

APPENDIX A

The Central Principle of Being a Judge and the Eight Pillars



*“Mirror, mirror, on the wall,
who is the fairest of them all?”*

“Oliver Wendell Holmes.”

Charles Saxon/The New Yorker Collection/The Cartoon Bank

The Central Principle of Being a Judge

(*Handbook*, section 1:1)

“The basic function of an independent, impartial and honorable judiciary is to maintain the utmost integrity in decision making, and this code should be read and interpreted with that function in mind.” (Advisory Com. com, Cal. Code of Jud. Ethics, canon 1.)

The Central Principle of Being a Judge provides a single foundational idea unifying the elements of judging based on constitutional provisions, statutes, precedents, the rules on procedure, and the code of judicial ethics governing the conduct of judges in court and in private life. The Central Principle derives from the long historic development of the idea that those who sit in judgment on the lives of others must render honest decisions. For example both Deuteronomy, 16:18–20 and the Law of the Twelve Tablets in the Republican Period in Roman history require judges to be honest and impartial.

Accomplishing the goal of ensuring the honesty and integrity of decisions is probably the most difficult and subtle of tasks. It is an activity that takes place in the privacy of a judge’s mind. Unless the judge says something revealing or provides a nonverbal clue, no one else would know whether the judgment was guided by fear of public opinion, desire for advancement, favoritism, or personal bias. Moreover, wrested judgment may also be influenced by unconscious factors.

The fact that distortion in judgment may not be conscious makes it no less a breach of the Central Principle of Being a Judge because part of the judicial responsibility is to know what is influencing one’s decision. In spite of the importance of this issue, there are instances, though rare, where disciplinary action has resulted from the decisionmaking process. To serve justice, the Central Principle needs to move to the top of one’s consciousness, for example:

- Did I consciously or unconsciously allow the intrusion of insidious bias to command?
- Did I allow my caseload and time pressures to transcend justice?
- Have I pretended to hear when, in fact, I did not listen?
- Have I failed to throw off the role of advocate on assuming the bench?
- Have I bowed to popular opinion, reaching decisions to gain public favor, career advancement, electoral victory, or to please the powerful?

The unifying idea of the Central Principle of Being a Judge is all about providing a judge with a clear focus on the goal of what it means to be a judge *and also* giving a judge a single guidepost when faced with any question, whether it be an ethics issue or any other issue where the judge must choose which path to take and what decision to make. It is the guide to doing what is right. (*Handbook*, § 1:37)

As a judge you sit in judgment of disputes of others. You are responsible for protecting the interests of those who are not able to take care of themselves. In each of these areas, judges hold a position of enormous importance, as set out in the Federalist papers:

“Justice is the end [goal] of government. It is the end of civil society. It ever has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit.” (The Federalist No. 51, attributed to Madison and/or Hamilton.)

Constitutions, statutes, rules, precedents, and so forth are tools that serve the judge’s ability to understand the Central Principle and guide the judge’s actions. But, the most important tools are in the judge’s mind, honor, and heart.

The Eight Pillars of Being a Judge

PURPOSE of the Eight Pillars

The Eight Pillars of Being a Judge focus on the thinking and organizational processes to help maintain a connection to judicial conduct and to the Central Principle of Being a Judge. The *Handbook*, sections 1:30–1:38, has a detailed explanation of the Eight Pillars.

PILLAR I—Mindfulness of Who You Are

(Summary of *Handbook* section 1:31)

Always be mindful that you are a judge—whether on the bench, at a party, or online. As you go about your daily lives, awareness that you are a judge should be running in the background like an antivirus program. As you concentrate on this element of mindfulness this awareness of who you are will be so much a part of you that, as information, events, or perceptions enter your mind, the idea that “*I am a judge*” is integral to your definition of self: you are a public figure who is seen as a symbol of justice.

In essence mindfulness “involves slowing down one’s mental processes enough to allow one to notice as much as possible about a given moment or situation, and then act thoughtfully based on what one has noticed. It sometimes is described as approaching each moment with a ‘beginner’s mind’ or ‘thinking about thinking while thinking.’” (Fogel, *Mindfulness and Judging*, Federal Judicial Center (2016), p. 2.)

Advancing the legitimate goals and objectives of being a judge. As one who holds high office, a judge must be acutely and constantly aware that everything he or she does or says must be managed through the filter of identity with this high office. What you do and say must always be in the service of (or, at the very least, be neutral to) the goals and objectives of your office. A judge needs to develop the mental process that allows for this kind of mindfulness to take place. The key question,

of course, is whether the conduct undermines those legitimate goals and objectives of high office, leading to an examination of whether the conduct comports with the Central Principle of Being a Judge.

What is expected of a judge? Most of the conduct that reinforces the Central Principle of Being a Judge is set out in the Code of Judicial Ethics and is based on the following foundational principles:

- *Uphold the independence, integrity, probity, fairness, honesty, and high standards of conduct;*
- *Eschew bias and prejudice, be impartial, and maintain an open mind;*
- *Avoid impropriety and appearance of impropriety;*
- *Maintain integrity, probity, uprightness, soundness of character, high standards of conduct, and follow the law, court rules and the Code of Judicial Ethics;*
- *Promote public confidence in the judiciary.*

Although these ideals obviously relate primarily to conduct in court proceedings, they are also central to a judge's conduct in everyday life away from court.

Notice-Reflect-Respond, described in sections 1:43, 2:46, and Appendix B, is a systematic means for ensuring mindfulness and managing self-control and is discussed in both Pillar I and Pillar II. (*Handbook*, §§ 1:31 and 1:32).

PILLAR II—Mindfulness in the Courtroom

(Summary of *Handbook* section 1:32)

Mindfulness and awareness in the courtroom require consistency of focus on your mission as a judge in court proceedings.

This means being conscious of what you do and say, and being attentive to what others do and say. Notice your own reactions, feelings, and thoughts in regard to what is taking place.

The work of judges is not confined to mastering the fine points of evidence, rules of law, intricacies of sentencing, or moving the calendar. If, at the end of each day, the judge goes into chambers satisfied at getting through the calendar while those who have appeared before the judge are smarting from a burst of judicial temper, sarcasm, or an unwillingness to listen, the judge's duty has not been fulfilled.

Learning the skills to deal with the pressures of a flawed and overloaded judicial system is as important as any other judicial skill. Sections 1:43 and 2:48 of the *Handbook* have practical guides to avoid ethical problems, and section 2:46 addresses loss of judicial demeanor.

Always remain focused on the judicial task before you. If what you do and say does not advance the legitimate goals and objectives of being a judge, including accomplishing the particular task before you, learn to notice and be aware when this takes place, and get yourself back on

track. Parties, lawyers, jurors, witnesses, and court observers expect a judge to pay close attention to the matter before the court. A court proceeding is not a place to berate the lawyers for wasting your time, entertain an “audience” with your wit and wisdom, catch up on social media, or prepare your law and motion calendar for the next day.

PILLAR III—The Rule of Law

(Summary of *Handbook* section 1:33)

Actions and decisions in court must be within the law. Judges are not in courtrooms to make up the rules as they go along. Observing the *rule of law* involves the fair application of the constitutions, statutes, case law, rules of court, the Code of Judicial Ethics, and other laws, ensuring the constitutional rights of all before the court, including self-represented persons.

The rule of law is the foundation of modern social order, replacing force and despotic whim. In administering justice, judges must respect and comply with the law. (Cal. Code Jud. Ethics, canons 2A, 3B(2).) Judicial independence does not mean freedom from constraints of the law, but is a basis for our confidence that judicial decisions are not influenced by political considerations, public opinion, the need to be popular, fear of losing an election, or the desire to curry favor with the powerful. Judicial independence requires that judges have the courage to do what is right regardless of these pressures, as well as the courage to stand between abuse of power by the state and the individual before the court.

Public confidence in the judicial institution is necessary to preserve the rule of law. We need not be reminded of the fragility of the rule of law when public confidence is shaken, or of the degree to which public confidence in public institutions has deteriorated in recent times. Articulation of the moral principles and values to which the judicial institution binds itself should serve to encourage public confidence in that institution, and respect for its decisions.

PILLAR IV—Make No Assumptions

(Summary of *Handbook* section 1:34)

Keep an open mind, never prejudge, learn, and remain aware of your biases and prejudices. These are essential elements to fairness and impartiality. It is natural for humans to make assumptions and to harbor biases and prejudices, whether knowingly or unconsciously, and to take mental shortcuts in order to quickly arrive at conclusions. It is also a part of our nature that once a conclusion is reached (whether based on a bias, an assumption, or a “fact” triggered by evidence presented in a trial), it is difficult to accept as “fact” something contrary to that conclusion. The instruction to jurors to “keep

an open mind” is often easier spoken than successfully accomplished. The same holds true for judges.

“If you don’t make assumptions, you can focus your attention on the truth, not on what you *think* is the truth. Then you see life the way it is, not the way you want to see it.” (Excerpted and adapted from *The Four Agreements: A Practical Guide to Personal Freedom*, by don Miguel Ruiz, (Amber-Allen Pub. 2001).)

Judicial Empathy. The Code of Judicial Ethics requires judges to treat those who come before the court with fairness, impartiality, and courtesy. (Cal. Code Jud. Ethics, canon 3, 3B(4).) The Code also mandates that judges perform duties “without bias or prejudice.” (*Id.*, canon 3B(5), 3C(1), 3C(5)) and to require attorneys and court staff to refrain from manifesting bias or prejudice (*id.*, canon 3B(6), 3C(3)). A judge must conduct all extrajudicial activities so that they do not “cast reasonable doubt on the judge’s capacity to act impartially as a judge. (Advisory Com. com., Cal. Code Jud. Ethics, canon 4A.)

Judicial empathy moves the judge to understand the lives and challenges of those who come before the court. This understanding is necessary to avoid assuming that others experience life the same way you do. Appropriate judicial empathy should be undertaken when warranted by the circumstances of the case and the parties. The honesty and integrity of a judge’s decisions benefit greatly from such introspection. Thomas B. Colby defines empathy in a judicial context as “the cognitive ability to understand a situation from the perspective of other people, combined with the emotional capacity to comprehend and feel those people’s emotions in that situation.” (Colby, *In Defense of Empathy* (2012) 96 Minn. L.Rev. 1944, 1945.)

Judicial empathy requires a judge to be open to the idea that unconscious or implicit biases may unwittingly influence a judge’s view of the facts, causing one to make assumptions and thereby impact decisions. In understanding judicial empathy the judge needs to differentiate it from sympathy which might well interfere with the judge’s duty to ensure fairness, impartiality and appearance of impartiality. The *Handbook*, Pillars I and V, sections 1:31 and 1.35, and sections 2:03 through 2:28, has an extended discussion of fairness, impartiality, and absence of bias.

The greatest failure of a judiciary and judges in modern times took place in Nazi Germany. As recounted in the article in California Litigation, Nobel Peace Prize Laureate Professor Elie Wiesel said that the Nazi judges ignored the impact of their decisions on individual people and demonstrated a total absence of “humanity.” (See Fybel, *When Mass Murder and Theft of All Human Rights Were “Legal”: The Nazi Judiciary and Judges* (2012) vol. 25, No. 2, California Litigation, 15–21.)

Keeping an open mind, controlling assumptions, and recognizing our responsibility of humanity and empathy, may be the most difficult and vital of judicial burdens. Thwarting the impact of bias, prejudice and assumptions requires constant mindfulness of what one is thinking, or failing to think, and focusing on reason. **Judicial empathy is an antidote to prejudice.**

PILLAR V—Professional Distance

(Summary of *Handbook* section 1:35)

Do not become embroiled, take things personally, or be an advocate. You are no longer a lawyer, and your *only stake* in a matter before you is that justice must be administered fairly, impartially, honestly, and without fear or favor.

Embroilment is the process by which a judge surrenders impartiality. In doing so, the judge becomes a party to the quarrel, involved rather than impartial and losing professional distance. Once a judge becomes embroiled in a matter, fairness, impartiality, and the integrity of decisions leave the courtroom. Embroilment is a frequent cause of judicial misconduct and discipline. Loss of self-control, loss of control of the courtroom, frustration that produces anger, acting in a way that favors one side in a matter, assuming the role of a prosecutor or defense attorney, and coercing a plea or settlement, are examples of losing professional distance. (see Pillar VI below.) The humility to seek out and accept advice is a hallmark of professionalism.

PILLAR VI—Ensure Both Reality and Public Perception of Honesty and Integrity

(Summary of *Handbook* section 1:36)

Ensuring honesty and integrity in the process of making decisions and in the decisions themselves encompasses both the *reality* as well as the *public perception* of integrity. The California Constitution, Code of Civil Procedure, Penal Code, Rules of Court, Code of Judicial Ethics, Evidence Code, and all the other rules that govern the system of justice in California are focused on this one ultimate objective, this one unifying idea: ensuring the honesty and integrity of decisionmaking. Not only must a judge do what is right according to law, he or she must also be *perceived* to be doing so. Ensuring honesty and integrity in actions outside of court is also essential to the public perception of the integrity of judicial actions and the judiciary.

To secure public confidence in the independence, integrity, and impartiality of the judiciary, judges need to speak honestly about their institution and undertake the processes necessary for its improvement. The courthouse is not an exclusive club that looks after the judge's self-interest. Public confidence is earned when judges take actions that place the good of society above their self-interest.

PILLAR VII—Courage to Do the Right Thing

(Summary of *Handbook* section 1:37)

Do what is right according to the law and have the courage to

do so. Judges are ordinary people asked to do the extraordinary. They are given enormous power and are required to eschew any temptation to abuse that power. Judicial integrity is tested by the challenge to do what is right regardless of fear or the judge's unwillingness to do what is right.

You are entrusted to protect the liberty of the people, and not compromise honor and abandon trust by succumbing to biases and prejudices. Judges and ordinary people have the natural desire for acceptance and advancement, but judges have the obligation never to yield these desires by giving in to political pressure or public opinion. (See Cal. Code Jud. Ethics, canon 3B(2).)

There are many things one can do to counter these influences. As mentioned in section 1:22 of the *Handbook*, keep copies of the Central Principle and the Eight Pillars on your bench. Focus on who you are and what you have been entrusted to do, and remember the qualities of the great judges you have known, including their integrity and courage.

“One must be true to the things by which one lives. The counsels of discretion and cowardice are appealing. The safe course is to avoid situations which are disagreeable and dangerous. Such a course might get one by the issue of the moment, but it has bitter and evil consequences. In the long days and years which stretch beyond that moment of decision, one must live with oneself; and the consequences of living with a decision which one knows has sprung from timidity and cowardice go to the roots of one's life. It is not merely a question of peace of mind, although it is vital; it is a matter of integrity of character.” (Dean Acheson (United States Secretary of State, 1945–1953) Present at the Creation: My Years in the State Department (W.W. Norton & Co. 1987), p. 36.)

PILLAR VIII—Accountability and Humility

(Summary of *Handbook* section 1:38)

Acceptance of accountability. Judicial accountability is an important element in public acceptance of court decisions. As you read the *Handbook* and look into ethics issues you need to focus on the Central Principle of Being a judge and incorporate the Eight Pillars into your thinking. As a member of the community, imagine if there were no place to lodge a complaint about the conduct of judges, where judges could act with impunity, where biases ran wild, and where self-interest and political power dominated judicial decisions.

Without honorable judges, who else would we have to protect against abuse of governmental power in order to ensure the rule of law? The Commission on Judicial Performance exists to oversee judges' ethics when judges fail to do so themselves. We cannot look at accountability as personally offensive, or see the institutions of accountability as “the enemy.” As judges, you are not here to look out for yourselves or your personal interests. You are here as guardians of a system of justice that

protects our democracy. As a guardian of justice, a judge needs to recognize that accountability is an appropriate and fundamental obligation of this calling. A necessary corollary to the Central Principle of Being a Judge is acceptance of accountability and humility. Recognizing that you are accountable for your actions means having the humility to accept that you can make mistakes, and that learning never ends. It may even be a way of making fewer mistakes.

And, finally, the judge is the only person who knows for sure whether his or her decision and the process of decision making carried the integrity, honesty, impartiality, and fairness required of all judges.

Public confidence in the integrity of the judiciary is enhanced by the maintenance of these institutional systems of accountability. Over time, each judge will learn the legal rules, the relevant statutes and cases, along with the many rules of judicial ethics. But, as you learn these ethical and legal rules, the Central Principle and the Eight Pillars will be your touchstone.