

COMMITTEE ON JUDICIAL CONDUCT AND DISABILITY

Memorandum of Decision

1 This Memorandum of Decision addresses two petitions for
2 review of an order of the Judicial Council of the Ninth Circuit.
3 The Committee's review is based on the delegation to it by the
4 Judicial Conference of the United States of the responsibility to
5 consider petitions addressed to the Judicial Conference for
6 review of circuit council actions under 28 U.S.C. § 357(a).
7 Jurisdictional Statement of the Committee on Judicial Conduct and
8 Disability (As approved by the Executive Committee, effective
9 March 12, 2007), *available at*
10 http://www.uscourts.gov/judconf_jurisdictions.htm#Disability.
11 See also 28 U.S.C. §§ 331 (authorizing the Judicial Conference to
12 establish a standing committee to review petitions), 357(b) ("The
13 Judicial Conference, or the standing committee established under
14 section 331, may grant a petition filed by a complainant or judge
15 under subsection (a).").

16 In the order in question, dated November 16, 2006, the
17 Judicial Council of the Ninth Circuit adopted -- with minor
18 revisions -- the findings of a special investigatory committee
19 and ordered that District Judge Manuel L. Real be publicly
20 reprimanded for his misconduct. The district judge filed a
21 petition for review of the Judicial Council's Order. The
22 complainant also filed a petition for review, arguing that the
23 sanction of a public reprimand was insufficient. For the reasons
24 given below, we approve the Judicial Council's Order, and deny

1 both petitions.

2
3 BACKGROUND

4 We briefly summarize the history of this matter. In
5 February 2003, a misconduct complaint was filed against a United
6 States district judge, alleging, inter alia, that the judge had,
7 based on an ex parte contact, withdrawn the reference of a
8 bankruptcy matter from the bankruptcy court and stayed
9 enforcement of a state unlawful detainer judgment. [**Complaint No.**
10 **03-89037**] The Chief Judge of the Ninth Circuit dismissed the
11 complaint without convening a special committee under Section 353
12 of the Judicial Conduct and Disability Act to investigate the
13 allegations. The complainant petitioned the Judicial Council for
14 review of this order. On September 10, 2003, the Judicial
15 Council asked the district judge to provide a further explanation
16 of his actions in the matter. The judge responded by letter
17 dated October 9, 2003. Following a limited investigation, a
18 divided Judicial Council vacated the Chief Judge's dismissal and
19 remanded for further specified proceedings.

20 Upon remand, the district judge filed a lengthy response to
21 the allegations of the complaint and to the order of the Judicial
22 Council. On November 4, 2004, the Chief Judge once again
23 dismissed the misconduct complaint without appointing a special
24 committee. The complainant petitioned the Judicial Council for
25 review, and again the Judicial Council requested additional
26 information from the district judge. The judge responded in a

1 letter dated June 17, 2005. Thereafter, on September 29, 2005, a
2 divided Judicial Council affirmed the Chief Judge's dismissal of
3 the misconduct complaint, holding that a subsequent appellate
4 court ruling -- which held that the judge had abused his
5 discretion by withdrawing the reference in the bankruptcy case --
6 coupled with the judge's prediction that such conduct would not
7 recur constituted "appropriate corrective action" in the matter.
8 The complainant petitioned the Judicial Conference for review of
9 this matter, which was referred to this Committee under the
10 delegation described above. A majority of this Committee found
11 that we had no jurisdiction to consider a petition for review of
12 a Chief Judge's dismissal of a complaint when no special
13 investigatory committee had been appointed under Section 353. In
14 re Opinion of Judicial Conference Comm. to Review Circuit Council
15 Conduct & Disability Orders, 449 F.3d 106, 109 (U.S. Jud. Conf.
16 2006). A minority of this committee believed that we had
17 jurisdiction to review whether a special committee should have
18 been appointed and that a committee was required under the
19 circumstances. Id. at 109-17.

20 In 2005, the complainant filed a new complaint. He alleged
21 that the district judge had committed misconduct by being
22 disingenuous and misleading in his responses regarding the 2003
23 Complaint. This time, the Chief Judge of the Ninth Circuit
24 appointed a special committee to investigate the allegations.
25 The special committee subsequently conducted a four-month
26 investigation that necessarily covered much of the alleged

1 misconduct that led to the initial 2003 Complaint. The special
2 committee reported its findings and recommendations to the
3 Judicial Council, which accepted them with minor revisions.

4 The Judicial Council's Order found that the district judge
5 had committed misconduct by making misleading statements to the
6 Judicial Council itself in his 2003 letter, and by making further
7 misleading statements to the special committee during its
8 investigation. The Judicial Council further found that the judge
9 had committed misconduct by withdrawing the bankruptcy reference
10 and ordering a stay of judgment based on an ex parte contact.
11 The Judicial Council ordered that the judge be publicly
12 reprimanded for this misconduct.

13 As noted, both the district judge and the complainant have
14 petitioned for review of the Judicial Council's Order. The
15 judge's petition advances the following four arguments: (i) that
16 the 2005 Complaint was effectively an "appeal" of an earlier
17 complaint and was thus barred by 28 U.S.C. § 352(c); (ii) that
18 Judge Kozinski should have been recused by the Judicial Council
19 because of his bias against the subject judge; (iii) that the
20 findings of the special committee, as adopted in the Judicial
21 Council's Order, are overstated and unsupported by the evidence;
22 and (iv) that a public reprimand is too harsh a punishment in
23 light of the humiliation the judge already suffered as a result
24 of the investigation. The complainant's petition argues that a
25 public reprimand is an inadequate sanction.

26 For reasons discussed below, we find none of these arguments

1 convincing.

2
3 DISCUSSION

4 We assume familiarity with the following orders and reports
5 in this matter: Order and Memorandum of the Judicial Council of
6 the Ninth Circuit, No. 05-89097 (Nov. 16, 2006); and Report to
7 the Judicial Council of the Ninth Circuit from the Committee
8 Convened Pursuant to 28 U.S.C. § 353(a) to Investigate the
9 Allegations of Judicial Misconduct in the Complaints Docketed
10 Under 05-89097 and 04-89039, Pertaining to Complaint 05-89097
11 (Oct. 10, 2006) (As modified by order of the Judicial Council of
12 the Ninth Circuit for adoption by the Judicial Council).

13 a) Finality

14 In his petition, the district judge argues that the 2005
15 Complaint "encompasses *the identical factual allegations* that
16 were raised in the [2003 Complaint]." **[Real Petition at 6**
17 **(emphasis in original).]** He therefore suggests that the 2005
18 Complaint constitutes an "appeal" for "review" of the dismissal
19 of the 2003 Complaint, which is barred by 28 U.S.C. § 352(c)
20 ("The denial of a petition for review of the chief judge's order
21 shall be final and conclusive and shall not be judicially
22 reviewable on appeal or otherwise."). The judge argues that
23 Section 352(c) provides "finality" for the proceedings and bars
24 any "court or reviewing body" from further considering the
25 matters involved in the 2003 Complaint. **[Real Petition at 12.]**

26 The 2005 Complaint, however, was not an appeal of the

1 earlier dismissal. Rather, the 2005 Complaint was a new
2 proceeding with new factual allegations, and was thus not barred
3 by Section 352(c).

4 However, the Judicial Council's Order concluded that the
5 judge had engaged in some of the misconduct alleged in the
6 original 2003 Complaint. The Order did, therefore, involve a re-
7 examination of some factual issues involved in the earlier
8 proceedings. This overlap raises the question of whether
9 reconsideration of these issues triggers a claim preclusion
10 principle analogous to res judicata requiring dismissal of the
11 present proceeding.

12 If this proceeding was litigation in an adversarial setting
13 in which the need for finality was of great importance, further
14 consideration of the matter might be barred. We cannot, however,
15 ignore the profound differences between this type of proceeding
16 and litigation. This Committee has recognized that, although
17 misconduct proceedings "have an adjudicatory aspect, they also
18 have an administrative and managerial character not present in
19 traditional adjudication by courts." In re Complaints of
20 Judicial Misconduct, 9 F.3d 1562, 1566 (U.S. Jud. Conf. 1993).
21 Consequently, before applying the legal doctrine of claim
22 preclusion, we must examine the reasons underlying that doctrine
23 and consider their applicability and relevance to misconduct
24 proceedings.

25 The doctrine of claim preclusion serves three basic
26 purposes: (i) the need for finality in the settlement of

1 disputes; (ii) the need to conserve judicial resources by
2 avoiding duplicative proceedings; and (iii) the prevention of
3 harassment. See Allan D. Vestal, Res Judicata/Preclusion V-8 to
4 V-12 (1969). These purposes are not served by an application of
5 the doctrine in the present matter.

6 First, the need for finality has less relevance to the
7 present circumstances than it does to litigation generally. In
8 ordinary litigation, there is not only a strong interest in
9 reaching a correct conclusion, but also an interest in achieving
10 finality so that the parties may obtain repose and their dispute
11 be finally settled. The need for finality arises both from the
12 nature of an adversary system, which requires parties to pursue
13 their own claims as they see fit, and from the negative
14 consequences of allowing a dispute to continue after a decision
15 has been rendered in an initial, full adjudication. Parties to
16 litigation are thus generally not allowed to revive fully
17 adjudicated claims by serially advancing new legal theories not
18 raised in earlier proceedings but involving the same underlying
19 transactions.

20 By contrast, misconduct proceedings under the Judicial
21 Conduct and Disability Act are adversarial only to the extent
22 that they may be initiated by complaint and usually allow
23 interested parties some opportunity to present their respective
24 view of the events in question. Fundamentally, however,
25 misconduct proceedings are inquisitorial and administrative.
26 Chief circuit judges need not passively await the filing of

1 complaints and then referee a contest between a complainant and a
2 judge, bounded by the four corners of the complaint. Instead,
3 chief circuit judges may "identify" and review complaints
4 themselves. See 28 U.S.C. §§ 351(a)-(b), 352(a). In addition, a
5 complainant who has initiated a complaint does not have the full
6 rights accorded a party to litigation. See 28 U.S.C. § 358(b).
7 Indeed, the Act provides no mechanism for a complainant to
8 withdraw a complaint. Thus, the Illustrative Rules "treat[] the
9 complaint proceeding, once begun, as a matter of public business
10 rather than as the property of the complainant. The complainant
11 is denied the unrestricted power to terminate the proceeding by
12 withdrawing the complaint." Commentary to Illustrative Rule 19.
13 Furthermore, Illustrative Rule 10(a) allows special committees,
14 on which chief judges sit ex officio, the right to "expand the
15 scope of the investigation to encompass" misconduct that is
16 "beyond the scope of the complaint."

17 The inquisitorial nature of a misconduct proceeding is the
18 direct result of the Act's adoption of a self-regulatory system
19 in recognition of the need to maintain judicial independence, as
20 opposed to a system in which misconduct complaints are
21 adjudicated by an external tribunal. Under this self-regulatory
22 regime, the responsibility of chief judges, special committees,
23 judicial councils, and the Judicial Conference, must be to
24 vindicate the process rather than adjudicate the rights of
25 parties. Moreover, there cannot be public confidence in a
26 self-regulatory misconduct procedure that, after the discovery of

1 new evidence or a failure to investigate properly or completely
2 serious allegations of misconduct, allows misconduct to go
3 unremedied in the name of preserving the "finality" of an
4 earlier, perhaps misfired, proceeding.

5 Therefore, any argument that the instant proceeding is
6 barred because it is duplicative of the prior one is
7 unpersuasive, particularly because no special committee
8 investigation was undertaken in the earlier proceedings. We now
9 have what the previous proceeding lacked -- a defined record and
10 factual findings based on that record. We thus conclude that
11 neither the letter nor the intent of the Judicial Conduct and
12 Disability Act prevents us from rendering a decision on the
13 merits based upon that record and those findings because of
14 considerations of finality.

15 As to the second purpose served by the doctrine of claim
16 preclusion, concerns about wasting judicial resources on
17 duplicative proceedings are not weighty in these circumstances.
18 Misuse of the misconduct procedure can be easily prevented. See
19 Illustrative Rule 1(f) ("A complainant who has filed vexatious,
20 repetitive, harassing, or frivolous complaints, or has otherwise
21 abused the complaint procedure, may be restricted from filing
22 further complaints."). There is, therefore, no danger of opening
23 the floodgates to duplicative misconduct proceedings by allowing
24 the present proceeding to continue.

25 Finally, the risk of harassment is a serious concern in the
26 context of judicial misconduct complaints, but it is not an issue

1 in this case. A judge should not be forced to respond repeatedly
2 to the same charges, with a new special committee appointed each
3 time to review the same evidence. Harassment, however, is not
4 implicated where, as here, no full proceeding by a special
5 committee occurred in the first instance, and some new
6 allegations of cognizable misconduct, supported by new evidence,
7 are presented. When there is a reason for continuing or
8 reinstating a proceeding that is legitimate and not intended to
9 harass or punish, the nature of the administrative,
10 self-regulatory process requires that the new proceeding be
11 completed. This is particularly important where, as here,
12 credible evidence is presented that the subject judge hindered
13 the original proceeding.

14 We thus proceed to the district judge's substantive
15 arguments.

16 b) Recusal of Judge Kozinski

17 There is no merit in the district judge's argument that
18 Judge Kozinski should have been recused. The district judge has
19 presented no evidence whatsoever of an actual bias or the
20 appearance of bias on Judge Kozinski's part. The fact that Judge
21 Kozinski, as a member of the Judicial Council, took actions in
22 the earlier proceeding with which the district judge disagrees,
23 particularly in concluding in the earlier proceeding that the
24 district judge had entered orders in the bankruptcy case based on
25 ex parte contacts with the debtor, in no way constitutes
26 recusable bias.

1 c) The Judicial Council's Findings

2 The Judicial Council, acting on the report of the special
3 committee, made two principal findings: First, that the district
4 judge committed misconduct by making inaccurate and misleading
5 responses to the Judicial Council and special committee; and
6 second, that the judge committed misconduct by withdrawing the
7 bankruptcy reference and staying a judgment in that matter based
8 on personal knowledge and information received ex parte. The
9 district judge challenges both findings as well as the
10 alterations the Judicial Council made to the special committee's
11 report.

12 Ordinarily, we will defer to the findings of the Judicial
13 Council and the special committee, and will overturn those
14 findings only if, upon examination of the record, they are
15 clearly erroneous. Based on the record before us, we cannot
16 conclude that the factual findings of the special committee as
17 adopted by the Judicial Council, or the committee's
18 interpretation of the evidence before it as adopted by the
19 Council, were clearly erroneous. First, the district judge's
20 versions of relevant events have been incomplete and involved
21 serious, material variations. Second, there is overwhelming
22 evidence that the judge's withdrawal of the reference of the
23 bankruptcy proceeding and stay of a state court proceeding was
24 based on a contact with the debtor, who was a probationer in a
25 separate criminal matter before the judge, and occurred without
26 any notice to other parties to the bankruptcy proceeding. This

1 was judicial action based on an improper ex parte contact,
2 whether or not a probation officer witnessed the contact.

3 Nor are the minor alterations to the committee report made
4 by the Judicial Council problematic. The alterations are largely
5 semantic, leaving the substantive conclusions of the special
6 committee undisturbed and the recommended sanction unchanged.

7 d) Public Reprimand

8 While the Judicial Conference has an obvious interest in
9 avoiding major disparities in sanctions among the various
10 circuits, we will generally defer to a judicial council's
11 judgment with respect to an appropriate sanction so long as the
12 council has fully considered all the relevant options. In this
13 case, the district judge's misconduct was arbitrary and caused
14 significant harm to the bankruptcy litigants. His response to
15 well-founded concerns over judicial actions based on improper ex
16 parte contact has been a persistent denial of any impropriety.
17 The judge's claim that he has been punished enough is not
18 compelling because the lack of any sanction would appear to
19 ratify the judge's view that no serious misconduct occurred. Nor
20 do we agree with the complainant that the gravity of the
21 misconduct requires a harsher sanction. A public reprimand is
22 within the discretion of the Council, was arrived at through a
23 full consideration of the available alternatives, and should not
24 be overturned.

25
26 CONCLUSION

1 For the above reasons, we deny both petitions for review.

2
3 Respectfully Submitted,

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5 Hon. Ralph K. Winter, Chair
6 Hon. Pasco M. Bowman II
7 Hon. Carolyn R. Dimmick*
8 Hon. Dolores K. Sloviter
9 Hon. Joseph A. DiClerico, Jr.

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17 * Judge Dimmick has not participated in this proceeding, having
18 concluded, in her discretion, that the circumstances warranted
19 her disqualification. See Rule 25(a) of the Draft Rules
20 Governing Judicial Conduct and Disability Proceedings Undertaken
21 Pursuant to 28 U.S.C. §§ 351-364, current working draft *available*
22 *at*
23 <http://www.uscourts.gov/library/judicialmisconduct/commentonrules>
24 [.html](http://www.uscourts.gov/library/judicialmisconduct/commentonrules).