1503.)

For the purposes of persuasive authority, consider using the opinions from either the Supreme Court's review of Commission on Judicial Performance decisions or the

original decisions themselves. These opinions provide some examples of what would at least be considered a violation of ethical standards in California and some helpful language to explain why certain types of comments are problematic.

For instance, take a look at trial court's comments in *Gonzalez v. Commission on Judicial Performance* (1983) 33 Cal.3d 359, 376. There, the Supreme Court found a series of ignorant-sounding comments to be "apt to offend minority members" of the public and were "highly demeaning to minorities." (*Ibid.*) While sparing this audience the trial court's actual comments here, the Supreme Court found that each of the comments was a "facially blatant ethnic slur." (*Ibid.*) It also found the comments "were unbecoming and inappropriate" and constituted "unjudicial conduct by a judge acting in his judicial capacity." (*Ibid.*) Finally, the court held that "ethnic and racial epithets" diminish the public's "esteem for the judiciary." (*Id.* at p. 377; see also *In re Stevens* (1982) 31 Cal.3d 403, 404 ["racially stereotypical remarks" constitutes judicial misconduct because they are "prejudicial to the administration of justice [and] bring the judicial office into disrepute"].)

The Commission on Judicial Performance has found that comments based on racially offensive stereotypes constitute judicial misconduct. (See *Inquiry Concerning Kleep* (2017) 2 Cal.5th CJP Supp. 1, 15 [suggesting that "ethnic stereotyping" is both "inconsistent with the fair, impartial and dispassionate administration of justice [and] such the remarks do not inspire trust and confidence in the courts"].)

The opinion in *Inquiry Concerning Kleep, supra*, 3 Cal. 5th CJP Supp. 1, highlights the dual considerations of both prejudice to a defendant and harm to the public confidence in the judiciary. In *Kleep*, the various comments and actions by the trial court judge included his comments to a deputy public defender. (*Id.* at pp. 26-28.) After the attorney stated her appearance, the judge said, "I love her accent," and then quizzed the attorney on her citizenship. (*Id.* at p. 27.) After learning she was a U.S. citizen from a different country, the trial court added, "I wasn't planning on having you deported." (*Ibid.*) Justifying his comments, the judge stated, "he did not intend to belittle [the attorney] by commenting on her accent. He intended his comment as a compliment. Nevertheless, he

acknowledges his reference to deportation was inappropriate. He says he was “[t]rying to get a laugh’ and ‘put people at ease.” (*Id.* at p. 14.)

The Commission in *Kreep* found that the comments violated the judicial ethics and because the comments would “appear to an objective observer to be prejudicial to public esteem for the judiciary,” they constituted “prejudicial misconduct.” (*Inquiry Concerning Kreep, supra*, 3 Cal.5th CJP Supp. at p. 28.) In particular, the Commission noted, “Drawing attention to a person’s ethnicity and questioning a person’s citizenship when these are not issues in the matter before the judge, can reasonably be perceived as offensive and reflecting bias. Additionally, a judge should be sensitive to the possible impact of such comments on the attorney-client relationship when made in the presence of the attorney’s client. Judge Kreep maintains that his comments were not meant to be offensive. However, as noted by the masters, regardless of his intent, the comments were likely to offend members of the public and could be construed as discourteous, demeaning, or as suggesting bias based on ethnic or national origin. [Citations].” (*Id.* at p. 28.)

Some useful language to support a claim of judicial bias can also come from the California Code of Judicial Ethics. “A judge shall avoid impropriety and the appearance of impropriety in all of the judge’s activities.” (Cal. Code Jud. Ethics, canon 2.) “A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. A judge shall not make statements, whether public or nonpublic, ... that are inconsistent with the impartial performance of the adjudicative duties of judicial office.” (Cal. Code Jud. Ethics, canon 2A.) In addition, “[a] judge shall require order and decorum in proceedings before the judge.” (Cal. Code Jud. Ethics, canon 3B(3).) “A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity ... .” (Cal. Code Jud. Ethics, canon 3B(4).) “A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, engage in speech, gestures, or other conduct that would reasonably be perceived as (a) bias or prejudice, including but not limited to bias or prejudice based upon race,



sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, or (b) sexual harassment.” (Cal. Code Jud. Ethics, canon 3B(5).)

Note, however, that under federal law at least, a violation of a state statute or judicial canon does not necessarily prove a due process violation. (See *People v. Mendoza* (2000) 24 Cal.4th 130, 197.)

**D. Legal Points and Authorities for Arguing Bias Where the Trial Court Judge Improperly Aligned Itself with the Prosecution.**

“Although the trial court has both the duty and the discretion to control the conduct of the trial [Citation], the court ‘commits misconduct if it persistently makes discourteous and disparaging remarks to defense counsel so as to discredit the defense or create the impression it is allying itself with the prosecution.’ ” (*People v. Carpenter* (1997) 15 Cal.4th 312, 353, citing *People v. Fudge* (1994) 7 Cal.4th 1075, 1198.) For example, when the judge questions a witness, they “must not undertake the role of either prosecutor or defense counsel.” (*People v. Carlucci*, (1979) 23 Cal.3d 249, 258.) “The court’s questioning must be ‘temperate, nonargumentative, and scrupulously fair’ [citations], and it must not convey to the jury the court’s opinion of the witness’s credibility.” (*People v. Cook* (2006) 39 Cal.4th 566, 597.) On the other hand, “[u]nwarranted interruptions of counsel that interfere with a properly conducted examination, excessive questioning that virtually takes the witness out of counsel’s hands, or a display of partisanship are improper. [Citations.]” (5 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Trial, § 544, p. 781.) To argue that a trial court judge has manifested bias in the presentation of evidence, appellate counsel must demonstrate that the judge “ ‘officially and unnecessarily usurp[ed] the duties of the prosecutor ... and in so doing create[d] the impression that [they were] allying ... with the prosecution.’ ” (*People v. Clark* (1992) 3 Cal.4th 41, 143; see also *People v. Harris* (2005) 37 Cal.4th 310, 347.)

There are two cases that resulted in reversals after the trial court judge appeared to take a metaphorical seat alongside the prosecutor. The first demonstrates a pattern of

conduct for which the cumulative effect required reversal while the second provides an example of where comments during jury selection were held to be reversible error.

In *Sturm*, *supra*, 37 Cal.4th at page 1233, the court of appeal reversed a death penalty judgment in a case following the trial court's conduct during a second penalty phase trial. There, it engaged in a pattern of disparaging defense counsel and defense witnesses in the presence of the jury and conveyed the impression that he favored the prosecution by frequently interposing objections to defense counsel's questions, belittling defense witnesses and interjecting its own objections to defense counsel's examinations. (*Id.* at p. 1238.) At one point the judge went on a lengthy diatribe to explain to the jury that there was a reason that the trial court was overruling the defense counsel.<sup>3</sup> (*Id.* at p. 1238.) The *Sturm* court held that, "[c]onsidered in the aggregate, the inappropriate comments made by the trial judge spanned the entire penalty phase trial, from voir dire through the defense case in mitigation. 'Perhaps no one of them is important in itself but when added together their influence increases as does the size of a snowball rolling downhill.' [Citation.] The numerous instances of misconduct created an atmosphere of unfairness and were likely to have led the jury to conclude that 'the trial court found the People's case against [defendant] to be strong and [defendant]'s evidence to be questionable, at best.'" (*Id.* at p. 1243, citing *Burns*, *supra*, 109 Cal.App.2d at p. 543; see also *Santana*, *supra*, 80 Cal.App.4th at p. 1207 [trial court took on the prosecutor's role for pages of transcript by belaboring points of evidence adverse to the defendant and expertly cross-examining defense witnesses].)

Similarly, in *People v. Mello* (2002) 97 Cal.App.4th 511, 514, while ostensibly aiming to excuse any self-proclaimed "racist" from the jury pool, the trial court judge urged the potential jurors to lie under oath if they had racial prejudice but were too embarrassed to admit it. Under *Chapman*, the *Mello* court concluded that, "although the judge's motive was admirable (to exclude racial bias from the jury), his method (instructing prospective jurors to lie under oath) was grave error that undermined defendant's ability to secure a

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<sup>3</sup> It is worth reviewing the actual facts of this case for a rendition of what the trial court judge actually said.

fair and impartial jury and adversely affected the fundamental truth-finding function of the jury.” (*Id.* at p. 513; see also *People v. Robinson* (1960) 179 Cal.App.2d 624, 635 [example of a trial court judge who “acted as prosecutor as obviously and efficiently as would have been the case had he been sitting beside the deputy district attorney at the counsel table”].)

Some adverse case law implies that judicial bias cannot be demonstrated by relying on the trial court’s erroneous evidentiary rulings or from the trial court judge’s improper reactions to the facts of the case. (See *People v. Peoples* (2016) 62 Cal.4th 718, 789; see also *People v. Avila* (2009) 46 Cal.4th 680, 715-716.) But this does not preclude finding bias from the court’s comments that reflect it is relying on prejudicial factors that are not material to the facts of the case, such as the race or gender identity of the defendant or the attorney.

It is not clear as to whether a single comment would constitute reversible error, but by no means is a claim precluded. For example, in *Seumann*, *supra*, 61 Cal.4th at page 1320, during the examination of a difficult witness, the prosecutor said, “You are under oath to tell the truth. I know that doesn't mean much to you.” Defense counsel immediately objected. (*Ibid.*) The trial court sustained the objection, saying to the prosecutor: “I know the temptation, but sustained.” (*Ibid.*) On appeal the defendant argued that the comment “I know the temptation” was reversible judicial misconduct that demonstrated judicial bias. (*Ibid.*) The *Seumann* court disagreed, holding that “[n]ot only was the comment solitary and fleeting, it was also ambiguous in that it may reasonably have been understood by the jury not as an expression of where the court's sympathies secretly lay, but as merely a polite reminder to the prosecutor, upon sustaining the defense objection, to maintain her composure in the face of a recalcitrant and combative witness.” (*Id.* at pp. 1320-1321.)

Finally, another source of judicial misconduct that may indicate a bias against the defense is where the trial court judge relies on their own personal knowledge rather than the facts in evidence or a fact that would be considered common knowledge. (*David B. v. Superior Court* (2004) 123 Cal.App.4th 768, 794-795 [it was improper for the court to rely

on the Department’s usual practice instead of taking evidence on whether the Department undertook its usual practice in the instant case]; see also *People v. Davis* (2013) 57 Cal.4th 353, 360 [judicial notice could not substitute for lack of evidence before a jury].)

The take-away for arguing the trial court improperly aligned with the prosecution is to be on the lookout for the ways in which the trial court judge injected itself into the proceedings. While establishing a pattern of interjections and missteps makes for a stronger claim, a single comment may be sufficient even when made during jury selection to only half the seated jurors. (See *People v. Tatum* (2016) 4 Cal.App.5th 1125, 1130-1131.)

#### **IV. Federalization.**

As mentioned previously, a “criminal defendant has due process rights under both the state and federal Constitutions to be tried by an impartial judge.” (*Cowan, supra*, 50 Cal.4th at p. 455; see *Arizona v. Fulminante* (1991) 499 U.S. 279, 309; *People v. Brown* (1993) 6 Cal.4th 322, 332.) Although you do not have to prove actual bias to show federal due process error, you must show more than the “appearance of bias.” (*Freeman, supra*, 47 Cal.4th at p. 996.) Under federal law, the relevant test is “based on an objective assessment of the circumstances in the particular case” and requires a showing that there exists “the probability of actual bias on the part of the judge or decisionmaker [that] is too high to be constitutionally tolerable.” (*Ibid.*, quoting *Caperton, supra*, 556 U.S. at p. 877.)

What is too high? Our high court has emphasized that only the most “extreme facts” would support a federal due process error. (*Caperton, supra*, 556 U.S. at pp. 887-888.) The facts of *Caperton* constituted such a scenario. The *Caperton* court held that a justice on the West Virginia Supreme Court of Appeals violated the defendant’s due process rights by not recusing himself when the president of the defendant corporation, which had lost at trial, had donated \$3 million to the justice’s election campaign at a time when it was likely that the corporation would seek review in that court. (*Id.* at pp. 886-887.) These were “extreme facts.” (*Id.* at p. 887)

Where else may such “extreme facts” exist? In determining what constitutes a risk of bias that is constitutionally “intolerable,” the Supreme Court has emphasized that no mechanical definition exists; cases requiring recusal “cannot be defined with precision” because “[c]ircumstances and relationships must be considered.” (*Caperton, supra*, 556 U.S. at p. 880.) “[T]he question is whether, under a realistic appraisal of psychological tendencies and human weakness, the interest [or bias or prejudice] poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.” (*Caperton, supra*, 556 U.S. at p. 870.)

As mentioned above, our high court in *Freeman, supra*, 47 Cal.4th at page 1006, footnote 4, alluded to the type of facts that it would consider “extreme” and demonstrative of “actual bias.” (See *Hernandez v. Paicius, supra*, 109 Cal.App.4th 452; *Hall v. Harker, supra*, 69 Cal.App.4th 836; *Catchpole v. Brannon, supra*, 36 Cal.App.4th 237; *Marriage of Iverson, supra*, 11 Cal.App.4th 1495.) These are all cases where the trial court judge made repeated comments that constituted a pattern of misconduct.

What this all means for appellate counsel is to be creative in fashioning a persuasive argument that the risk of bias is too high.

## **V. Arguing Prejudice.**

As with claims of error that involve both state and federal constitutional rights, appellate counsel should argue prejudice occurred under *Chapman, supra*, 386 U.S. at page 24. But note, however, that there is authority for the proposition that a biased judge constitutes structural error requiring reversal without a specific prejudice showing.

Here is a suggested format for arguing prejudice in this context with some quotes to help bolster the inevitable *Chapman* claim.

### **A. Reversal per se**

As a first step, argue that the judicial bias affected “the framework within which the trial proceeds, rather than simply an error in the trial process itself.” (See *Arizona v. Fulminante, supra*, 499 U.S. at p. 310.) Such errors are not subject to a harmless-error

analysis because they affect the entire conduct of the trial from beginning to end. (*Id.* at pp. 309-310.) In other words, “these errors deprive defendants of ‘basic protections’ without which ‘a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence ... and no criminal punishment may be regarded as fundamentally fair.’” (*Neder v. United States* (1999) 527 U.S. 1, 8-9.)

Indeed, courts have held that a trial before a biased or partial judge is subject to automatic reversal as a “structural error.” (*Neder, supra*, 527 U.S. at p. 8; *Fulminante, supra*, 499 U.S. at pp. 309-310; *Chapman supra*, 386 U.S. at p. 23, fn. 8.) In *Tatum, supra*, 4 Cal.App.5th at page 1131, for example, the court declined to conduct a harmless error analysis; once it determined that “the trial court’s remarks exceeded the scope of proper judicial comment” and “interfered with [the defendant’s] constitutional right to a jury trial,” it concluded: “Reversal of [the defendant’s] conviction is, therefore, mandatory.”

## **B. Apply *Chapman*.**

Whether or not you argue for structural error, you should also be prepared to argue the trial court’s impartiality was error under *Chapman*. (See *Chapman, supra*, 386 U.S. at p. 24.) Under this standard, an appellate court must reverse the defendant’s conviction unless the People can prove beyond a reasonable doubt that the trial court’s expressed bias was “unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record.” (*Yates v. Evatt* (1991) 500 U.S. 391, 403.) “The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this trial* was surely unattributable to the error.” (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279, emphasis in original.)

Note that if you are arguing judicial bias as a form of erroneous judicial comment, then also explain how the *Watson* standard for prejudice is met. (See *People v. Watson* (1956) 46 Cal.2d 818, 835; see also Part VII, *infra*.)

**C. Quotes to show the prejudicial impact of judicial comments and influence.**

The potential effect a trial court judge's comments, conduct, and influence can have on a jury cannot be understated. Indeed, justices have described this potential in many different ways. For example, "The danger of judicial comment is that the jury is likely to place too much reliance on the judge's opinion of how to resolve a factual issue. The members of the jury are apt to give great weight to any hint from the judge as to his [or her] opinion on the weight of the evidence or the credibility of the witnesses. Jurors are ever watchful of the words that fall from him [or her]. Particularly in a criminal trial, the judge's last word is apt to be the decisive word." (*Tatum, supra*, 4 Cal.App.5th at pp. 1130-1131, internal citations omitted.)

It is also a basic principle that "[j]urors rely with great confidence on the fairness of judges, and upon the correctness of their views expressed during trials. For this reason, and too strong emphasis cannot be laid on the admonition, a judge should be careful not to throw the weight of his [or her] judicial position into a case, either for or against the defendant." (*People v. Mahoney* (1927) 201 Cal. 618, 626-627.) Jurors are also "quick to perceive a leaning of the court. Every remark dropped by the judge, every act done by him [or her] during the progress of the trial is the subject of comment and conclusion by the jurors, and invariably they will arrive at a conclusion based thereon as to what the court thinks about the case." (*People v. Zammora* (1944) 66 Cal.App.2d 166, 210-211.)

**VI. Ineffective Assistance of Counsel on Direct Appeal or in a Habeas Petition for the Failure to Bring Recusal Motion Under State Law.**

An aspect of arguing judicial bias worth noting concerns whether or not trial counsel sought to disqualify the trial court judge under Code of Civil Procedure section 170.1. Such an occurrence should be included in a procedural history of the bias issue raised. It is important to note that the denial of a motion under Code of Civil Procedure, section 170.1, is considered a nonappealable order and can only be reviewed by a writ of mandate to the Court of Appeal. (Code Civ. Proc., § 170.3, subd. (d).) This means that if the defendant motioned to recuse the trial court judge and that motion was denied, it

cannot be argued on appeal that the denial was legally erroneous. In this circumstance, the best available appellate argument is that the trial court judge's bias violated due process.

If no recusal motion was brought, an argument might be advanced that trial counsel was constitutionally ineffective for failing to do so. This is not an easy claim to make on direct appeal or via habeas since the problem will be showing prejudice (i.e., demonstrating the trial court judge's actual bias violated due process). That being said, what follows is a quick overview of the recusal process in the event that a habeas ineffective assistance of counsel claim is an option.

Code of Civil Procedure section 170.1, subdivision (a), provides the list of grounds for disqualification of a trial court judge. For our purposes, the pertinent clauses are found in Code of Civil Procedure section 170.1, subdivision (a)(6), which includes the catch all justification that a judge shall be disqualified "For any reason: (iii) A person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial."

In the trial court, a request for recusal is required if the facts that lead to the appearance of bias were known to the defense. (*Scott, supra*, 15 Cal.4th at pp. 1205-1208.) If a court refuses or fails to disqualify itself, a party may seek the judge's disqualification, but the party must do so "at the earliest practicable opportunity after discovery of the facts constituting the ground for disqualification." (Code Civ. Proc., § 170.3, subd. (c)(1).) Without a timely request for recusal, appellate review of a trial court's failure to recuse itself is precluded. (See *Scott, supra*, 15 Cal.4th at p. 1205.) The standard for seeking disqualification is significantly lower than the showing required for a due process violation; "reasonably entertain a doubt" of impartiality versus "probability of actual bias." (See Code Civ. Proc., § 170.1, subdivision (a)(6); see also *Freeman, supra*, 47 Cal.4th at p. 1006.) Accordingly, if there was no request for recusal, but the facts that lead to the appearance of bias were known to the defense, this could be grounds for an ineffective assistance of counsel claim via a writ of habeas corpus.



Before embarking on such a writ, it is strongly recommended that trial counsel be consulted as to the reasons no recusal motion was brought. From there, appellate counsel can assess whether an ineffective assistance of counsel claim is viable. After all, it is very possible that no recusal motion was brought simply because the trial court judge was the best option available and a request for recusal would not have been beneficial. Still, if there is no reasonable justification, consult with your project buddy about whether a habeas petition is warranted.

Of course, whether or not a recusal motion was timely brought below, a state and federal due process challenge can still be advanced on the grounds that the trial court judge's impartiality violated both the due process right to an impartial decisionmaker as well as the right to a fair trial. (See *Freeman, supra*, 47 Cal.4th at p. 1006.)

## **VII. A Suggested Approach to Arguing Judicial Bias on Appeal.**

Having spent a ton of time in the weeds and cases on the issue of judicial bias, the following is one suggested strategy for raising the issue on appeal. It's not the required, or indeed only, way but the goal is to both make the strongest claims and highlight that the law is not abundantly clear on how such a bias claim should be argued. Since there is leeway, it's worth exploiting the ambiguity.

### **A. The issues framework.**

A claim of judicial bias is not an easy argument to make, but when fashioning such a claim consider a multi-prong approach to arguing bias on appeal. One way to fully flesh out a claim of judicial bias is thus to break the issues into three parts that may lead three separate roman numeral issues in the direct appeal brief as well as a habeas petition relating to ineffective assistance of counsel.

First, frame the issue as one of erroneous judicial comment. Generally, a trial court may comment on the evidence, including the credibility of witnesses, so long as its remarks are accurate, temperate, and scrupulously fair. (*People v. Melton* (1988) 44 Cal.3d

713, 735; see also Cal. Const., art. VI, § 10 [“[t]he court may make any comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the cause”].) The trial court may not, however, express a view on the ultimate issue of guilt or innocence or usurp the jury’s exclusive function as arbiter of questions of fact and the credibility of witnesses. (*People v. Cook* (1983) 33 Cal.3d 400, 408, overruled on other grounds by *People v. Rodriguez* (1986) 42 Cal.3d 730, 766.) “The trial court may not, in the guise of privileged comment, withdraw material evidence from the jury’s consideration, distort the record, expressly or impliedly direct a verdict, or otherwise usurp the jury’s ultimate factfinding power.” (*Rodriguez, supra*, 42 Cal.3d at p. 766.) “The propriety and prejudicial effect of a particular comment are judged both by its content and by the circumstances in which it was made.” (*Melton, supra*, 44 Cal.3d at p. 735, internal citations omitted.)

For this argument, explain that the court’s comment(s) constituted judicial misconduct because “a reasonable [person] would entertain doubts concerning the judge’s impartiality.” (*Catchpole, supra*, 36 Cal.App.4th at p. 246.) Accordingly, the trial court’s “remarks exceeded the scope of proper judicial comment permitted by section 10 of article VI [of the California Constitution] and interfered with [appellant’s] constitutional right to a jury trial.” (*Tatum, supra*, 4 Cal.App.5th at p. 1131.)

For prejudice, argue that reversal is mandatory under the line of cases dealing with erroneous comments. (See *Tatum, supra*, 4 Cal.App.5th at p. 1131; see also *Cook, supra*, 33 Cal.3d 400, 412, overruled on other grounds *People v. Rodriguez* (1986) 42 Cal. 3d 730, 766; see also *People v. Moore* (1974) 40 Cal.App.3d 56, 67.) Out of an abundance of caution, follow this up with a *Watson* argument. (See *Watson*, 46 Cal.2d at p. 835.) Under *Watson*, the appellate court must determine whether the trial court’s comments resulted in a “miscarriage of justice.” (*Ibid.*) A miscarriage of justice exists where it is reasonably probable that appellant would have obtained a more favorable result “in the absence of the error.” (*Id.* at p. 836.) A “reasonable probability” under *Watson* “does not mean more likely than not, but merely a *reasonable chance*, more than an *abstract possibility*.” (*College Hospital v. Superior Court* (1994) 8 Cal.4th 704, 715, emphasis in original.)

The second potential issue, and separate roman numeral, would be to claim that the judge's bias demonstrated impartiality in violation of the state and federal constitutions. Under state and federal law, the appellant must show that there exists ‘“the probability of actual bias on the part of the judge or decisionmaker [that] is too high to be constitutionally tolerable.’” (*Freeman, supra*, 47 Cal.4th at p. 996, quoting *Caperton, supra*, 556 U.S. at p. 877.) To reach this threshold, appellate counsel must demonstrate that the case involves “extreme facts” such as a pattern of bias. (See *Freeman, supra*, 47 Cal.4th at p. 1006, fn. 4. [suggesting that a pattern of bias may equate to a showing of actual bias and referencing as examples *Hernandez v. Paicius* (2003) 109 Cal.App.4th 452; *Hall v. Harker, supra*, 69 Cal.App.4th 836; *Catchpole v. Brannon, supra*, 36 Cal.App.4th 237, and *In re Marriage of Iverson, supra*, 11 Cal.App.4th 1495.) For prejudice, argue first that an impartial judge constitutes structural error because it impacts the fairness of the whole trial, and then follow it up with both a *Watson* and *Chapman* prejudice analysis.

The third step would be to consider an ineffective assistance of counsel claim if there was no objection to the trial court's comments. (See *Strickland v. Washington, supra*, 466 U.S. at p. 687.) Before doing this, however, it is imperative that trial counsel's actual justification be sought. If their justification is a sound one (e.g., that judge was the best available), then no ineffective assistance of counsel backup claim is needed. Generally speaking, any ineffective assistance of counsel claim relating to judicial bias is a tough sell and may rarely be warranted. Mainly because any prejudice would directly relate to the extent of the trial court's actual bias.

Finally, consider whether there are grounds for a habeas petition alleging the ineffective assistance of counsel for either (or both) the failure to bring a recusal motion and the failure to contemporaneously object to the trial court's bias. Again, it is crucial that trial counsel be consulted early on for their perspective (and justification) regarding the lack of recusal motion or objection. After that, consult with the project buddy.

When arguing that trial counsel erred by failing to bring a recusal motion, explain first that the requisite standard for when a trial court judge must recuse itself is a

relatively low burden. Under Code of Civil Procedure section 170.1, subdivision (a)(6)(iii), the trial court judge must recuse themselves if “A person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial.”

Next, show that this standard was met in the case and that the facts that lead to the appearance of bias were known to the defense. (See *Scott, supra*, 15 Cal.4th at pp. 1205-1208 [a request for recusal is required if the facts are known to the defense].) From there explain that there could be no reasonable tactical justification for the failure to request recusal because there could be no conceivable downside. Had the request been made, the trial court judge would have disqualified themselves. Or, if the trial court denied the request, there would at least be an adequate record of the basis for the accusation of bias, which would help establish error on appeal under both state and federal law. (See e.g., *Schmidt v. Superior Court* (2020) 44 Cal.App.5th 570, 593 [without a request for recusal, the record was inadequate to show “extreme facts” to justify a due process violation].) On the issue of prejudice, explain how the failure to request recusal and the concomitant inadequate record caused an unfair trial before an impartial decisionmaker. Further, explain that without the request for recusal, the appellant is precluded from the more favorable standard for recusal under Code of Civil Procedure Section 170.1, and is instead left with a standard on appeal that is significantly more burdensome.

**B. Focus on the impact to factual findings and credibility.**

For all of the avenues suggested above, and to the extent possible, try to frame the bias claim as one which affected the assessment of factual findings and credibility. When the allegations of bias relate to factual issues they are particularly troubling because the appellate court usually defers to the trial court’s factual and credibility findings. (*Catchpole v. Brannon, supra*, 36 Cal. App. 4th at p. 247.) Indeed, many of the cases in which reversal was achieved on the grounds of judicial bias focused on bias that impacted the credibility of witnesses.

For example, in *People v. Oliver* (1975) 46 Cal.App.3d 747, 752-753, the trial court's conduct rose to the level of an improper directed verdict. In *Oliver*, the trial court judge said that he had never seen "an array of witnesses whose credibility is so doubtful" as the defense witnesses. (*Id.* at p. 750.) The Court of Appeal acknowledged that a court is permitted to comment on the credibility of witnesses but said that the trial court judge in *Oliver* did so "without reference to either reason or record." (*Id.* at p. 753.) The court held that a trial court's opinion that defense witnesses were not credible "allow[ed] the jurors to discredit and disbelieve such witnesses without determining the question of credibility in accordance with proper instructions." (*Ibid.*) In essence, a comment suggesting that the defense case was not credible is no different than a comment that the defendant is guilty, and thus constitutes an improper directed verdict. (*Ibid.*)

In the rather bizarre case of *Tatum, supra*, 4 Cal.App.5th at page 1131, the judge told prospective jurors during voir dire, including six jurors who were ultimately empaneled, that she did not trust plumbers. The judge said that she had had " 'horrible experiences with plumbers' " and that if she learned someone was a plumber she thought, " 'he's not going to be telling the truth.' " (*Ibid.*) At trial, the defendant's alibi witness was a plumber. (*Ibid.*)

The Court of Appeal found error ruling that the trial court's comments "irreparably damage[ed] [the defendant's] chance of receiving a fair trial." (*Tatum, supra*, 4 Cal.App.5th at p. 1131.) The court held that the trial court's comments suggested that the judge might discredit the defendant's alibi witness based on her bias against plumbers in general. (*Ibid.*) As a result, the judge's comment "exceeded the scope of proper judicial comment" and violated the defendant's right to a fair trial. (*Ibid.*) What is particularly notable about *Tatum*, is that the Court of Appeal held that reversal was "mandatory" even though the error occurred during voir dire and before only half of the seated jurors. (See *Ibid.*) The court also had some choice words about why an objection and admonition from the court would have been pointless. "Under these circumstances an instruction would have been as ineffectual as the famous words spoken by the Wizard of

Oz, ‘Pay no attention to that man behind the curtain!’ (The Wizard of Oz (Metro-Goldwyn-Mayer 1939)).” (*Id.* at pp. 1131-1132.)

Finally, during the jury’s deliberations in *Cook*, *supra*, 33 Cal.3d at page 404, the jury indicated it was deadlocked and asked for the court’s opinion on the veracity of certain witnesses. The court obliged and expressed its belief in the prosecution witnesses’ testimony and in the defendant’s guilt. (*Id.* at pp. 405-406.) The jury then found the defendant guilty. (*Id.* at p. 406.) The *Cook* court concluded that the court’s comments prevented the jury from functioning “as the sole and exclusive arbiter of the prosecution witnesses and the guilt or innocence of the defendant.” (*Id.* at p. 412.) The trial court thus interfered with the defendant’s constitutional right to a jury trial and reversal was thus “mandatory.” (*Ibid.*)

The take-away from this line of credibility-affecting cases is to try to analogize your case and the impact of the purported bias as one that impeded the jury’s “sole and exclusive” role in judging credibility and adducing facts.

## CONCLUSION

One hopes that examples of judicial bias are rare - whether that is bias toward the prosecution or bias based on gender, race, ethnicity, social class, indigency, sexuality, sex, or any other minority or “other” based criteria. But bias exists. As appellate counsel, we have a role to play in challenging the inequities in our judicial system and to help hold the judiciary accountable.<sup>4</sup> To that end, appellate counsel must keep an eye out for times when the judicial officer expressed some type of explicit or implicit bias from the bench.

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<sup>4</sup> If you have not already had opportunity, I encourage you to read Patrick McKenna’s June 1, 2020 open letter written in response to the untimely death of Mr. George Floyd and the nationwide protests that followed. Available on [our website](#).