

COMMITTEE ON JUDICIAL CONDUCT AND DISABILITY

Memorandum of Decision

INTRODUCTION

1 This Memorandum of Decision addresses a petition for review
2 of an order of the Judicial Council of the Ninth Circuit. The
3 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 March 21, 2007, the Judicial
17 Council adopted the findings and recommendations of a special
18 committee. Based on its investigation and an acknowledgment of
19 the district judge, the committee found that the judge had
20 engaged in a pattern and practice of not providing reasons for
21 his decisions when required to do so and that this pattern and
22 practice was misconduct. It recommended a private reprimand.

23 In a letter dated March 26, 2007, the original complainant
24 sought review by the Judicial Conference of the Judicial

1 Council's Order, arguing that the sanction of a private reprimand
2 was insufficient. For the reasons stated below, we grant the
3 petition, vacate the Judicial Council's Order, and remand for
4 further consideration.

5 BACKGROUND

6 On July 18, 2006, the special committee wrote to the
7 district judge complained against and informed him of the scope
8 of the investigations. The committee interpreted the complaint
9 as alleging that the district judge had engaged in a pattern and
10 practice of abusing his judicial power by (i) refusing to follow,
11 or demonstrating recalcitrance in following, court of appeals
12 orders; (ii) improperly taking jurisdiction of cases; and (iii)
13 failing to follow the law. In addition to four cases cited in
14 the original 2004 Complaint, the committee identified twenty-
15 three additional cases -- cases that had been remanded to the
16 district judge multiple times, or reassigned to a different judge
17 on remand -- that it felt might bear on the complaint. On July
18 25, 2006, the committee advised the district judge that it had
19 identified two additional cases for consideration.

20 On September 21, 2006, the committee notified the district
21 judge that it had analyzed the twenty-nine cases more thoroughly
22 and refined the issues, reducing the number of cases to be
23 considered to seventeen. The committee informed the district
24 judge that the cases presented the following issues: (i) refusal
25 to follow, or demonstrating recalcitrance in following, court of
26 appeals orders or directives; (ii) improper taking of

1 jurisdiction over cases, or improper treatment of jurisdiction;
2 (iii) failure to provide reasons when required; (iv) improper
3 reliance on ex parte contact; and (v) abuse of authority.

4 The special committee held a hearing on November 8 and 9,
5 2006, at which testimony -- including testimony by the district
6 judge -- was heard, and exhibits were introduced. At the
7 conclusion of the hearing, the committee advised the district
8 judge that it was persuaded that there was no basis for finding
9 judicial misconduct with respect to many aspects of the
10 complaint. The committee, however, also stated that it intended
11 to investigate further whether the district judge had a pattern
12 or practice of "failing to state reasons" when either prevailing
13 law or a direction from the court of appeals in specific cases
14 required him to do so, and whether -- if established -- such a
15 pattern or practice would constitute judicial misconduct. **[Tr.**
16 **11/9/06, pp. 92-93.]**

17 Following the hearing, the committee decided to expand the
18 scope of its investigation of the "reasons" issue and identified
19 seventy-two additional cases that appeared to be relevant to the
20 investigations. In a December 18, 2006 letter to the district
21 judge, the committee described the expanded investigation and the
22 additional cases it would be considering.

23 After sending this letter, the committee entered discussions
24 with the district judge's counsel about "expediting" the
25 investigation. The discussions resulted in the following
26 acknowledgment from the district judge:

1 I realize that my failure in some cases to adequately
2 state my reasons for my decisions when this is required
3 by either prevailing law or direction from the Court of
4 Appeals causes additional expense and delay to the
5 litigants, and, therefore, is a pattern and practice that
6 the Committee has determined is misconduct because it is
7 prejudicial to the effective and expeditious
8 administration of the business of the courts. I hereby
9 commit to use my best efforts to adequately state reasons
10 when required in the future.¹
11

12 Following this acknowledgment, the committee determined that
13 it was appropriate to treat the expanded investigation as a
14 separate complaint and to address it in a separate report. In
15 that February 14, 2007 report, the committee "decided to accept
16 the district judge's acknowledgment [of misconduct]. Based on
17 that acknowledgment and on its own investigation, the Committee
18 unanimously [found] that the district judge had a pattern and
19 practice of not providing reasons when he was required to do so
20 and that this pattern and practice constitutes misconduct."

21 **[Special Committee Report at 7.]** The committee unanimously
22 recommended a private reprimand as an appropriate sanction. **[Id.**
23 **at 9.]** The committee found that a sanction short of a private
24 reprimand was "not sufficient," because the conduct of the
25 district judge was "manifestly prejudicial to the effective and
26 expeditious administration of the business of the courts, was
27 repeated and continued over a substantial period of time, caused
28 significant harm to litigants, and wasted judicial resources."

¹ The judge's acknowledgment is not a model of clarity. In particular, it appears to acknowledge only that the special committee has found his pattern and practice of not giving reasons to be misconduct.

1 [Id. at 9-10.] The committee found that a more severe sanction
2 was not warranted "based on the [Judicial Conduct and Disability
3 Act's] non-punitive, corrective purpose, on the Committee's
4 determination that most of the allegations of the 2004 Complaint
5 did not have merit, and on the district judge's acknowledgment of
6 his misconduct . . . and his commitment to correcting that
7 behavior in the future." [Id. at 10.] The Judicial Council's
8 Order adopted the findings and recommendations of the special
9 committee in toto.

10 DISCUSSION

11 In a March 26, 2007 letter, the original complainant sought
12 review of the Judicial Council's Order, arguing that the sanction
13 of a private reprimand was insufficient. Because we find that
14 two issues raised by the complaint -- explained more fully below
15 -- require the Judicial Council's Order to be vacated, and the
16 case remanded for further consideration, we grant the petition.

17 First, we believe that the type of misconduct alleged in the
18 complaint may not be cognizable under the Act and, therefore,
19 requires further examination by the Judicial Council. A
20 complaint alleging only conduct "directly related to the merits
21 of a decision or procedural ruling" does not allege misconduct
22 within the meaning of the Act. 28 U.S.C. § 352(b)(1)(A)(ii).
23 The misconduct procedure is not designed as a substitute for, or
24 supplement to, appeals or motions for reconsideration. Nor is it
25 designed to provide an avenue for collateral attacks or other
26 challenges to judges' rulings. Id.; Implementation of the

1 Judicial Conduct & Disability Act of 1980, A Report to the Chief
2 Justice, 239 F.R.D. 116, 239-40 (Sept. 2006) ("Breyer Committee
3 Report").

4 This principle is of critical importance.² The Act is
5 intended to further "the effective and expeditious administration
6 of the business of the courts." It would be entirely contrary to
7 that purpose to use a misconduct proceeding to obtain redress for
8 -- or even criticism of -- the merits of a decision with which a
9 litigant or misconduct complainant disagrees. Adjudication is a
10 self-contained process governed by extensive statutory provisions
11 and rules of procedure. Inserting misconduct proceedings into
12 this process would cause these provisions and rules to be far
13 less "effective" and "expeditious." Moreover, allowing judicial
14 decisions to be questioned in misconduct proceedings would
15 inevitably begin to affect the nature of those decisions and
16 would raise serious constitutional issues regarding judicial
17 independence under Article III of the Constitution. Judges
18 should render decisions according to their conscientiously held
19 views of prevailing law without fear of provoking a misconduct
20 investigation. Indeed, for these very reasons, judges have
21 absolute immunity from civil liability for their decisions,
22 Pierson v. Ray, 386 U.S. 547, 553-54 (1967), a principle fully
23 applicable to misconduct proceedings.

² This district judge has not petitioned for review and thus has not argued to the Committee the issues discussed. However, given that the misconduct procedure is largely administrative and inquisitorial, the Committee has discretion to follow the mandates of the Act rather than apply ordinary waiver principles.

1 The present matter involves a reprimand for decisions
2 rendered without giving a statement of reasons. The failure of a
3 judge to give reasons for a decision is, in our view, a merits
4 issue regarding that decision. The merits of a decision and the
5 reasons given or not given for it are often inseparable. For
6 example, litigants seeking to overturn a decision often argue
7 that the decision violates existing law because inadequate
8 reasons have been given. United States v. Hirliman, 503 F.3d
9 212, 213 (2d Cir. 2007). If an appellate court finds that claim
10 to be correct, the decision will generally be vacated and the
11 case remanded for further proceedings that may result in a
12 different outcome. Id. at 215. However, it is often the case
13 that even when a statement of reasons is generally required, the
14 reasons for a particular decision are entirely obvious on the
15 record and would not benefit from an explicit recitation by the
16 judge. United States v. Travis, 294 F.3d 837, 841 (7th Cir.
17 2002) (“[W]e shall uphold a sentence imposed with an incomplete
18 statement, provided that a more than adequate foundation in the
19 record supports the district court’s findings.”) (internal
20 citation and quotation marks omitted). Given this context, the
21 giving or not giving of reasons for a particular decision, like
22 the reasons themselves, should not be the subject of a misconduct
23 proceeding. We have concluded that misconduct complaints
24 regarding the failure to give adequate reasons for a particular
25 decision are, absent more, not cognizable under the Act.

26 The Judicial Council appears to have recognized this issue

1 by restricting its consideration to whether the district judge
2 had engaged in, and had acknowledged, a "pattern and practice" of
3 not giving reasons for his decisions when required to do so by
4 prevailing law or by the direction of the court of appeals in
5 particular cases.

6 We agree that a judge's pattern and practice of arbitrarily
7 and deliberately disregarding prevailing legal standards and
8 thereby causing expense and delay to litigants may be misconduct.
9 However, the characterization of such behavior as misconduct is
10 fraught with dangers to judicial independence. Therefore, a
11 cognizable misconduct complaint based on allegations of a judge
12 not following prevailing law or the directions of a court of
13 appeals in particular cases must identify clear and convincing
14 evidence of willfulness, that is, clear and convincing evidence
15 of a judge's arbitrary and intentional departure from prevailing
16 law based on his or her disagreement with, or willful
17 indifference to, that law.

18 We have concluded that this standard is necessary to ensure
19 that misconduct proceedings do not intrude upon judicial
20 independence by becoming a method of second-guessing judicial
21 decisions. For example, every experienced judge knows of cases
22 where the circumstances justifiably called for a decision that
23 was superficially at odds with precedent. This is because
24 although prevailing legal standards have large areas of clarity,
25 litigation often involves the borders of those areas. Breathing
26 room -- something more than a comparison of a judge's ruling with

1 a special committee's or judicial council's view of prevailing
2 legal standards -- must therefore be afforded. This standard,
3 requiring clear and convincing evidence of an arbitrary and
4 intentional departure from, or willful indifference to prevailing
5 law, provides that breathing room.

6 In the present case, the Judicial Council made no express
7 finding of willfulness, and the district judge's letter also
8 fails to admit willfulness expressly. Therefore, we conclude
9 that we must return this matter to the Judicial Council of the
10 Ninth Circuit for further consideration of the facts of this case
11 under the above-articulated standard. Great care must be taken
12 in finding clear and convincing evidence of willfulness. To the
13 extent that such a finding is based simply on a large number of
14 cases in which reasons were not given when seemingly required by
15 prevailing law, the conduct must be virtually habitual to support
16 the required finding. However, if the judge has failed to give
17 reasons in particular cases after an appellate remand directing
18 that such reasons be given, a substantial number of such cases
19 may well be sufficient to support such a finding. Hirliman, 503
20 F.3d at 216-17.

21 The second issue with which we are concerned is the sanction
22 imposed in this matter. The judge in question has very recently
23 been publicly sanctioned by the same Judicial Council in a
24 decision affirmed by this Committee. In affirming that decision,
25 we noted that the judge had persistently denied an impropriety in
26 the face of overwhelming evidence of an ex parte contact. We

1 find that history to be relevant to the determination of an
2 appropriate sanction. Moreover, the conduct alleged here, if
3 found willful, is very serious indeed. A private reprimand for
4 such conduct in the wake of a previous public reprimand for other
5 misconduct is not a sanction commensurate with the totality of
6 recent misconduct by this judge. Therefore, if the Council finds
7 willfulness, it should consider a more severe sanction, such as a
8 public censure or reprimand and an order that no further cases be
9 assigned to the judge for a particular period of time.

10 CONCLUSION

11 For the reasons discussed above, we grant the petition for
12 review.

13 Respectfully Submitted,

14 Hon. Ralph K. Winter, Chair
15 Hon. Pasco M. Bowman II
16 Hon. Carolyn R. Dimmick*
17 Hon. Dolores K. Sloviter
18 Hon. Joseph A. DiClerico, Jr.
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25 * Judge Dimmick has not participated in this proceeding, having
26 concluded, in her discretion, that the circumstances warranted
27 her disqualification. See Rule 25(a) of the Draft Rules
28 Governing Judicial Conduct and Disability Proceedings Undertaken
29 Pursuant to 28 U.S.C. §§ 351-364, current working draft *available*
30 *at*
31 [http://www.uscourts.gov/library/judicialmisconduct/commentonrules](http://www.uscourts.gov/library/judicialmisconduct/commentonrules.html)
32 [.html](http://www.uscourts.gov/library/judicialmisconduct/commentonrules.html).
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