THE SUBCOMMITTEE ON COURTS, THE INTERNET AND INTELLECTUAL PROPERTY

TESTIMONY OF THE HONORABLE MANUEL L. REAL SEPTEMBER 21, 2006

We are here today because a lawyer who has had a personal vendetta against me for over twenty years filed a complaint accusing me of misconduct in my handling of a bankruptcy case. That lawyer had no personal involvement in the bankruptcy case and his accusations were based solely on his speculation. His accusations are untrue. Though I regret the circumstances that bring me here, I welcome the opportunity to respond to those accusations.

I. PERSONAL BACKGROUND

My parents were immigrants from Spain who came to California and settled in San Pedro, California. I was born and raised in San Pedro and have lived there my entire life. During World War II, I served in the United States Navy and was discharged with the rank of Lieutenant (JG). After the war, I attended the University of Southern California and then Loyola Law School, where I graduated in 1951.

I was an Assistant United States Attorney for three years after law school, and then went into private law practice. In 1964, I was appointed as the United States Attorney for what was then the Southern District of California. I served in that position until 1966, when President Lyndon Johnson nominated me to be a United States District Judge for the Central District of California.

On November 17th of this year, I will have been a United States District Judge for forty years. During that time, I have handled over 31,000 cases and have presided over thousands of civil and criminal trials. From 1982 to 1993, I was privileged to serve as the Chief Judge for the Central District of California. I have also served as an elected member of the Judicial Conference of the United States and as a member of the Ninth Circuit Judicial Council and Judicial Conference.

In my years as a federal judge, I have won various awards, including the Award of Merit from the Urban League, the Distinguished Achievement Award from Loyola Law School, the Foundation for Improvement of Justice Award, and the Los Angeles County School District Award.

In the 1970s, I handled a desegregation case involving the Pasadena public schools and was the first district judge outside of the South to order a public school system to integrate, and I now have a California elementary school named after me. Needless to say, that ruling, along with several other tough decisions I have had to make, generated significant controversy and public attention. Every case that a judge decides disappoints the losing party and leaves one of the litigants unhappy.

In my nearly forty years on the bench, I have had several complaints of judicial misconduct made against me. However, none of them, including the one that brings me here today, has been found to have any merit, and I have never been sanctioned for any judicial misconduct

II. DEBORAH CANTER'S BANKRUPTCY ACTION

Because of the complaint of misconduct and the criticism that followed Judge Kozinski's intemperate dissent to the Judicial Council's opinion dismissing that complaint, my involvement in the bankruptcy action filed by Deborah Canter has been blown out of proportion. In truth, Ms. Canter was just one of the more

than one thousand criminal defendants who have appeared before me, pleaded guilty and been placed on probation.

I have not had any contact with Ms. Canter other than in open court or at open-door probationary meetings in my office, where she was always accompanied by her Probation Officer. Those meetings lasted no more than fifteen minutes. Other than that, I have never met with or spoken to Ms. Canter or received any letter or other written communication from her.

I became involved in Ms. Canter's bankruptcy action solely because lawyers for her father-in-law had illegally filed in her bankruptcy action a confidential Pre-Sentence Report from her criminal case. Pre-Sentence Reports of criminal defendants are not public documents, but rather are confidential records of the court. The Central District Criminal Rules require that the documents be filed under seal. As I was the judge presiding over her criminal action, Ms. Canter's Pre-Sentence Report could only be released by my order. In my nearly forty years on the bench, I had never had another criminal case where someone misused a confidential Pre-Sentence Report.

A. Ms. Canter's Probation

Ms. Canter entered a guilty plea to charges of making false statements and loan fraud. On April 13, 1999, I sentenced her to five years of probation under the supervision of the U.S. Probation Office and ordered her to perform 2,000 hours of community service, which is a significant amount of community service. I also ordered her to report to me with her Probation Officer every 120 days as directed by the U.S. Probation Office. She did not receive preferential treatment, but was treated the same as all criminal defendants who pleaded guilty and whom I placed on the 120-day probation program.

Approximately eighty percent of the criminal defendants that I place on probation are required to report to me every 120 days. I have won awards for my

program of personally supervising probationers through these periodic meetings. I have been told by Probation Officers that they like the program and that the probationers on it have fewer violations. The probationers who report to me know that the judge who sentenced them cares about their efforts and problems in rehabilitating themselves.

I had two 120-day meetings with Ms. Canter before I withdrew the bankruptcy reference. The first meeting was on August 23, 1999, and Ms. Canter was accompanied by her Probation Officer, Randall Limbach.

Before that meeting, Mr. Limbach sent me a short status report disclosing that Ms. Canter was involved in divorce proceedings and was seeking to gain full custody of her daughter. That issue also was mentioned at the 120-day meeting. Status reports are prepared for all probationers and routinely sent to me in advance of the 120-day meetings.

At my second 120-day meeting with Ms. Canter on January 24, 2000, she told me that attorneys for creditors had filed the confidential Pre-Sentence Report in her bankruptcy action and she was concerned that this might discredit her in the eyes of the bankruptcy judge. She also told me that the report had been filed in state court proceedings, but did not tell me which proceedings. At the meeting, Ms. Canter gave me a cover sheet from a document filed in her bankruptcy action.

I told her to contact her Federal Public Defender regarding the misuse of the Pre-Sentence Report. It was my expectation that her Public Defender would file a motion requesting some sanction against the offending lawyers who had misused a confidential court document.

B. <u>The Withdrawal of the Bankruptcy Reference</u>

After my January 24, 2000 meeting with Ms. Canter and her Probation Officer, I issued an order withdrawing the reference of Ms. Canter's bankruptcy action, which I signed on January 27, 2000. This meant that Ms. Canter's

bankruptcy case would be transferred to me for future handling. As a district judge, I am authorized by statute to withdraw the reference of a bankruptcy case. Though this is usually done at the request of a party to the bankruptcy, the statute specifically permits me to do so without such a request. This was the second time I had withdrawn the reference of a bankruptcy case.

I took over Ms. Canter's bankruptcy case because she told me during the 120-day meeting that her Pre-Sentence Report had been improperly filed in her bankruptcy action and I wanted to determine whether this was true.

On February 24, 2000, the bankruptcy file was transferred to my chambers. After the file arrived, I personally reviewed it and saw that a Request for Judicial Notice had been filed attaching Ms. Canter's Pre-Sentence Report as an exhibit.[1] The Request was filed in support of a motion to lift the automatic stay that was imposed when Ms. Canter filed bankruptcy, and which prevented her father-in-law from prosecuting an unlawful detainer action against her. The motion specifically discussed the confidential Pre-Sentence Report. These documents confirmed Ms. Canter's statements during the January 24, 2000 meeting. The Request for Judicial Notice also contained a copy of the complaint in the unlawful detainer action. The bankruptcy file also showed that the automatic stay had been lifted.

I concluded that the Pre-Sentence Report had been improperly used to lift the automatic stay in order to proceed with the unlawful detainer action against Ms. Canter.

I asked my secretary, Loyette Fisher, to find out the status of the unlawful detainer action. She contacted a state court clerk, who faxed her a copy of the

[1] December 30, 1999 Request for Judicial Notice, without attachments except for the cover page of the Pre-Sentence Report, is attached hereto as Exhibit A. In addition to the documents attached hereto, I am concurrently submitting an Appendix of Exhibits that I believe are relevant to the Subcommittee's investigation.

docket sheet showing the status of the lawsuit. I learned from that document that a judgment had been entered in the unlawful detainer action, shortly after the automatic stay was lifted. Based upon this information, I issued an order on February 29, 2000 staying the unlawful detainer action. I entered the stay order to preserve the status quo in the unlawful detainer action pending further proceedings in the bankruptcy action.

Ms. Canter's Federal Public Defender filed a motion regarding the misuse of her Pre-Sentence Report in March 2000. At the hearing on the motion, I was advised that the father-in-law's bankruptcy attorney and the husband's divorce lawyer would "withdraw" all copies of the Pre-Sentence Report filed with the courts.

I was still concerned that the Pre-Sentence Report had influenced the state divorce court judge's rulings regarding spousal support and child custody issues. Therefore, I ordered the parties to find out whether the Pre-Sentence Report had been considered by that judge in making rulings and, in the meantime, continued the hearing until July 2000. The parties subsequently filed a status report saying they had a conference call with the state court judge who said the Pre-Sentence Report had not influenced him. Accordingly, I canceled the July hearing.

In June 2000, the Canters sought to revive the unlawful detainer action by filing a motion to vacate the order staying that action. I denied the motion because there were two pending actions (the state court divorce action and the bankruptcy action) where the parties were contesting the ownership of the house and I concluded that the determination of that issue should be made in one of those actions.

In May 2001, Ms. Canter's father-in-law filed a second motion to vacate the February 20, 2000 stay order. His attorneys now argued that the state divorce court had determined the issue of ownership of the house and, therefore, the stay

should be lifted so the unlawful detainer action could proceed. They also filed a motion to dismiss the adversary complaint filed in the bankruptcy action by Ms. Canter in which she contended she had an ownership interest in the house.

At the June 2001 hearing, I granted the motion to dismiss the adversary complaint, but gave Ms. Canter an opportunity to file an amended complaint. I did so because I concluded that while the state divorce court had found that Ms. Canter did not have a community property interest in the house, she might be able to allege a claim based upon other legal theories. I denied the motion to vacate the stay because I had given Ms. Canter an opportunity to amend her adversary complaint. I felt that, if she still failed to state a claim in the amended pleading, the father-in-law could simply re-file the motion to vacate the stay.

At the end of this hearing, the attorney for Ms. Canter's father-in-law, Herbert Katz, asked me to state the reasons for my ruling. I told him "because I said so" or words to that effect. Later, I would get much criticism for that comment. However, I had given Mr. Katz a full opportunity to make an oral argument regarding the motion, and did not want to engage in further argument with him over my reasons for denying it. It has never been my practice to explain the reasons for my rulings on motions like this one and I have made similar comments to many other lawyers.

Sometime in the previous month, May 2001, I had a conversation with Judge David Carter regarding the possible transfer of the Canter bankruptcy to him.

I had two concerns that led me to consider transferring the case. First, Judge Carter was handling Anna Nicole Smith's bankruptcy case that raised similar issues as Ms. Canter's adversary complaint. Second, I felt there was a possibility that Ms. Canter's adversary complaint might be tried and I was uncomfortable about trying the case because she was a probationer. Though I had discontinued

my 120-day meetings with Ms. Canter when I took over her bankruptcy case, she was still one of my probationers.

On July 9, 2001, I signed the order transferring Ms. Canter's bankruptcy action to Judge Carter.

In my discussions with Judge Carter, I did not suggest to Judge Carter how he should handle the case after the transfer. I had nothing further to do with Ms. Canter's bankruptcy after ordering the transfer of the case to Judge Carter.

III. MR. YAGMAN'S COMPLAINT OF JUDICIAL MISCONDUCT

Ms. Canter's father-in-law appealed my order staying the unlawful detainer action. On August 15, 2002, the Court of Appeals issued an opinion stating I had abused my discretion when I withdrew the reference in Ms. Canter's bankruptcy action without "good cause" and ordered a stay of the unlawful detainer action. Ms. Canter's bankruptcy lawyer filed a brief in that appeal, but did not tell the Court of Appeals my reason for withdrawing the reference. Therefore, the Court of Appeals did not know about my concern over the misuse of Ms. Canter's Pre-Sentence Report in the bankruptcy action when the court concluded that I did not have "good cause" to do so.

A Los Angeles lawyer, Stephen Yagman, read the Court of Appeals' opinion in the Canter bankruptcy action and filed a complaint against me in March 2003, accusing me of misconduct in my handling of that case. Mr. Yagman was not a party to the bankruptcy action or the lawyer for any party in that proceeding or any other lawsuit involving Ms. Canter, and he knew nothing about the facts of the case.

In 1984, I sanctioned Mr. Yagman $250,000, the amount of the other side's attorneys' fees, for his persistent and willful disregard of the federal rules and his outrageous courtroom behavior in a defamation case I was handling. *Matter of Yagman*, 796 F.2d 1165 (9th Cir. 1986). Though the Court of Appeals reversed the

sanction portion of my order, Mr. Yagman has had a personal vendetta against me ever since.

I am not the only one. Mr. Yagman has a practice of making outrageous statements against federal judges whom he does not like so that they will disqualify themselves from hearing his cases. Sometimes this is successful. As an example, Mr. Yagman accused another district judge of being "drunk on the bench," "anti-Semitic," and "dishonest." A three-judge disciplinary panel found those accusations to be patently false and suspended Mr. Yagman for two years, finding that he had made the comments for the specific purpose of getting the judge to recuse himself in future cases. *Standing Committee v. Yagman*, 856 F. Supp. 1384, 1395 (C.D. Cal. 1994).

Mr. Yagman appealed and the Ninth Circuit reversed on First Amendment grounds in an opinion written by Judge Alex Kozinski. *Standing Committee v. Yagman*, 55 F.3d 1430 (9th Cir. 1995).

Mr. Yagman was also suspended from practicing law by the California State Bar on two different occasions, and again by the New York State Bar. In June of this year, he was indicted by the U.S. Attorney on nineteen counts of income tax evasion, bankruptcy fraud, and money laundering.

What was Mr. Yagman's complaint against me? Mr. Yagman said he read the Court of Appeals opinion in Ms. Canter's bankruptcy and then learned from the court's records that Ms. Canter was one of my probationers. Based on this alone, Mr. Yagman accused me of acting improperly in "oddly" putting a "comely" female criminal defendant on probation "to himself, personally" and in withdrawing the bankruptcy reference in order to "benefit an attractive female."[2] Both accusations were entirely untrue.

[2] Complaint No. 03-89037, attached hereto as Exhibit B.

Pursuant to the Ninth Circuit Rules on Complaints of Judicial Misconduct, Mr. Yagman's complaint was reviewed by Chief Judge Mary M. Schroeder and, on July 14, 2003, the Chief Judge entered an order dismissing the complaint.[3]

The Chief Judge found that Mr. Yagman's "allegations of inappropriate conduct were not substantiated," since Mr. Yagman had not provided any proof to support his allegation. In addition, the Chief Judge found that my decisions in the bankruptcy case had already been reviewed by the Court of Appeals and, therefore, Mr. Yagman's complaint had to be dismissed under the Ninth Circuit Rules.

Mr. Yagman filed a petition for review of the Chief Judge's dismissal with the Judicial Council on August 7, 2003. In that petition, Mr. Yagman questioned whether his complaint had been adequately investigated and again accused me of being "salaciously cozy" with Ms. Canter. In response to Mr. Yagman's criticism, the Judicial Council conducted its own investigation of the facts underlying Mr. Yagman's complaint. The Judicial Council's staff, under the personal direction of Judge Kozinski, interviewed at least *fifteen* witnesses regarding Mr. Yagman's allegations.

After conducting this investigation, the Judicial Council remanded the complaint to the Chief Judge for further investigation and directed her to investigate whether I entered my orders in the bankruptcy case based upon an improper *ex parte* communication with Ms. Canter. The Judicial Council did this because Ms. Canter's former bankruptcy attorney, Andrew Smyth, had told one of the Judicial Council's investigators that his wife, who was also his secretary, told him she had helped Ms. Canter prepare a letter to me asking for my help in preventing her eviction and that Ms. Canter said she delivered the letter to me.

[3] Chief Judge Schroeder's July 14, 2003 Order and Memorandum, attached hereto as Exhibit C.

During the summer of 2004, Chief Judge Schroeder again reviewed Mr. Yagman's complaint, this time in light of the additional issues raised in the Judicial Council's remand order. Her investigator spoke to Ms. Canter, who denied that she had ever written or delivered a letter or any other document to me or had had any *ex parte* communications of any kind with me.[4] My counsel also filed a brief with Chief Judge Schroeder, attaching the declaration of Ms. Canter's Probation Officer relating the discussions regarding the misuse of the confidential Pre-Sentence Report that occurred during my January 24, 2000 meeting with Ms. Canter, and a declaration from my secretary confirming that I had not received any *ex parte* communication from Ms. Canter.[5]

After a review of this information, Chief Judge Schroeder again dismissed the complaint.[6]

In her order of dismissal, the Chief Judge noted that the Judicial Council's remand order had "focused on the ex parte nature of communications between the judge and the defendant/debtor" and, therefore, she had made an additional inquiry, "including sworn declarations and other documentary evidence." Based upon that information, the Chief Judge concluded that "there is no basis for a finding that credible evidence exists of a letter or other 'secret communication' having passed between the defendant/debtor and the district judge."

Mr. Yagman appealed the Chief Judge's second order of dismissal to the Judicial Council. On September 29, 2005, the Judicial Council denied his petition

[4] September 9, 2004 Declaration of Deborah Canter, attached hereto as Exhibit D.

[5] August 5, 2004 Declaration of Randall Limbach and August 6, 2004 Declaration of Loyette Lynn Fisher, attached hereto as Exhibits E and F.

[6] Chief Judge Schroeder's November 4, 2004 Supplemental Order and Memorandum, attached hereto as Exhibit G.

for review.[7] The majority's opinion specifically dealt with the issue of whether there had been an *ex parte* communication with Ms. Canter, stating:

> The Judicial Council's remand to the Chief Judge indicated concern that the district judge may have received an improper ex parte letter from the probationer, and that the withdrawal of the reference may have been based upon information contained in the alleged letter. *After an investigation, the Chief Judge found that no such letter had been transmitted to, or received by, the district judge. We will not upset that factual finding.*

425 F.3d at 1181 (emphasis added).

The Judicial Council's majority opinion (joined by seven of the ten judges on the Judicial Council) affirmed the Chief Judge's dismissal of Mr. Yagman's complaint. *Id.* at 1182. Three judges dissented, including Judge Kozinski who wrote what I believe to be an intemperate, thirty-nine-page dissenting opinion, reflecting his conclusion that I had committed misconduct. The other two judges who dissented did not join in Judge Kozinski's opinion.

Mr. Yagman requested the Judicial Conference of the United States to review the Judicial Council's opinion. On April 28, 2006, the Judicial Conference Committee issued a decision on that appeal, holding that "Congress gave the Judicial Council final review authority" over the Chief Judge's order of dismissal.

Immediately after the Judicial Council issued its opinion affirming the second dismissal of Mr. Yagman's complaint, he filed a second complaint against me. In his new complaint, Mr. Yagman alleged that I was untruthful in my

[7] *In Re Complaint of Judicial Misconduct*, 425 F.3d. 1179 (9th Cir. 2005), attached hereto as Exhibit H.

response to the Judicial Council's inquiries regarding whether I had an improper *ex parte* communication with Ms. Canter.

A Special Committee appointed by Chief Judge Schroeder held hearings on Mr. Yagman's second complaint in August and I anticipate that the committee will issue a report and recommendation to the Ninth Circuit Judicial Council in the near future.

IV. MR. YAGMAN'S ACCUSATIONS ARE UNTRUE

In his dissent from the Judicial Council's opinion affirming the dismissal of Mr. Yagman's first complaint, Judge Kozinski stated at length why he concluded that there had been an improper *ex parte* communication with Ms. Canter that led me to withdraw the reference and enter the order staying the unlawful detainer action. Judge Kozinski principally relied on the following assumptions to reach those conclusions:

- Judge Kozinski concluded that my October 9, 2003 memorandum to the Judicial Council shows that I acted based upon an *ex parte* communication. 425 F.3d at 1185-87.
- Judge Kozinski believed the story reported by Ms. Canter's former lawyer, Andrew Smyth, that his wife, Michelle Smyth had typed a letter for Ms. Canter and that Ms. Canter later told his wife she had given it to the judge. *Id.* at 1189-90.
- Judge Kozinski concluded that because the judgment in the unlawful detainer action was entered after the January 24, 2000 120-day meeting, there had to have been an *ex parte* communication from Ms. Canter in order for me to know that the judgment had been entered. *Id.* at 1190-92.

These assumptions are wrong and I will explain to the Subcommittee why they are wrong.

A. The October 9, 2003 Memorandum

As part of the Judicial Council's consideration of Judge Schroeder's dismissal of Mr. Yagman's original complaint, Judge Kozinski wrote to me on September 10, 2003, asking me to explain why I withdrew the reference, why I entered the stay order, and whether I had any communication with Ms. Canter regarding these or related issues.

When I received this letter, I was angry over Judge Kozinski's inquiry. I was angry for three reasons: First, Mr. Yagman had sent Judge Kozinski a copy of the first complaint in violation of the Ninth Circuit Rules, leading me to conclude that there was some connection between Judge Kozinski and Mr. Yagman. Second, I believed that Judge Schroeder had properly dismissed Mr. Yagman's complaint. Third, Mr. Yagman had accused me of having a "salaciously cozy" relationship with Ms. Canter at the time of my marriage to Elizabeth Sykes in March 2000.

In preparing my response to Judge Kozinski's September 10, 2003 letter, I did not review Ms. Canter's bankruptcy file because the file had been transferred to Judge Carter in July 2001, and I did not consult with any of my staff or law clerks regarding the response. As a result, my response to Judge Kozinski's letter is inaccurate in its chronology of what I knew when I withdrew the reference and imposed the stay order.

In my October 9, 2003 memorandum, I responded to the question "why did you withdraw the reference" by stating, in part, that "a person who was a probationer in a criminal case informed me that the home in which she and her husband were living at the time of their divorce had been given to them by her husband's parents . . . [and] [s]he was contesting her right to occupancy in the divorce court." Eventually, I did learn of these facts, but only at a later date from pleadings filed in the case. I did not know this information when I issued the order

withdrawing the reference, since it had not come up at my January 24, 2000 meeting with Ms. Canter and Mr. Limbach. Mr. Limbach confirmed what was discussed at this meeting in his declaration. (Exh. E.)

In the October 9, 2003 memorandum, I also said that I learned of the unlawful detainer action at one of my 120-day meetings with Ms. Canter. This, too, is inaccurate. I did not discuss the unlawful detainer action with Ms. Canter at either of the 120-day meetings I had with her. Mr. Limbach, Ms. Canter's Probation Officer, also confirmed this in his declaration. (Exh. E.) I first learned of the unlawful detainer action when I reviewed the bankruptcy file in late February 2000.

Though the October 9, 2003 memorandum is inaccurate as to the timing of when I learned certain information, it does accurately reflect my concern that Ms. Canter's Pre-Sentence Report had been improperly used in the state divorce action and in the bankruptcy action. I learned of this during my January 24, 2000 meeting with Ms. Canter and this was my motivation for withdrawing the reference and issuing the stay order.

Judge Kozinski's conclusion, therefore, that my October 9, 2003 memorandum confirms that an *ex parte* communication with Ms. Canter "must have" occurred is wrong. It is wrong because my memorandum's recitation of the information I had available when I took those actions is incorrect. The memorandum is incorrect because I reacted emotionally when I received Judge Kozinski's inquiry and prepared my response without adequate research or reflection.

I now realize that my failure to respond more carefully and accurately to Judge Kozinski's initial inquiry was a mistake. If I had done so, I doubt that we would be here today.

B. Michelle Smyth's Story

The second "fact" relied upon by Judge Kozinski to support his conclusion that I withdrew the reference and imposed the stay based on an *ex parte* communication was the story of Michelle Smyth, the secretary and wife of one of Ms. Canter's former lawyers. Ms. Smyth told Judge Kozinski's investigator that she had helped Ms. Canter prepare a letter to me regarding her divorce and that Ms. Canter had delivered the letter to me. 425 F.3d at 1189-90.

In contrast with Ms. Smyth's story, Ms. Canter signed a declaration prepared by the Judicial Council's investigator in which she denied that she had ever written or delivered a letter or any other document to me or to anyone in my chambers. She also denied that she had ever met with or had any conversation with me outside of the presence of counsel or a probation officer.

I confirmed the statements of Ms. Canter in a letter that was submitted to Chief Judge Schroeder.[8] In that letter, I truthfully stated that I had never received any letter or written communication of any sort from Ms. Canter or anyone acting for her concerning my intervening on her behalf to prevent her eviction. I also confirmed that I had never been alone with Ms. Canter and had only met with her in the presence of her Probation Officer or in open court.

In addition, my secretary, Loyette Fisher, signed a declaration stating that she had carefully reviewed the files in my chambers relating to Ms. Canter and did not find any letter or other written communication from Ms. Canter to me. (Exh. F.) She also declared that she did not recall ever having received or seen any letter from Ms. Canter to me.

[8] August 10, 2004 letter from Manuel L. Real to Don Smaltz, attached as Exhibit I.

Based upon this information, Chief Judge Schroeder dismissed Mr. Yagman's first complaint, concluding that despite Ms. Smyth's story, there was insufficient evidence to find that there had been an *ex parte* letter or declaration that led me to withdraw the reference and re-impose the stay.

I now know that Ms. Smyth has changed her story. In a recent interview, Ms. Smyth now says that it was not a letter that Ms. Smyth typed, but rather a sworn declaration on twenty-eight line pleading paper.[9]

I do not know why an employee of Ms. Canter's former lawyer would tell a story that is untrue, but I do know that I never received the letter (or declaration) from Ms. Canter that Ms. Smyth said she helped prepare.

C. Knowledge of the Unlawful Detainer Action

The third "fact" relied upon by Judge Kozinski was that the judgment in the unlawful detainer action was not entered until February 7, 2000. 425 F.3d at 1190-91. Based on this timing, Judge Kozinski concluded that Ms. Canter could not have told me of the judgment during the January 24, 2000 meeting and, therefore, I had to have learned of it in a subsequent *ex parte* communication from her.

As discussed above, when the bankruptcy files were routinely transferred to my chambers on February 24, 2000, I personally reviewed those files and learned of the unlawful detainer action. I then asked my secretary to check the status of that action and she obtained the docket sheet from the state court clerk. I learned from the docket sheet that a judgment had been entered and, based on that information, issued my February 29, 2000 stay order.

Judge Kozinski's speculation regarding the source of my knowledge of the unlawful detainer judgment is simply wrong.

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[9] September 19, 2006 Declaration of Eric L. Dobberteen, attached as Exhibit J.

V. CONCLUSION

The accusations of misconduct made against me by Mr. Yagman are untrue. I did not receive any *ex parte* communication from Ms. Canter. I did not make any rulings in her bankruptcy action based upon any such communication or "to benefit an attractive female" as alleged by Mr. Yagman, an accusation I find repugnant, particularly at my age. I hope that I have fully explained the history of my involvement in Ms. Canter's bankruptcy action and the reasons for my rulings in that action. If not, I welcome any questions the Subcommittee might have.

EXHIBIT A

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Attorney for Creditor Alan Canter and Canter Family Trust

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

In re

Deborah M. Canter

CASE NO. ~~LA99-49126-AA~~ SACV 01-688 DOC

(Chapter 13)

REQUEST FOR JUDICIAL NOTICE PURSUANT TO FEDERAL RULE OF EVIDENCE 201

[Filed Concurrently with The Canter Family Trust's Motion for Relief from the Automatic Stay]

Date: 1/26/2000
Time: 2:30 p.m.
Crtm: 1375

TO THE HONORABLE ALAN AHART, THE CHAPTER 13 TRUSTEE, EDWINA DOWELL, THE DEBTOR, AND ALL PARTIES OF INTEREST:

Pursuant to Federal Rule of Evidence, 201 (b),(c) and (d), the moving party requests mandatory and discretionary judicial notice of the following:

1. California Civil Code, Sections 1624 and 1946. Attached as **Exhibit A;**
2. Schedule J of the debtor in the instant case. **Exhibit B;**
3. The petitions and schedules of the prior bankruptcy cases filed by the debtor: case numbers 92-38435 (ch. 7), 96-10153 (ch. 13),

96-16058 (ch. 13), and 97-35894 (ch. 13). At the time of the filing of this motion copies were not available. True and correct copies will be obtained from the court archives and submitted under separate cover as **Exhibits C, D, and E** respectively.

4. The Criminal Judgment and probation report in United States v. Maristina Canter, Case No. 98-576-R . **Exhibit F.**

5. Documents filed with the county recorder of Los Angeles County as follows.

a.	Grant Deed of 9/11/91 to Alan and Elizabeth Canter on property located at 446 S. Highland, Los Angeles	**Exhibit G**
b.	Deed of Reconveyance to Alan and Elizabeth Canter of July 23, 1992 for 446 S. Highland, Los Angeles	**Exhibit H**
c.	Quitclaim deed from Alan and Elizabeth Canter of September 22, 1997 to the Canter Family Trust	**Exhibit I**

6. Unlawful detainer complaint in *Canter v. Canter*, Municipal Court case No. 99U18116. **Exhibit J.**

7. Verified Transcript of debtor's 341a hearing held on December 10, 1999. **Exhibit K.**

8. Interrogatories to and Debtor's Answers to Interrogatories, **Exhibit L.**

Dated: December 29, 1999

Respectfully submitted

Mark E. Brenner, Esq.
Attorney for Creditors Alan Canter and the Canter Family Trust

REQUEST FOR JUDICIAL NOTICE- EXHIBIT F- JUDGMENT AND PROBATION IN CRIMINAL CASE

UNITED STATES DISTRICT CO
LOS ANGELES, CALIFORNIA
PRESENTENCE REPORT

COURT NAME:	T/N: Deborah Maristina Romano	DICTATION DATE
CANTER, Maristina	AKA(s): CANTER, Deborah ROMERO, Deborah ROMEN, Deborah	October 27, 1998
		SCHED. SENT. DATE December 14, 1998

ADDRESS	LEGAL ADDRESS	DOCKET NO.
446 S. Highland Aveune Los Angeles, CA 90036 (323) 935-2520	Same	98-00576
		CITIZENSHIP United States

AGE	RACE	SEX	BIRTH DATE	BIRTH PLACE	EDUCATION
43	White	Female	2-27-55	Los Angeles, CA	12 years

MARITAL STATUS	DEPENDENTS	SOCIAL SECURITY NO.
Married	1 (Daughter)	548-94-0669

FBI NO.	U.S. MARSHAL NO.	OTHER IDENTIFYING NOS.:
Not received	13650-112	CA DL: N2384700 CII: None

OFFENSE

18 USC 1001: False Statements (Counts 1, 9 & 14 of 14-Count Indictment), Class D Felonies;
18 USC 1014: Loan Fraud (Count 5), Class B Felony

PENALTY

5 years pursuant to 18 USC 1001 [$250,000 maximum fine pursuant to 18 USC 3571(b)(3) as to Counts 1, 9, & 14]; 30 years and/or $1 million fine pursuant to 18 USC 1014 as to Count 5

CUSTODIAL STATUS	DATE OF ARREST
Released 6-16-98 on $50,000 Appearance Bond with affidavit of surety, no justification, and PSA supervision.	June 16, 1998

PLEA	VERDICT
Guilty, 8-24-98 (Counts 1, 5, 9 & 14)	

DETAINERS/CHARGES PENDING

None

OTHER DEFENDANTS

None

DATE OF NOTIFICATION	DEFENSE COUNSEL:
August 25, 1998	Guy Iverson (Federal Defender) 312 North Spring Street, Suite 1503 Los Angeles, CA 90012 (213) 894-2235

SENTENCING JUDGE	DATE PARTIES NOTIFIED	PROBATION OFFICER
HONORABLE MANUEL L. REAL	November 3, 1998	USPO KELLER, Ext. 6024 SUSPO BARNES, Ext. 5576
	DISCLOSURE DATE 09 1998	

EXHIBIT B

03-80037

COMPLAINT FORM
JUDICIAL COUNCIL OF THE NINTH CIRCUIT
COMPLAINT OF JUDICIAL MISCONDUCT AND DISABILITY

MAIL THIS FORM TO THE CLERK, UNITED STATES COURT OF APPEALS, P.O. BOX 193939, SAN FRANCISCO, CA 94119-3939. MARK THE ENVELOPE "JUDICIAL MISCONDUCT COMPLAINT" OR "JUDICIAL DISABILITY COMPLAINT." DO NOT PUT THE NAME OF THE JUDGE ON THE ENVELOPE.

SEE RULE 2(e) FOR THE NUMBER OF COPIES REQUIRED FOR FILING. 03-03-03

1. **Complainant's name:** STEPHEN YAGMAN

Address:
LAW OFFICE
YAGMAN & YAGMAN & REICHMANN & BLOOMFIELD
723 Ocean Front Walk
Venice Beach, CA 90291-3270
(310) 452-3200

Daytime telephone: ( )

2. **Name of judge complained about:** MANUEL L. REAL

Court: C.D. CAL.

3. Does this complaint concern the behavior of the judge in a particular lawsuit or lawsuits?
☑ Yes ☐ No

If "yes" give the following information about each lawsuit (use reverse side if there is more than one):

Court: C.D. Cal.

Docket Number: See attached

Are (were) you a party or lawyer in the lawsuit? ☐ Party ☐ Lawyer ☑ Neither

If a party, give the name, address, and telephone number of your lawyer:

Docket numbers of any appeals to the Ninth Circuit: See attached

4. Have you filed any lawsuits against the judge? ☐ Yes ☑ No

If yes, give the following information about each lawsuit (use the reverse side if there is more than one):

Court:

Present status of suit:

Name, address, and telephone number of your lawyer:

Court to which any appeal has been taken:

Docket number of the appeal:

Present status of appeal:

5. **Statement of Facts:** On separate sheets of paper, not larger than the paper this form is printed on, describe the facts and evidence that support your charges of misconduct or disability. *See* Rules 1(c) (proper

See attached

Stephen Yagman

EXHIBIT B

LAW OFFICES
YAGMAN & YAGMAN & REICHMANN & BLOOMFIELD
723 OCEAN FRONT WALK
VENICE BEACH, CALIFORNIA 90291-3270
(310) 452-3200

STEPHEN YAGMAN

February 7, 2003

Honorable Mary M. Schroeder
Chief Judge
230 North First Avenue
Phoenix, AZ 85025

Re: Complaint against U.S. Dist. Judge Manuel L. Real

Dear Judge Schroeder:

This letter is written to make a complaint against the above-named Judge pursuant to 28 U.S.C. § 372(c), based on the following.

In re Deborah M. Canter: Canter v. Canter, 2002 DJDAR 9407 (9th Cir. August 15, 2002), the owners of Los Angeles' Canter's Delicatessen were stuck for two years, to the tune of $35,000 they never will be able to recoup, until the Ninth Circuit wrested the case away from U.S. Dist. Judge Manuel L. Real, who had hijacked the case from the U.S. Bankruptcy Court in Los Angeles.

Elizabeth and Alan Canter, the owners of Canter's Deli bought a house as an investment in 1991, and rented it out to their son, Gary Canter, who, from 1991 to 1999, lived there with his wife, comely Deborah M. Canter, aka D. Maristina Canter, until their separation. Gary Canter always paid rent to his parents on the house.

In the meantime, Deborah Canter got into some criminal trouble. Her criminal case was assigned to Judge Real. ***He put her on probation***, not to the United States Probation Dept., but rather ***to himself, personally***. The Ninth Circuit disposition omits fact from its opinion probably because this fact was not in the record of this case, but my curiosity in the opinion that led to a little district court docket research revealed this fact.

Deborah Canter stayed on in the Canter house. The Canters filed an unlawful detainer action against her in state court, but the proceedings were stayed twenty-four minutes before the unlawful detainer trial was to have begun, when Deborah Canter filed a Chapter 13 bankruptcy proceeding.

Three months later, on January 26, 2000, the bankruptcy court lifted the stay and allowed the Canter parents to pursue their unlawful detainer action.

On February 7, 2000, Deborah signed a stipulated judgment providing that she would vacate the premises, and judgment was entered.

Judge Real, on February 17, 2000, withdrew the matter from bankruptcy court, and on February 29, 2000 Judge Real stayed enforcement of the state

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court unlawful detainer judgment, which required Deborah Canter to vacate the premises. She remained on personal probation to Judge Real.

Twice the Canter parents asked Judge Real to lift the stay, and twice Judge Real refused.

When the Canter parents asked Judge Real why the stay was reinstated, his response was "because I said it."

Under then-current federal law Judge Real's refusal to lift the stay was an unappealable interlocutory order. Then this court rendered its disposition.

In *In re Canter*, the Ninth Circuit re-stated the old rule of *Bauman v. United States*, 557 F.2d 650, 654-55 (9th Cir. 1997), that five conditions governed eligibility for mandamus: (1) no other adequate means of relief, such a direct appeal; (2) damage not correctable on appeal; (3) a clearly erroneous order; (4) an oft-repeated error or manifestation of a persistent disregard of federal rules; and (5) new and important problems, or issues of law of first impression. In a rarity, the Circuit found all five factors to be present.

Citing *In re Kemble*, 776 F.2d 802, 806 (9th Cir. 1985), the court restated that it does not "have jurisdiction over interlocutory appeals from orders withdrawing reference of cases to the bankruptcy court." Thus, no direct appeal was available.

The court found the Canters would be damaged and prejudiced in a way not correctable on appeal, citing *DeGeorge v. U.S. Dist. Ct.*, 219 F.3d 930, 934 (9th Cir. 2000). It held the Canters "sit in limbo . . . [and] Deborah [bankrupt and on probation to Judge Real] continues to reside in the property . . . without any rental payments . . . . "

The court held that "[t]he district court's [action] was an inefficient allocation of judicial resources, . . . [r]ather than enhancing efficiency, the district court's action created inefficiency, engendering a series of nonproductive motions and hearings[,] negatively impacted bankruptcy administration by needlessly disrupting the bankruptcy court's seamless processing of the case[,] [and] derailed the [bankruptcy] process provided by statute." Moreover, the court said that "[t]he district court's [action] also resulted in great delay and costs to Appellants[] . . . [and] encouraged forum shopping by essentially reversing the bankruptcy court's prior determinations."

The court found the final two *Bauman* factors met because Judge Real's action "manifests a persistent disregard of the federal court rules," and because the case raised an issue of first impression. The court commented on the phenomenon: "In fact, this case presents the rare circumstance where all the *Bauman* factors favor granting the writ of mandamus[,]" which is what was done.

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Rather than send the case back to Judge Real, perhaps in light of its knowledge of *Brown v. Baden*, 796 F.2d 1165 (9th Cir. 1986), *cert. denied*, 484 U.S. 963 (1987), a case remanded by the Ninth Circuit to Judge Real in which he simply refused to turn over the files to a new judge, the court itself remanded the case directly to the bankruptcy court.

It would appear to a reasonable observer who knew all these facts that something inappropriate happened here, beyond what the court discussed. What I mean to say is that it appears that Judge Real acted inappropriately to benefit an attractive female whom he oddly had placed on probation to himself, and, if this occurred, then it would constitute extreme judicial misconduct.

It is requested that this matter be appropriately investigated to determine, among other things, the actual relationship between Deborah Canter and Judge Real.

Thank you.

Very truly yours,

STEPHEN YAGMAN

c: Hon. Alex Kozinski

EXHIBIT C

JUDICIAL COUNCIL

FOR THE NINTH CIRCUIT

In re Charge of

Judicial Misconduct

No. 03-89037
ORDER AND
MEMORANDUM

Before: SCHROEDER, Chief Judge

A complaint of misconduct has been filed against a district judge of this circuit. Administrative consideration of such complaints is governed by the Rules of the Judicial Council of the Ninth Circuit Governing Complaints of Judicial Misconduct or Disability (Misconduct Rules), issued pursuant to the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980. 28 U.S.C. §§ 351-364.

Complainant, an attorney, intimates that the judge acted for his own salacious interests by placing an "attractive female" criminal defendant on probation, "not to the United States Probation Depart., but rather **to himself, personally.**" (Emphasis in original.) He states that "a little district court docket research revealed this fact." Complainant adds that the judge's actions in withdrawing the underlying bankruptcy matter from the bankruptcy court and staying enforcement of the state

EXHIBIT C

unlawful detainer judgment further support the allegation of improper conduct. The Court of Appeals reviewed the judge's withdrawal of the matter from the bankruptcy court, determined that his actions were in error, and remanded the case to bankruptcy court. Complainant requests investigation into the relationship between the judge and the defendant, which was not discussed in the Court of Appeals opinion.

Upon inquiry the allegations of inappropriate conduct were not substantiated. Complainant failed to include any objectively verifiable proof (for example, names of witnesses, recorded documents, or transcripts) supporting his allegations of misconduct. Furthermore, complaints alleging misconduct occurring in open court should be supplied with the specific date of occurrence, the details of the hearing, and if possible, copies of transcripts. Conclusory charges that are unsupported, as here, will be dismissed. 28 U.S.C. § 352(b)(1)(A)(iii); Misconduct Rule 4(c)(3).

The judge's decisions pertaining to the bankruptcy case have already been reviewed by the Court of Appeals. A complaint will be dismissed if it is directly related to the merits of a judge's ruling or decision in the underlying case. 28 U.S.C. § 352(b)(1)(A)(ii); Misconduct Rule 4(c)(1). Charges relating to

those decisions are, therefore, also dismissed.

COMPLAINT DISMISSED.

Mary McClure

Chief Judge

EXHIBIT D

DECLARATION OF DEBORAH M. CANTER

I, DEBORAH M. CANTER, declare as follows:

1. I have personal knowledge of the facts set forth in this declaration and, if called upon to testify, I could and would competently testify thereto.

2. I was formerly represented by Andrew Smyth, Esq., in connection with bankruptcy proceedings. At one point in the proceedings I received a call at home from Mr. Smyth's wife and legal secretary, Michelle. She asked me to come in to the office to sign a declaration about an eviction action pending against me. I did so, and at Michelle's request I gave her $50 for an attorney's messenger service to deliver the declaration to the court. Michelle did not specify the addressee, and I do not have a copy of the declaration.

3. Approximately one week later, while I was at home, my mother told me that Mr. Smyth's office was on the phone. Mr. Smyth said that an eviction stay order had been issued.

4. I have never written or delivered a letter or any other document to District Judge Manual Real or to anyone in his chambers.

5. I have never met with, seen, or had any conversation with Judge Real outside the presence of counsel or a probation officer.

I declare under penalty of perjury pursuant to the laws of the United States that the foregoing is true and correct.

DATED: September 1, 2004

Deborah M. Canter

DEBORAH M. CANTER

EXHIBIT D

EXHIBIT E

DECLARATION OF RANDALL LIMBACH

I, RANDALL LIMBACH, declare as follows:

1. I am a United States Probation Officer and have been so employed since 1998. I have personal knowledge of the matters set forth in this declaration, and if called upon to testify, I would and could competently testify thereto.

2. On about April 15, 1999, the case of *United States v. Deborah Canter* was assigned to me, in my capacity as a Probation Officer. Ms. Canter had been sentenced upon her conviction of federal criminal violations to five years probation and 2,000 hours of community service by U.S. District Judge Manuel L. Real.

3. Even prior to Ms. Canter's case having been assigned to me, I was familiar with Judge Real's successful "120 Day Program" of periodically meeting with probationers to encourage their rehabilitation and participation in community service programs. In my opinion it is a valuable program that is helpful to probationers.

After Ms. Canter's case was assigned to me, and Judge Real placed her on probation, I assisted in coordinating meetings amongst Ms. Canter, Judge Real and me in Judge Real's Chambers.

4. Judge Real's meetings with probationers generally lasted approximately fifteen (15) minutes and the Probation Officer was present at the meetings. Ms. Canter's case was treated no differently.

5. On April 20, 1999, Ms. Canter and I had our first meeting, and I made arrangements for her to comply with her community service obligations as a volunteer with AIDS Project L.A.

6. On August 23, 1999, Ms. Canter and I met with Judge Real for her first 120-day meeting during which Judge Real explained the purpose and goals of the program to her. I was present for the entire meeting.

7. On January 24, 2000, Ms. Canter and I met with Judge Real for her second "120-Day" meeting. During the course of this meeting, Ms. Canter advised Judge Real that the confidential probation report from her criminal case had been used against her by counsel for her creditors in a bankruptcy case that she had filed in the District Court. I observed Ms. Canter provide Judge Real with a copy of the bankruptcy case cover sheet. Judge Real advise her to confer with her criminal attorney, Guy Iverson, concerning her complaint that confidential information from her criminal case had been improperly disclosed in the Bankruptcy proceeding.

At this meeting, Judge Real inquired of me if Ms. Canter had provided this same information to me and I informed Judge Real that she had. Judge Real stated that he would look into the possibility that improper use of confidential probation materials had been used in the bankruptcy case. I was present for the entire meeting on January 24, 2000.

8. I have reviewed my file in the *Canter* case and my notes show that on February 3, 2000, I met with Ms. Canter in connection with her probation status and she informed me that she had followed Judge Real's instruction to advise her attorney, Guy Iverson, of her bankruptcy case complaint.

9. On April 3, 2000, I once again met with Ms. Canter and she informed me that it was her understanding, based upon information she had received from Mr. Iverson, that Judge Real had assumed jurisdiction over her bankruptcy case.

10. I recall having been subsequently advised by Judge Real's staff that a previously scheduled 120-day meeting on April 24, 2000 would not take place in that Judge Real had taken jurisdiction over Ms. Canter's bankruptcy case and there was a need to avoid even a perception of a conflict.

11. In June of 2002, I was transferred to the Inglewood Division of the U.S. Probation Office and no longer have supervision of Ms. Canter's case.

I declare under penalty of perjury pursuant to the laws of the United States that the foregoing is true and correct.

DATED: August 5, 2004

RANDALL LIMBACH

EXHIBIT F

DECLARATION OF LOYETTE LYNN FISHER

I, LOYETTE LYNN FISHER, declare as follows:

1. I have been employed either as a Courtroom Deputy Clerk or Administrative Assistant to Judge Manuel L. Real for the last twenty-four years. Part of my responsibilities as Judge Real's Administrative Assistant is to receive correspondence and mail delivered to Judge Real's Chambers and to appropriately file these documents.

2. I have personal knowledge of the facts set forth in this declaration, and, if called upon to testify, I could and would competently testify thereto.

3. In 1976, Judge Real instituted his "120 Day Program" for defendants who were sentenced to probation. The program was designed to help probationers become productive and law abiding citizens. The program is administered through the Probation Office. I receive a list of probationers that are scheduled for the 120 day program each month. The probation officer submits a report that details how the probationer is doing in their performance of community service, work, restitution and any problems with the probationer. I call the names of the probationers in the courtroom and escort them with their probation officer into Judge Real's chambers for the meeting. During the meeting Judge Real counsels the probationer with respect to problems they may have encountered, monitors the probationer's progress and lends encouragement to complete the program. More than four hundred probationers have successfully completed Judge Real's 120 Day Program. It is my belief that this program has been of great value to the probationers and to the community in general.

4. On or about December 22, 2003, I reviewed an order from the Judicial Council involving the case of *United States v. Deborah Canter*. I carefully reviewed the file concerning Ms. Canter, which I maintain as

EXHIBIT F

Judge Real's Administrative Assistant. After conducting a diligent search of the file, I found no letter or other written communication from Deborah Canter to Judge Real. Nor do I recall ever having received or seen any letter from Ms. Canter to Judge Real during the time I have been employed as Judge Real's Administrative Assistant.

I declare under penalty of perjury pursuant to the laws of the United States that the foregoing is true and correct.

DATED: August 6, 2004

LOYETTE LYNN FISHER

EXHIBIT G

JUDICIAL COUNCIL

FOR THE NINTH CIRCUIT

In re Charge of	No. 03-89037
	SUPPLEMENTAL
Judicial Misconduct	ORDER AND
	MEMORANDUM

Before: SCHROEDER, Chief Judge

A complaint of misconduct has been filed against a district judge of this circuit. Administrative consideration of such complaints is governed by the Rules of the Judicial Council of the Ninth Circuit Governing Complaints of Judicial Misconduct or Disability (Misconduct Rules), issued pursuant to the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980. 28 U.S.C. §§ 351-364.

In February 2003 complainant, an attorney who was not a party and did not represent a party in the relevant litigation, submitted a misconduct complaint alleging that the judge in question had acted for inappropriate personal reasons in placing an attractive female criminal defendant on probation "to himself, personally," and that the judge's actions in withdrawing that defendant's bankruptcy matter from the bankruptcy court and staying enforcement of a state unlawful detainer judgment against her further supported complainant's allegation of improper conduct.

EXHIBIT G

Before entering an Order, the Chief Judge conducted an inquiry into the charges, and specifically the allegation that there was an inappropriate personal relationship between the judge and the defendant/debtor. In the course of that inquiry, the Probation Office confirmed that all meetings that took place between the judge and the defendant were regularly scheduled, were documented in Probation Office files, and included a probation officer in attendance at all times. The Probation Office and the Clerk's Office further confirmed that the defendant was the subject of a formal probation/commitment order, and that it was the custom of the judge to hold periodic status meetings with probationers and their probation officers.

In a Dismissal Order and Memorandum filed on July 14, 2003, the Chief Judge noted that the Court of Appeals had already reviewed the case in which withdrawal of bankruptcy jurisdiction had occurred; the court had held that the withdrawal had been improper, and had remanded the case to Bankruptcy Court. This complaint was therefore related to the merits of a prior appeal. The Chief Judge observed that misconduct complaints relating to the merits of a judicial decision are not cognizable under the misconduct statute and the circuit's rules, and that such merits determinations are reserved for appellate review. In this instance appellate review had already occurred. The Chief Judge further stated that her inquiry had not substantiated the

conclusory charges of any inappropriate personal relationship between the judge and the defendant/debtor. Accordingly, in the July 14, 2003 Order, the Chief Judge dismissed the complaint in its entirety, pursuant to 28 U.S.C. §§ 352(b)(1)(A)(ii) and (iii), and Misconduct Rules 4(c)(1)and (c)(3).

Complainant petitioned for review by the Judicial Council. The Judicial Council then apparently made some further inquiry. By a divided vote, on December 18, 2003, the Judicial Council issued an Order vacating the Chief Judge's Dismissal Order and remanding the matter to the Chief Judge for further proceedings consistent with its Order. The council's Order stated that "In response to an inquiry from our council, the debtor's bankruptcy attorney claimed that, unbeknownst to him, his secretary had drafted a letter from the debtor to the district judge, asking for his help in preventing her eviction. According to the secretary, the letter was delivered by the debtor 'a day or two before . . . [the district judge] withdrew the [bankruptcy] reference,' and the next time they saw each other, the debtor told her 'the letter had worked.'" The Judicial Council noted that this information was based on hearsay, but asked that it be investigated further. The Order expressed concern that the district judge might have exercised judicial power based on "secret communications," and a further concern that he assigned the case to himself for the express purpose of granting the debtor

relief in a matter unrelated to the criminal case assigned to him.

The Judicial Council focused on the ex parte nature of communications between the judge and the defendant/debtor and viewed the new information about a letter to be more serious than either the information considered by the panel that heard the prior appeal or the communications previously considered by the Chief Judge. Therefore, the Judicial Council remanded the misconduct complaint for further inquiry by the Chief Judge.

Accordingly, the Chief Judge directed that a further inquiry be conducted. That inquiry has now been concluded. In connection therewith additional information, including sworn declarations and other documentary evidence, was obtained.

The council's inquiry had included hearsay information from the debtor's former attorney and his secretary/wife concerning a letter prepared by the debtor and personally delivered by her to the judge. In the course of the Chief Judge's subsequent inquiry, the debtor and the judge, each of whom would have first-hand knowledge of such delivery, firmly denied that any such letter was written or delivered. No such document was found in the court's records, and both the debtor and the judge also firmly denied that any meetings or communications outside of the scheduled status meetings with a probation officer in attendance took place. The debtor further denied, under penalty of perjury,

that she had any conversation with her former attorney's secretary/wife in which the debtor stated either that she had delivered a letter to the judge or that "the letter had worked." Because the district judge, his staff, and the debtor all certified that the "letter" and "visit" mentioned in the hearsay account previously reported to the Judicial Council did not exist or happen, there is no basis for a finding that credible evidence exists of a letter or other "secret communication" having passed between the defendant/debtor and the district judge. There is similarly no basis for finding that there was any private meeting or discussion between them at any time.

Furthermore, with respect to the withdrawal of bankruptcy jurisdiction itself, two material points have been considered that were not addressed before the Judicial Council. The first relates to the district judge's reason for withdrawal of the bankruptcy reference. In a supplemental statement the district judge wrote that he had been made aware that the defendant/debtor's pre-sentence report had been unlawfully filed and/or referred to in Bankruptcy Court and in state court proceedings. In response to the Chief Judge's inquiry, he stated that he withdrew the bankruptcy reference in light of that knowledge. Withdrawal for the purpose of preventing further violations of confidentiality and conducting contempt proceedings constitutes, at the least, an "arguably legitimate basis" for such

action.

Second, the district judge himself recognized the questionable nature of his intervention in the bankruptcy case and, pursuant to the court's internal procedures, asked another district judge to review the record. Following the voluntary transfer of the bankruptcy case to a disinterested judge in his district for independent review, that judge granted a motion to return the case to bankruptcy court. This transfer occurred several months before the matter was argued in the Court of Appeals. For reasons that are not clear, the appellate panel apparently was unaware that at the time of oral argument on the propriety of withdrawal of the bankruptcy reference, the case had long since been returned to Bankruptcy Court and closed by the assigned bankruptcy judge.

Having considered all of the evidence in this matter, it is apparent that complainant's factual allegations of an inappropriate personal relationship, and the Judicial Council's subsequent concern about secret communications having occurred between the district judge and the defendant/debtor, are not reasonably in dispute within the meaning of 28 U.S.C. § 352(a). Furthermore, the unlawful filing of and references to a confidential pre-sentence report in defendant/debtor's bankruptcy proceedings constituted a legitimate basis for the district judge's initial assumption of jurisdiction in the bankruptcy case,

sufficient to preclude a finding of judicial misconduct.

Accordingly, for the reasons expressed herein, the complaint is dismissed.

COMPLAINT DISMISSED.

William M Schneider

Chief Judge

EXHIBIT H

they may have or discover claims against the other which are unknown or unanticipated by them. Nevertheless, the Parties hereby expressly waive all rights they may have with respect to such unknown claims or damages.

DHX further represents and warrants that it is the sole owner of all of the respective claims hereby released by it and agrees to hold harmless and indemnify all parties released herein from and against all liability, damage, costs and expense, including attorneys fees, as a result of any claim asserted or brought, whether litigation is commenced or not, by any person or entity who claims an interest in the released claims.

The Parties acknowledge and agree that any rule of interpretation, to the effect that ambiguities are to be resolved against the drafting party, shall not apply to the interpretation of this Agreement.

This Agreement shall be construed according to and governed by English law. Further, in any action to enforce the terms of this Agreement, the prevailing party or parties shall be entitled to recover reasonable attorneys' fees, experts' fees and costs in connection with such action.

This Agreement constitutes the entire agreement between Parties pertaining to the subject matter hereof, and may be modified only by a written agreement signed by all Parties hereto. This Agreement may be executed in counterparts, each of which shall be deemed to be an original.

The signatures below further represent that they have authority to execute this release on behalf of the respective parties.

Date: 8/15/04 DHX, Inc.
BY: _____ /s/ _____
Its: President

Date: 16/3/04 AGF M.A.T., S.A.
By: _____ /s/ _____
P. Warren / Allianz Marine & Aviation
Its: Authorized Agent

Date: 16/3/04 Allianz AGF MAT, Ltd.
By: _____ /s/ _____
P. Warren / Allianz Marine & Aviation
Its: Authorized Agent

APPROVED:

Date: March 15, 2004 _____ /s/ _____
DAVID E.R. WOOLLEY

Date: _____ GIBSON ROBB & LINDH LLP
_____
G. GEOFFREY ROBB

Counsel

David E.R. Woolley, Los Angeles, California, for plaintiff-appellant-cross-appellee.

G. Geoffrey Robb, Gibson Robb & Lindh LLP, San Francisco, California, for defendant-appellee-cross-appellant.

In re COMPLAINT OF JUDICIAL MISCONDUCT.

No. 03–89037.

Judicial Council of the Ninth Circuit.

Sept. 29, 2005.

Background: Misconduct complaint was filed against a district judge. After the Chief Judge dismissed the complaint, complainant petitioned for review.

Holdings: The Judicial Council of the Ninth Circuit held that:

(1) judge did not commit misconduct by ordering female probationer to appear before himself personally, and

(2) adequate corrective action was taken in response to any inappropriate conduct occurring when district judge withdrew reference in female probationer's bankruptcy proceeding and stayed eviction proceedings against the probationer.

EXHIBIT H

Affirmed.

Ezra, Chief District Judge, filed opinion concurring in part and dissenting in part.

Kozinski, Circuit Judge, filed dissenting opinion.

Winmill, District Judge, filed dissenting opinion.

1. Judges ⇐11(2)

District judge did not commit misconduct by ordering female probationer to appear before himself personally, where judge had for many years directed both male and female probationers to appear before him personally during their probationary period, and in all cases, such personal meetings were in the company of the probation officer.

2. Judges ⇐11(2)

Adequate corrective action was taken in response to any inappropriate conduct occurring when district judge withdrew reference in female probationer's bankruptcy proceeding and stayed eviction proceedings against the probationer based on information he allegedly learned from probationer during personal meeting with her in her criminal case; in response to Judicial Council's request for acknowledgment of "improper conduct" and a "pledge not to repeat it," judge acknowledged that he could have prevented misunderstandings by the parties if he had articulated reasons for his actions and that a similar situation would not occur in the future.

3. Judges ⇐11(1)

Overall purpose of the Judicial Conduct and Disability Act is not to punish but to protect the judicial system and the public from further acts by a judicial officer that are detrimental to the fair administration of justice. 28 U.S.C.A. § 372.

Before: ALARCÓN, KOZINSKI, KLEINFELD, McKEOWN and W. FLETCHER, Circuit Judges, and EZRA, LEVI, McNAMEE, STRAND and WINMILL, District Judges.

ORDER

A misconduct complaint was filed against a district judge of this circuit pursuant to 28 U.S.C. § 372(c) (now 28 U.S.C. § 351(a)) in February 2003. The Chief Judge entered an Order and Memorandum dismissing the complaint on July 14, 2003. The Judicial Council entered an Order vacating and remanding to the Chief Judge for further proceedings on December 18, 2003. After further investigation, the Chief Judge entered a Supplemental Order and Memorandum on November 4, 2004, again dismissing the complaint. Complainant has filed a petition for review of the Chief Judge's November 4th Order.

Complainant alleges that the district judge acted for inappropriate personal reasons in placing a "comely" female criminal defendant on probation "to himself, personally," and in withdrawing the reference in the bankruptcy proceeding of this probationer in order to "benefit an attractive female." The claim asserted in the complaint is that the judge "acted inappropriately to benefit an attractive female" and requested that "this matter be appropriately investigated to determine, among other things, the actual relationship" between the probationer and the judge. An investigation was made of the allegation.

[1] Complainant's suggestion of an inappropriate personal relationship with the probationer is entirely unfounded. This district judge has for many years directed criminal probationers, both male and female, to appear before him personally during their probationary period. In all cases, the district judge's personal meeting with the probationer is in the company of

the probation officer. The probationer in this case was supervised in the same manner as other probationers supervised by this district judge, as described in an affidavit by her probation officer.[1]

[2] The withdrawal of the reference by the district judge was dealt with by the court of appeals in *In re Canter*, 299 F.3d 1150 (9th Cir.2002). The court held that the district judge had abused his discretion in withdrawing the reference and in staying eviction proceedings against the probationer.

The district judge withdrew the reference on February 17, 2000, and stayed the eviction proceedings on February 29. While evaluating the misconduct complaint now before us, the Chief Judge learned that in July 2001 the district judge transferred the bankruptcy proceeding to another district judge to allow the second judge to evaluate the propriety of the withdrawal of the reference. The second judge re-referred the proceeding to the bankruptcy court in September 2001. The bankruptcy court granted the trustee's motion to abandon the estate's interest in the residence in question in January 2002.

The Judicial Council's remand to the Chief Judge indicated concern that the district judge may have received an improper ex parte letter from the probationer, and that the withdrawal of the reference may have been based on information contained in the alleged letter. After an investigation, the Chief Judge found that no such letter had been transmitted to, or received by, the district judge. We will not upset that factual finding. Further, any other impropriety in the district judge's receipt of information from the probationer during his personal meeting with her, and in the withdrawal of the reference based on that information, has been the subject of appropriate corrective action by the court of appeals, which held that there had been an abuse of discretion, and by the district judge's own earlier action in transferring the bankruptcy proceeding to another district judge.

On May 18, 2005 the Judicial Council communicated with the district judge setting forth with specificity the nature of the inappropriate conduct that he had engaged in relating to the withdrawal of the reference of the Canter bankruptcy and setting forth the necessity for appropriate and sufficient corrective action including an acknowledgment by the district judge of his "improper conduct" and a "pledge not to repeat it."

In response to the Judicial Council's communication, the district judge, in a written response from his lawyers, advised that, "... he has carefully reflected upon the underlying events surrounding this proceeding. Upon reflection, he recognizes that if he had articulated his reasons for withdrawing the reference and re-imposing the stay, and his underlying concerns that led to those actions, misunderstandings by the parties could have been prevented. As would any dedicated jurist, he believes those types of misunderstandings should be avoided wherever possible, and he recognizes that it was unfortunate they occurred in this situation. He does not believe that any similar situation will occur in the future."

[3] We are satisfied that adequate corrective action has been taken such that

1. The court's supervision of a probationer does not involve additional parties or require adversary legal proceedings unless the probation officer asks the court to revoke probation because of an alleged violation of a condition of probation. The conditions of probation, and, therefore, the supervision of a probationer, often focus on the probationer's living arrangements and economic circumstances. *See* 18 U.S.C. § 3563(a)(7), (b)(1), (b)(2), (b)(13), and (b)(19).

there will be no re-occurrence of any conduct that could be characterized as inappropriate. In response to the dissents, it is important to note that the overall purpose of the Judicial Conduct and Disability Act is not to punish but to protect the judicial system and the public from further acts by a judicial officer that are detrimental to the fair administration of justice. *See Rule 1 of the Rules of the Judicial Council of the Ninth Circuit Governing Complaints of Judicial Misconduct or Disability* ("The law's purpose is essentially forward-looking and not punitive. The emphasis is on correction of conditions that interfere with the proper administration of justice in the courts."). As the procedural history of this complaint amply demonstrates, the Council has given close and diligent attention to this matter over a period of many months. Although the specific allegation raised by the complainant of judicial action in exchange for sexual favors is as straightforward as it is without merit, the additional issues that have been raised along the way in the course of the Council's inquiry are factually and legally complex. It is not surprising that all members of the Council do not agree on the correct resolution of these issues. Indeed, it is even a fair question whether these additional matters are properly within the scope of the complaint. Assuming that they are, the Council's finding of corrective action is a considered judgment, based on the circumstances of this case, that is specifically authorized by the rules that govern these proceedings. *See Rule 14(d).* A finding of corrective action is not a cover up or a whitewash; it is a finding that adequate steps have been taken to assure that the conduct will not be repeated, whether or not the conduct crosses over the line from inappropriate conduct to misconduct.

Judge Kozinski suggests that the Council's goal is to avoid "hurting the feelings of the judge" who is the subject of the complaint. Dissent at 13831. Not so. Our goal in these proceedings is to maintain the integrity of the judiciary, not to cater to hurt feelings. Compared to many of the decisions we are called upon to make, decisions on misconduct complaints do not make any special claim on a judge's intellectual integrity or personal courage. Any judge who feels that his or her impartiality might be affected because of a personal relationship to the judge about whom a complaint is made must recuse. Otherwise, it is our duty to consider the complaints objectively, without bias for or against the judge or the complainant. This is not an onerous duty, and we gladly accept it.

The Judicial Council finds that appropriate corrective action has been taken in this case and we therefore AFFIRM the November 4, 2004, Order of the Chief Judge dismissing the complaint.

EZRA, Chief District Judge, partially concurring and partially dissenting:

This complaint of misconduct is a complex and difficult one that it is exacerbated by the unproven, and as far as I can discern from the record unfounded, insinuation of licentious conduct on the part of the District Judge with respect to his dealings with Ms. Canter. With respect to those allegations of personal misconduct I join with both the majority and Judge Winmill's dissent and would affirm the Chief Judge's dismissal of that portion of the complaint as well as the allegations surrounding the so called letter.

However, in my view the record is insufficient with regard to the remainder of the complaint and I therefore regretfully cannot join the majority in affirming the Chief Judge's disposition of the remaining allegations. I would remand to the Chief Judge for further proceedings in order to allow the record to be more fully devel-

oped with respect to the bankruptcy stay ordered by the District Judge and the District Judge's motivation behind it.

I wish to make it clear that by this partial dissent I am not suggesting a finding of misconduct should be made. It is my view that given the serious nature of the allegations and the points made by both the majority and the two dissents that further fact finding with appropriate input from those implicated needs to be undertaken before a conclusion either way can be reached under our standard of review.

KOZINSKI, Circuit Judge, dissenting:

Passing judgment on our colleagues is a grave responsibility entrusted to us only recently. In the late 1970s, Congress became concerned that Article III judges were, effectively, beyond discipline because the impeachment process is so cumbersome that it's seldom used. *See* 126 *Cong. Rec.* S28091 (daily ed. Sept. 30, 1980) (statement of Sen. DeConcini). At the same time, Congress was aware of the adverse effects on judicial independence if federal judges could be disciplined by another branch of government using means short of impeachment. *See* S.Rep. No. 96–362, at 6 (1979), *reprinted in* 1980 U.S.C.C.A.N. 4315, 4320. The compromise reached was to authorize federal judges to discipline each other. *See* 126 *Cong. Rec.* S28091. We are unique among American judges in that we have no public members—lawyers or lay people—on our disciplinary boards. *See* American Judicature Society, *Appendix C: Commission Membership, at* http://www.ajs.org/ethics/pdfs/Commission% 20membership.pdf (revised Aug. 2003) (listing disciplinary procedures for all state judges). Rather, judicial discipline is the responsibility of the circuit judicial councils—bodies comprised entirely of Article III judges. *See* Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, Pub.L. No. 96–458, 94 Stat.2035 (1980).

Disciplining our colleagues is a delicate and uncomfortable task, not merely because those accused of misconduct are often men and women we know and admire. It is also uncomfortable because we tend to empathize with the accused, whose conduct might not be all that different from what we have done—or been tempted to do—in a moment of weakness or thoughtlessness. And, of course, there is the nettlesome prospect of having to confront judges we've condemned when we see them at a judicial conference, committee meeting, judicial education program or some such event.

Pleasant or not, it's a responsibility we accept when we become members of the Judicial Council, and we must discharge it fully and fairly, without favor or rancor. If we don't live up to this responsibility, we may find that Congress—which does keep an eye on these matters, *see, e.g., Operations of Fed. Judicial Misconduct Statutes: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Prop. of the House Comm. on the Judiciary,* 107th Cong. (2001); *Report of the Nat'l Comm'n on Judicial Discipline and Removal* (1993)—will have given the job to somebody else, materially weakening the independence of the federal judiciary.

For the reasons I explain below, I believe the judge who is the subject of the complaint in this case has committed serious misconduct by abusing his judicial power. *See* Jeffrey M. Shaman, Steven Lubet & James J. Alfini, *Judicial Conduct and Ethics,* § 2.07, at 50 (3d ed.2000)[hereinafter Shaman, Lubet & Alfini] ("Judges abuse the power of the judicial office when they abbreviate or change critical aspects of the adversary process in ways that run counter to the scheme established by relevant constitutional and statutory law.").

Some may disagree, as a majority of the Judicial Council apparently does. But I hope that, by the time I've finished writing, my reasons will be clear. To that end, I must do what the majority eschews—discuss the unusual and uncomfortable facts presented by the record before us.

Many of the facts are already public, having been discussed by the court of appeals in *In re Canter*, 299 F.3d 1150 (9th Cir.2002). *Canter* grew out of a bankruptcy case involving Deborah Canter who, at the time, was undergoing a messy divorce from her husband Gary. During their married life, the couple had lived in a house on Highland Avenue in Los Angeles; the house was owned by Gary's parents, who transferred title to the Canter Family Trust in 1997. Gary paid rent while he and Deborah were living there. When the couple separated in 1999, Gary moved out, leaving Deborah in possession; the rent payments stopped.

The Trust brought an unlawful-detainer action against Deborah seeking eviction and back rent, and the case was set for trial on October 26, 1999. Twenty-four minutes before trial was to start, Deborah filed a bankruptcy petition, which automatically stayed the unlawful-detainer case. *See* 11 U.S.C. § 362. Three months later, on January 26, 2000, the bankruptcy court lifted the automatic stay on a motion filed by the Trust. Deborah, represented by attorney Andrew Smyth, did not file an opposition. Thereafter, the Trust and Deborah—again represented by counsel—signed a stipulation. Based on that stipulation, the state unlawful-detainer court on February 7, 2000, ordered Deborah to vacate the Highland Avenue premises.

At that point, lightning struck. Without notice, without warning, without giving the Trust an opportunity to oppose, without so much as a motion, the district judge who is now the subject of this disciplinary complaint withdrew the case from the bankruptcy court. Twelve days later, the same judge entered a second order, enjoining the state-court judgment evicting Deborah. Like the withdrawal order, the injunction was not preceded by the usual processes to which we are accustomed in American courts, such as a petition from the party seeking the relief or a response from the opposing side. In fact, no one knew why the district judge had done what he did—the order gave no reasons, cited no authority, made no reference to a motion or other petition, imposed no bond, balanced no equities. The two orders were a raw exercise of judicial power, the net effect of which was to let Deborah Canter live in the Highland Avenue property rent-free. Just how raw this exercise of power was became clear—if it was not already—when the Trust twice asked the judge to lift the stay, and was twice met by summary denials.

The so-called hearing on the second of these motions gives a pretty good flavor of the judge's attitude in this matter. The motion (and an unrelated motion) were argued together on June 18, 2001—after Deborah Canter had occupied the property for some 15 months past the eviction judgment. Deborah was present (apparently pro se), but said nothing of substance. After counsel for the Trust soliloquized for about a page of transcript, we find the following unilluminating exchange:

> THE COURT: Defendants' motion to dismiss is denied, and the motion for lifting of the stay is denied—I'm sorry. The motion to dismiss is granted with ten days to amend.
>
> MR. KATZ: And the motion to lift the stay is denied?
>
> THE COURT: Denied; that's right.
>
> MR. KATZ: May I ask the reasons, your Honor?
>
> THE COURT: Just because I said it, Counsel.

I could stop right here and have no trouble concluding that the judge committed misconduct. It is wrong and highly abusive for a judge to exercise his power without the normal procedures and trappings of the adversary system—a motion, an opportunity for the other side to respond, a statement of reasons for the decision, reliance on legal authority. These niceties of orderly procedure are not designed merely to ensure fairness to the litigants and a correct application of the law, though they surely serve those purposes as well. More fundamentally, they lend legitimacy to the judicial process by ensuring that judicial action is—and is seen to be—based on law, not the judge's caprice. The district judge surely had the *power* to enjoin enforcement of the state-court eviction judgment once he assumed jurisdiction over the bankruptcy case, but he could legitimately exercise that power only if he had sufficient legal cause to do so. Here, the judge gave no indication of why he did what he did, and stonewalled all the Trust's efforts to find out.

Nor is there anything in the record that would suggest a legal basis for the judge's action. Canter might have appealed the bankruptcy court's order lifting the stay, but she didn't. She might also have filed a motion asking the district court to withdraw the reference and enjoin the state-court judgment. Had she done so, we could have gleaned from her motion some legal theory supporting the injunction. But Canter didn't do that either, so we're left in the dark as to what legal basis the judge might have had for enjoining the state's lawful processes. Judicial action taken without any arguable legal basis—and without giving notice and an opportunity to be heard to the party adversely affected—is far worse than simple error or abuse of discretion; it's an abuse of judicial power that is "prejudicial to the effective and expeditious administration of the business of the courts." *See* 28 U.S.C. § 351(a); Shaman, Lubet & Alfini, *supra*, § 2.02, at 37 ("Serious legal error is more likely to amount to misconduct than a minor mistake. The sort of evaluation that measures the seriousness of legal error is admittedly somewhat subjective, but the courts seem to agree that legal error is egregious when judges deny individuals their basic or fundamental procedural rights."); *In re Quirk*, 705 So.2d 172, 178 (La.1997) ("A single instance of serious, egregious legal error, particularly one involving the denial to individuals of their basic or fundamental rights, may amount to judicial misconduct." (citing Jeffrey M. Shaman, *Judicial Ethics*, 2 Geo. J. Legal Ethics 1, 9 (1988))).

But, of course, there's more. Federal district judges don't withdraw the reference in bankruptcy cases for no reason, and they don't enjoin state-court judgments sua sponte unless they have some information about the case that persuades them to do so. Because the district judge had no prior involvement in the bankruptcy case, and no motion was filed challenging the propriety of the bankruptcy court's order lifting the automatic stay, we can infer that the judge learned about the case some other way. And, sure enough, Deborah Canter was no stranger to the district judge. At about the time she was involved in her divorce proceedings with Gary, Deborah was also the defendant in a criminal case where she was charged with false statements in violation of 18 U.S.C. § 1001, and loan fraud in violation of 18 U.S.C. § 1014. That case was pending before this district judge and he had placed Deborah on probation after she pled guilty to four counts.

When this complaint was before the Judicial Council on a prior occasion, we wrote the district judge and asked him whether the bankruptcy case was assigned to him by random assignment (a process known

as the "wheel") or in some other fashion. We also inquired as to his reasons for staying the state-court proceedings. This is what he said:

> There is no wheel for the purpose of withdrawing the reference in a bankruptcy matter.[1] I felt it was related to my program of working with probationers to help their rehabilitation. I have been doing this for more than 25 years and have been told by the Probation Officer that it is a successful program. *In this case a person who was a probationer in a criminal case informed me that the home in which she and her husband were living at the time of their divorce had been given to them by her husband's parents.* She was still living in the house with her 8 year old daughter and was in divorce proceedings. *She was contesting her right to occupancy in the divorce court and I felt it should be finalized there so I re-imposed the stay to allow the state matrimonial court to deal with her claim. From her explanation of the proceedings in the state court it appeared to me that her counsel had abandoned her interest so it could not be adequately presented to the state court.* Counsel for her husband had asked the Probation Officer to release Mrs. Cantor's [sic] probation report so it would be used in the divorce proceedings. I denied that request upon the recommendation of the Probation Officer.
>
> . . .
>
> I have no exact memory of any specific conversation with Mrs. Canter concerning the withdrawal of the reference in the bankruptcy matter. But what I can re-construct from the records I have in the criminal case is that *at a 120 day meeting with Mrs. Canter in connection with her performance of community service advised me that there was an unlawful detainer action pending in the Municipal Court to evict her from the property in which she and her minor daughter were living that was nominally owned by the senior Canters but was given to them when she married her then estranged husband.*
>
> I have that recollection because shortly after that meeting and my withdrawal of the reference in the bankruptcy case Mrs. Canter's lawyer *in the criminal matter* filed an application for an order to show cause to find counsel for Gary Canter in the matrimonial matter and counsel for Alan Canter (Gary's father) in the bankruptcy matter in contempt for filing a copy of Mrs. Canter's confidential probation report against her privacy interest in both courts, matrimonial and bankruptcy. After a hearing on the order to show cause it was discharged by stipulation of counsel to withdraw the probation reports although I never learned how the probation report got into the hands of counsel in the matrimonial or bankruptcy matter in the first instance. (Emphasis added.)

The district judge's response confirms what common sense suggests: His actions in sua sponte seizing control of the bankruptcy case and enjoining the state-court judgment were not random events; they were taken in direct response to communications he had with Deborah Canter—the

1. The district judge is correct, strictly speaking, in saying that "[t]here is no wheel for the purpose of withdrawing the reference in a bankruptcy matter," but only insofar as it applies to sua sponte withdrawals—withdrawals by the district court without a motion. According to the clerk of the district court, if a party files a motion seeking withdrawal of the reference, the case is assigned randomly according to the "wheel." Sua sponte withdrawals are very rare, so rare in fact that the district court clerk only "recalled one other instance of such withdrawal, so long ago that she could not remember the name of the judge, but she believed it was a judge who has long since retired."

bankruptcy debtor—during the course of supervising her criminal probation. As the judge admits, he formed certain impressions about the state-court proceedings based on Canter's representations to him, and concluded that possession of the Highland Avenue property should be "finalized" during the course of the matrimonial proceedings, so he enjoined the unlawful-detainer judgment.[2] In addition, he believed—again based entirely on what Canter told him—that "her counsel had abandoned her interest so it could not be adequately presented to the state court." The judge also suggested that maintaining her in possession of the Highland Avenue property would "help [her] rehabilitation."

The judge's explanation does not provide a lawful basis for his actions. He cites no statute, regulation or caselaw that authorized him, even arguably, to enjoin the state-court judgment. His belief that the debtor was badly served by her lawyer in the state-court proceedings, even if it were based on anything more than the debtor's unilateral complaint, provides no authority for exercising federal power under the Bankruptcy Act to interfere with the state-court judgment.[3] Nor does the judge's belief that the debtor's rehabilitation would be helped if she remained in the Highland Avenue property provide a lawful basis for the injunction. We so ruled in our previous order:

> The debtor, represented by her counsel, had stipulated to a judgment requiring her to vacate the premises, and the unlawful detainer court had entered the judgment. The district judge acted based on his belief that the dispute over possession of the property should be "finalized" in the divorce proceeding rather than the unlawful detainer proceeding, because "it appeared to ... [him] that her counsel had abandoned her interest so it could not be adequately presented to the state court." However, we are not aware of any authority for a bankruptcy court to determine whether parties in state court proceedings were adequately represented by their counsel. Nor are we aware of any authority allowing the district court to allocate jurisdiction between two state courts dealing with related subject matter.

That the district judge believed his actions would help his probationer's rehabilitation is of no consequence. A judge may not use his authority in one case to help a party in an unrelated case. Exercise of judicial power in the absence of any arguably legitimate basis can amount to misconduct.

2. There is cause to doubt the district judge's explanation. *See* pp. 1196–97 *infra*. For present purposes, however, I accept it at face value.

3. As noted by the court of appeals in *In re Canter*, injunctions under the bankruptcy power may only be issued to protect the integrity of the bankruptcy estate:

> In staying enforcement of the municipal court judgment, the district court was acting pursuant to its powers under 11 U.S.C. § 105(a). Section 105(a) authorizes the district court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [Title 11]." *Walls v. Wells Fargo Bank, N.A.*, 276 F.3d 502, 506 (9th Cir.2002). Section 105(a) "contemplates injunctive relief in precisely those instances where parties are pursuing actions pending in other courts that threaten the integrity of a bankrupt's estate." *In re Baptist Med. Ctr. of N.Y.*, 80 B.R. 637, 641 (Bankr.E.D.N.Y.1987) (citations and internal quotation marks omitted).

In re Canter, 299 F.3d at 1155 (footnote omitted). There is plainly no authority to issue an injunction pursuant to section 105(a) for the purpose of providing the debtor a warm place to live at the expense of the creditors. Indeed, Congress has provided that a federal court may not enjoin a state-court judgment, unless specifically authorized by Congress or in aid of its jurisdiction. *See* 28 U.S.C. § 2283. The district judge's injunction was, thus, not merely unauthorized, it was unlawful.

Judicial Council Order (Dec. 18, 2003) at 5–6 (alterations in original). (For ease of reference, I attach a copy of our earlier order as an Appendix.)

The judge's response, moreover, adds a further dimension to his misconduct: His orders were not merely lacking in lawful authority, they were based on ex parte communications from the debtor for whose benefit those orders were entered. *See* Shaman, Lubet & Alfini, *supra*, § 5.01, at 160 ("At the very least, participation in *ex parte* communications will expose the judge to one-sided argumentation.... At worst, [it] is an invitation to improper influence if not outright corruption.").[4] By his own admission, the judge seized the case from the bankruptcy court so he could enter an injunction that would allow the debtor to remain in the Highland Avenue property. He did so based on information given to him by the debtor during the course of the criminal proceedings when the trustees and their lawyers were absent. In our earlier order we also ruled that this conduct was improper:

> The district judge's explanation confirms what complainant alleges and the evidence suggests: The district judge withdrew the reference in a bankruptcy case that was not previously assigned to him, and entered an order in that case based upon information he obtained ex parte from an individual who benefitted directly from that order.
>
> It is well established that a judge may not exercise judicial power based on secret communications from one of the parties to the dispute. *United States v. Thompson*, 827 F.2d 1254, 1258–59 (9th Cir.1987). The district judge did not, either before or after his ruling, disclose to the parties that this ex parte communication had taken place, its substance or the fact that it formed the basis of his ruling.
>
> While parties do not have a due process right to the random assignment of cases, a judge may not assign a case in order to affect its outcome. *See Cruz v. Abbate*, 812 F.2d 571, 574 (9th Cir.1987). The judge here withdrew the reference and assigned the case to himself for the very purpose of granting the debtor relief from her imminent eviction.

Judicial Council Order (Dec. 18, 2003) at 4–5.[5]

4. "*Ex parte* communications are those that involve fewer than all of the parties who are legally entitled to be present during the discussion of any matter." *Id.* § 5.01, at 159.

5. The majority claims that "it is ... a fair question whether these additional matters [other than the allegation of sexual impropriety] are properly within the scope of the complaint." Maj. at 1182. Fairness, like beauty, must be in the eye of the beholder. Our earlier order, remanding the case to the Chief Judge, dealt exclusively with these "additional matters." Were we just whistling in the wind? The Judicial Council has already construed the complaint as encompassing claims beyond sexual impropriety. It is unseemly for my colleagues to now call that considered judgment into question, and do so in a throwaway line with no explanation whatsoever. In any event, the suggestion that the complaint in this case was limited to "judicial action in exchange for sexual favors," *id.*, is preposterous. While the complaint makes reference to Canter as "an attractive female," there is no reference to sexual favors, nor to any quid pro quo. *See* n. 14 *infra*. Complainant clearly suggests that the judge may have been influenced by the debtor's appearance, but he expressly leaves open the nature of their relationship—a matter he suggests be investigated. The gravamen of the complaint is that the judge acted "inappropriately," a term that includes judicial acts based on ex parte communications and the related misconduct that is amply demonstrated by this record. Our duty is to read the complaint fully and fairly, construing the words the complainant actually uses rather than rewriting the complaint so it reads more narrowly than actually written. The standard the majority uses to construe the complaint here is very different from the standard we apply in normal civil litigation. *See, e.g., United States*

Before remanding the case to the Chief Judge, we ordered a limited investigation into the allegations of the complaint. This investigation was conducted, at the direction of the Judicial Council, by a staff person who called various individuals by telephone. This investigation uncovered evidence that there may have been further communications between the debtor and the district judge concerning her eviction. Among the individuals called by our staff was attorney Andrew Smyth, who represented Deborah Canter in the bankruptcy proceedings and also, apparently, in the state-court unlawful-detainer action. This is a summary of that conversation:

> Mr. Smyth said that when Deborah Canter filed in bankruptcy, she was being threatened with eviction by her in-laws and going through a nasty divorce. He was also aware that she was on probation and had regular appearances before [the district judge]. The Canter Family Trust moved for relief from the automatic stay in order to pursue its unlawful detainer action in state court, and Mr. Smyth stipulated to an order. He speculated that Ms. Canter may have lost some trust in him after that, but said that he believed that all of her defenses could best be raised in the state court action. He said he was surprised when [the district judge] withdrew the bankruptcy reference and reimposed the stay. At the time he had no idea why [the judge] had done so. He recalls that when the parties questioned [the judge] in court, [the judge] said "Because I said so." Mr. Smyth said that even at the time of the Court of Appeals argument, he and Mr. Katz were still speculating on the reason for [the judge's] action. Mr. Smyth said that he had "absolutely zero evidence" of any improper relationship between [the judge] and Ms. Canter, but was "suspicious" because Ms. Canter was a "cute girl" who projected a "waif" persona that was appealing. At the time he thought that perhaps [the judge] had become aware of her divorce and imminent eviction in the course of one of her probation visits.
>
> Mr. Smyth then said that he had only become aware of the "real" reason for the withdrawal sometime after the Court of Appeals opinion. He explained that his wife and legal secretary Michelle, whom he described as a Korean emigre unfamiliar with the habits of American judges, told him that one day Ms. Canter had come into the office crying about her circumstances, and that Michelle had offered to help her to compose a letter to [the judge] and told her to go see him. Michelle did "ghostwrite" a letter for Ms. Canter explaining how her husband's family was picking on her and how she was being victimized in the divorce. I asked Mr. Smyth whether he knew if Ms. Canter actually delivered such a letter to [the judge], so he put his wife on the phone. She said that Ms. Canter told her that she had taken the letter in to [the judge]. It was Michelle's understanding that Ms. Canter delivered the letter to [the judge] personally and had some brief discussion with him. Ms. Canter told Michelle that the letter had "worked." I asked Michelle when this delivery took place, and she said she believed it was a day or two before [the judge] withdrew the reference.

v. LSL Biotechnologies, 379 F.3d 672, 683 (9th Cir.2004) ("[F]ederal complaints are generally construed liberally ...."); *Miranda v. Clark County*, 319 F.3d 465, 471 (9th Cir. 2003) (en banc); *Harmon v. Billings Bench Water Users Ass'n*, 765 F.2d 1464, 1467 (9th Cir.1985). I see no justification for applying a different standard here just because the respondent is a federal judge, and the majority offers none.

In our order remanding the case to the Chief Judge, we noted proof that the judge had withdrawn the reference and stayed the eviction "in response to a direct plea for help from the debtor," Judicial Council Order (Dec. 18, 2003) at 4, and suggested that the matter "be investigated further," *id.*

The Chief Judge, on remand, obtained denials of any such communication from the judge and from Deborah Canter. Based on these denials, the Chief Judge concluded that "there is no basis for a finding that credible evidence exists of a letter or other 'secret communication' having passed between the defendant/debtor and the district judge. There is similarly no basis for finding that there was any private meeting or discussion between them at any time." Chief Judge Order (Nov. 4, 2004) at 5.

The majority declines to "upset that factual finding," maj. at 1181, but the Chief Judge is not a trier of fact, and she did not conduct an evidentiary hearing. Her authority is limited to determining whether there is credible evidence of misconduct, and she may dismiss the complaint only if credible evidence is entirely lacking. *See* 9th Cir. Misconduct R. 4. That the judge accused of receiving a secret communication and the party who allegedly made the communication both deny it does not negate the fact that we have contrary evidence—the statement of the secretary who claims to have ghostwritten the letter for Deborah Canter and also claims that Canter told her she had delivered the letter and that "[it] had 'worked.' "[6]

The Chief Judge did not contact the lawyer or his secretary and they did not retract the statements they had made to our investigator. Nor can I imagine why they would have lied about this in the first place, as it hardly reflects creditably on their own conduct. At the very least, then, we have a conflict in the evidence that only an adversary hearing can resolve. And an adversary hearing can only be held if the Chief Judge convenes an investigative committee pursuant to Ninth Circuit Misconduct Rule 4(e), which she declined to do.

But there is more here than merely the conflicting statements; there is the matter of timing: According to probation office records and the judge's own statement, Canter and the district judge had a probation review meeting in his chambers on January 24, 2000. That was the last such meeting before the district judge withdrew the reference on February 17 and entered his order enjoining the unlawful-detainer judgment on February 29.[7] But, at the

6. The two denials are hardly as conclusive as the Chief Judge and the majority want to believe. The district judge made no statements to us at all. Rather, he answered some questions in a letter directed to his own lawyer and the lawyer then passed that information on to the Chief Judge. Neither the judge's statement nor, of course, that of his lawyer is under oath. *See also* pp. 1196–97 *infra* (questioning the veracity of other unsworn statements made to us by the district judge). As for Canter's statement, it is made under penalty of perjury but (as I note on p. 1191 below) says suspiciously more than it needs to. Moreover, the declarant had recently been convicted of felonies of deception. *See* Fed.R.Evid. 609(a)(2). She had also filed five bankruptcy petitions in just over seven years, three of which were dismissed within two months of filing. This is considered evidence of bad faith use of the automatic stay to stall legal proceedings against her. *See In re Knight Jewelry*, 168 B.R. 199, 202–03 (Bankr. W.D.Mo.1994). When she filed the last of these petitions—the one that is at the heart of our complaint—she signed, also under penalty of perjury, a form required by Local Rule 1015–2, which purported to list all her past bankruptcy petitions, yet she neglected to list any of the four prior petitions on that form. *See* Bankr.C.D. Cal. R. 1015–2.

7. The next such meeting was on April 7, 2000.

time of the January 24 meeting, the bankruptcy court had not yet lifted the automatic stay—that didn't happen until two days later, on January 26. Nor did the state court enter its order of eviction—the one the district judge eventually enjoined—until two weeks later, on February 7.

How then did the district judge know about the state-court eviction order that he eventually enjoined? Once the bankruptcy court lifted its stay, it was no longer concerned with the unlawful-detainer action and there is nothing in the bankruptcy court file reflecting the subsequent eviction judgment. Yet, the district judge was familiar enough with Deborah Canter's situation—including the specific judgment entered in state court two weeks after her probation meeting—that he was able to quash it with cruise-missile accuracy: "Pending further proceedings in this Court the judgment of February 7, 2000, in the matter of *ALAN S. CANTER v. DEBORAH MARISTINA ROMANO* in Municipal Court No. 99U18116 is stayed." Dist. Ct. Order (Feb. 29, 2000).

Normally, of course, there would be a motion, with declarations and exhibits attached, that would leave no doubt about how the judge learned the information on which he based his decision. But the record here is entirely silent. One plausible inference—perhaps the most likely inference—is that some time after the January 24 probation meeting, Deborah Canter communicated with the judge privately—by letter, by telephone or in person—and advised him that an eviction order had been entered against her, and that she would have to move out unless he did something about it lickety-split. The letter, allegedly ghostwritten by Smyth's secretary and delivered by Canter to the district judge, would seem to fit the bill.

But there is still a bit more to this story. Deborah Canter's declaration, in which she denies having written or delivered a letter to the judge, actually contains information not mentioned in the Chief Judge's order:

> 2. I was formerly represented by Andrew Smyth, Esq., in connection with bankruptcy proceedings. At one point in the proceedings I received a call at home from Mr. Smyth's wife and legal secretary, Michelle. She asked me to come in to the office to sign a declaration about an eviction action pending against me. I did so, and at Michelle's request I gave her $50 for an attorney's messenger service to deliver the declaration to the court. Michelle did not specify the addressee, and I do not have a copy of the declaration.
>
> 3. Approximately one week later, while I was at home, my mother told me that Mr. Smyth's office was on the phone. Mr. Smyth said that an eviction stay order had been issued.

The district judge enjoined enforcement of the state-court judgment on February 29. Approximately a week earlier would have been February 22. What then was this "declaration about an eviction action pending against me" that Canter says Smyth's secretary had her sign and sent off "to the court" by messenger? It's hard to imagine it had anything to do with the unlawful-detainer proceedings, because those were concluded on February 7 with the entry of the eviction judgment. The only case Canter had pending at that time that in any way pertained to her eviction was the bankruptcy, and the only document filed around that time was a motion dated February 25, seeking conversion from Chapter 13 to Chapter 7. Neither that motion nor Canter's attached declaration makes any reference to the eviction.

Could the "declaration" to which Canter refers in her sworn statement to us actually be the letter that the lawyer's secretary described in her conversation with our in-

vestigator? To be sure, the two accounts differ in material respects, but they also have much in common: a conversation between the secretary and Canter, a missive signed by Canter concerning the eviction that was then sent off to the court, an eventual happy result. Could it be that Deborah Canter did sign a letter as described by the secretary? Could Canter be worried that such a letter might turn up, and is she providing herself an out by volunteering information about a declaration so she might later claim she didn't know what she was signing? This could explain why Canter included otherwise extraneous information in a declaration whose only purpose was to deny that she had any private communications with the district judge.

There might well be an innocent explanation for all this, but these are not the kind of details that a careful review of the record should overlook. In light of the other evidence we have as to a secret communication between the debtor and the district judge, leading up to his otherwise inexplicable order enjoining the state-court judgment, I cannot agree that the absence of such a communication has been conclusively established.

The majority, as did the Chief Judge before it, ignores these troubling issues and focuses instead on matters that are wholly irrelevant, such as the fact that the judge eventually transferred the case to another district judge, after suddenly developing doubts as to whether he had acted properly in seizing the case from the bankruptcy court. What the majority and the Chief Judge overlook is that the judge transferred the case *seventeen months* after he had removed it from the bankruptcy court, and just two days after the creditors had filed their mandamus petition with the court of appeals. Given that the district judge had developed no doubts whatsoever while maintaining the debtor in the Highland Avenue property for a year and a half, despite two motions by the Trust, this strikes me as a clumsy effort to avoid the inevitable dropping of the hammer by the court of appeals—an implicit acknowledgment of wrongdoing.[8]

Why does this matter, anyway? The district judge's misconduct occurred in

8. Worse, the Chief Judge suggests the fault really lies with the debtor's lawyers who hoodwinked the court of appeals by pressing on with the mandamus petition even though the district judge had corrected his own mistake: "For reasons that are not clear, the appellate panel apparently was unaware that at the time of oral argument on the propriety of withdrawal of the bankruptcy reference, the case had long since been returned to Bankruptcy Court and closed by the assigned bankruptcy judge." Chief Judge Order (Nov. 4, 2004) at 6.

This is untrue, unfair and beside the point. One need only listen to the tape of oral argument before the court of appeals—freely available from the clerk of that court—to learn that the court of appeals panel was fully apprised of these events. But this made no difference to the relief requested by the mandamus petitioners because neither this district judge, nor the second district judge (who did, indeed, determine—as has everyone else—that the first judge had no basis for withdrawing the case from the bankruptcy court), bothered to vacate the order enjoining the state-court judgment. The case was thus returned to the bankruptcy court with the injunction intact, and the bankruptcy judge—being lower on the food chain than the district judge—reasonably felt he had no authority to vacate that order. At the time of oral argument in the court of appeals, in March 2002, counsel for the creditors represented that his clients continued to feel bound by the injunction, and reminded the court that "Ms. Canter has now lived in my client's house for three years, rent free." The debtor's counsel agreed that the district judge's order continued to "prevent any action against the debtor." Deborah Canter could not be dislodged from the Highland property until the court of appeals vacated the district court's order impeding the state-court eviction judgment.

The majority seems to be under the impression that the district judge's injunction was terminated in January 2002, when the bankruptcy court "granted the trustee's motion to

February 2000, when he seized the case from the bankruptcy court based on information whispered to him by the debtor ex parte, and then stayed her eviction without a stated reason and without first giving the parties aggrieved by the order a chance to argue against it. It occurred again when he denied their two motions for reconsideration with the imperious "Just because I said it, Counsel" as the only reason. *See* p. 1184 *supra*. Had he vacated his order at a later date, this might have mitigated the harm caused by his misconduct, though it could not have undone the misconduct itself. But he didn't even do that much. With the help of another district judge hand-picked by him, the case was trundled back to the bankruptcy court with the order enjoining the state-court judgment intact, and so it remained until the court of appeals issued its mandamus. How or why this series of events serves as "corrective action" for the district judge's misconduct, *see* maj. at 1181–82, is a mystery to me.[9]

Nor, of course, does the mandamus order of the court of appeals, which did find that the district judge had abused his discretion, count as corrective action. *See* maj. at 1181–82. The majority's contrary suggestion does an injustice to the many other district judges who have been reversed for abuse of discretion. When a court of appeals says that a district judge abused his discretion, this is a legal conclusion that connotes mere error—not wrongdoing. The court of appeals here carefully refrained from saying whether the district judge committed misconduct, mindful no doubt that such determinations are the province of this body. Merely reversing an erroneous judgment that is the product of misconduct does not undo the misconduct. If my colleagues need a clear-cut hypothetical to demonstrate this self-evident proposition, consider a judgment procured by a bribe. That the court of appeals reverses the judgment—which it would do in every instance where the bribe was brought to its attention—does not and cannot insulate the district judge from the consequences of his misconduct on the theory that the misconduct has somehow been cured. *See* Shaman, Lubet & Alfini, *supra*, § 2.02, at 36 ("In some instances ... legal error may amount to judicial misconduct calling for sanctions ranging from admonishment to removal from office."); *accord Oberholzer v. Comm'n on Judicial Performance*, 20 Cal.4th 371, 84 Cal. Rptr.2d 466, 975 P.2d 663, 679 (1999) (legal error "can constitute misconduct if it involves 'bad faith, bias, abuse of authority, disregard for fundamental rights, intentional disregard of the law or any purpose

abandon the estate's interest in the residence in question." Maj. at 1181. If that is what my colleagues are saying—and I can see no other point in mentioning that event—they are simply mistaken. Termination of the bankruptcy proceedings had no effect on the district court's injunction and the creditors were still precluded from enforcing the state-court judgment, even though the debtor had abandoned any interest in the property, until the court of appeals vacated the injunction seven months later.

9. The Chief Judge also seems to say in her order that the judge's actions were justified by the fact that a copy of the debtor's presentence report had been improperly released and relied upon in the bankruptcy proceedings. Chief Judge Order (Nov. 4, 2004) at 5. The majority doesn't adopt this rationale and for good reason: It is manifestly untrue. The district-court docket in the bankruptcy case reflects no proceedings whatsoever related to the presentence report. In his written statement to us, the district judge admitted that a show-cause order *was* issued to deal with this issue, but in the criminal case. *See* p. 1186 *supra*. The docket in the criminal case confirms this. There was absolutely nothing about the improper release of the presentence report that justified withdrawing the reference in the bankruptcy case, much less the entry of an order enjoining the state-court unlawful-detainer judgment.

other than the faithful discharge of judicial duty' " (citing cases)); *In re Quirk*, 705 So.2d at 178 ("egregious legal error, legal error motivated by bad faith, and a continuing pattern of legal error" can also constitute misconduct).

Finally, I find the district judge's slippery statement of contrition risible. As the majority notes, we wrote the district judge and offered to close the matter without further action, provided he acknowledge his "improper conduct" and "pledge not to repeat it." *See* maj. at 1181.[10] This is consistent with the accepted practice of giving judges subject to a valid disciplinary complaint a chance to mitigate or correct their misconduct by an open acknowledgment of wrongdoing, an apology and a pledge to mend their ways. *See, e.g., In re Charges of Judicial Misconduct*, 404 F.3d 688, 700 (Judicial Council of the 2d Cir. 2005).

The district judge's response here falls far short of what I would consider corrective action. First of all, he fails to even acknowledge that he acted based on information he obtained from the party benefitted by his orders, without disclosing this to the opposing parties or giving them an opportunity to correct any misstatements or exaggerations that may have been made to him in private. Our rules governing judicial misconduct proceedings use this precise example of conduct that is sanctionable: " 'Conduct prejudicial to the effective and expeditious administration of the business of the courts' ... includes such things as ... improperly engaging in discussions with lawyers or parties to cases in the absence of representatives of opposing parties, and other abuses of judicial office." 9th Cir. Misconduct R. 1(c); *see also* 28 U.S.C. § 351(a); Code of Conduct for United States Judges, Canon 3(A)(4).

Second, the judge withdrew the bankruptcy reference without any legal justification, for no reason other than to benefit the debtor by blocking her eviction. *See id.*, Canon 3(C)(1)(a) (judges should not participate in cases "in which the judge's impartiality might reasonably be questioned, including but not limited to instances in which ... the judge has a personal bias or prejudice concerning a party"); *see also Cruz v. Abbate*, 812 F.2d 571, 574 (9th Cir.1987) ("While a defendant has no right to any particular procedure for the selection of the judge ... he is entitled to have that decision made in a manner free from bias or the desire to influence the outcome of the proceedings.").

Third, he acted without notice, in direct contravention of Fed.R.Civ.P. 65(a)(1) which states in categorical terms, "No preliminary injunction shall be issued without notice to the adverse party." [11] Notice is also one of the bedrock principles of due process and would be required even without the direct command of Rule 65(a). *See Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 170–72, 71 S.Ct. 624, 95 L.Ed. 817 (1951) (Frankfurter, J., concurring); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950).

Fourth, the district judge failed to heed the other explicit procedures applicable to

10. We also asked that the district judge tender an apology for his actions, a requirement the majority seems to have forgotten. Our letter said: "We believe that, in this case, the most appropriate corrective action would be for you to acknowledge your improper conduct, apologize for it and pledge not to repeat it."

11. It is clear that once an automatic bankruptcy stay is lifted, as happened in this case, it may not be re-imposed. Rather, the judge may act—if at all—only by issuing an injunction pursuant to section 105(a) of the Bankruptcy Code, in which case he must follow the procedures applicable to preliminary injunctions under Fed.R.Civ.P. 65. *See In re Canter*, 299 F.3d at 1155 & n. 1.

the issuance of an injunction, such as the requirements of a bond and a clear statement of reasons, *see* Fed.R.Civ.P. 65(c), (d), all of which are designed to provide transparency for purposes of appellate review and otherwise protect the interests of the party against which an injunction is entered. This was *twice* pointed out to the judge by the creditors in their motions for reconsideration, with no effect whatsoever. A federal courtroom is not Sherwood Forest; a judge may not take property from one party and give it to another, except by following established rules of procedure. *See* Shaman, Lubet & Alfini, *supra*, § 2.07, at 50 ("Judges abuse the power of the judicial office when they abbreviate or change critical aspects of the adversary process ... [and] have been disciplined for ... issuing dispositive orders without making findings of fact or setting forth reasons as required by law ....").

Fifth, the district judge acted without even colorable legal authority. To this day, I am unaware of any conceivable legal basis the district judge might have had for enjoining the state court judgment and keeping the debtor in the Highland Avenue property at the expense of the Trust. *See* p. 1187 n. 3 *supra*. Throughout these lengthy proceedings, the judge has offered nothing at all to justify his actions—not a case, not a statute, not a bankruptcy treatise, not a law review article, not a student note, not even a blawg. He's said nothing that would suggest he was mistaken—perhaps badly mistaken—but nevertheless acting in good faith. By his silence, the district judge has implicitly acknowledged that his orders were a raw exercise of power, unsupported by any authority other than that of his commission. *See* Shaman, Lubet & Alfini, *supra*, § 2.02, at 38 ("Intentional refusals to follow the law are another manifestation of unfitness for judicial office."). Congress has surely not made us the most powerful judges in the world so we can bestow thousands of dollars of bounties on our personal favorites whenever we feel like it.

Sixth, the district judge has failed to acknowledge the serious harm he caused the Trust through his improvident actions. Not only was it forced to host the debtor on its property rent-free for years—at a cost estimated by the court of appeals at $35,000—but it also had to spend money on lawyers to bring two motions for reconsideration and a mandamus petition in the court of appeals. Bankruptcy lawyers don't come cheap, and I'd be surprised if the legal costs associated with undoing the harm inflicted by the district judge didn't run into the tens of thousands of dollars. *See Miss. Comm'n on Judicial Performance v. Perdue*, 853 So.2d 85, 91 (Miss. 2003) (party aggrieved by judge's ex parte order incurred "attorneys fees in excess of $13,000.00").[12]

12. *Perdue* is a case remarkably like our own. The judge there granted a custody decree based on information provided to her ex parte. *Id.* at 92. Her order "stated no basis for jurisdiction," *id.*, was entered "without a petition being filed," *id.* at 91, and "there was no indication of any appearances, testimony, or evidence taken in the matter," *id.* at 92. Later, "when presented with a golden opportunity to right the wrong, Judge Perdue refused to even discuss the [matter]," *id.*, referred the case to another court, "thereby keeping in effect" her ex parte order, *id.* at 93, and "attempt[ed] to divert ... attention from her actions" by placing the blame on the aggrieved party, *id.* at 96. The Mississippi Supreme Court found it "especially troublesome" that the judge "fail[ed] to acknowledge her wrongdoing, or even that she may have made a mistake." *Id.* Based on these considerations, the court suspended the judge without pay for 30 days and assessed her the cost of the disciplinary proceedings. *Id.* at 98. The Mississippi Supreme Court's thorough and thoughtful opinion in *Perdue* contrasts favorably with the Judicial Council's summary order in our case.

Of all these things, the judge says nothing at all; he steadfastly refuses to admit any wrongdoing. What he seems to acknowledge—though it's hard to tell from his lawyer's guarded language—is that he should have communicated the reasons for his actions better, pretending that, had he done so, "misunderstandings by the parties could have been prevented." This is patently absurd. The problem at the root of the district court's actions lay in the fact that he *had* no reasons—at least no legitimate reasons—for doing what he did. What could he possibly have said that might have avoided "misunderstandings" by the Trust? Would the trustees have been placated had the judge told them that he had chatted with Deborah Canter in their absence and that, based on that conversation, he was convinced they had given her a raw deal? Any attempt on the judge's part to explain would only have made it clear that his orders lacked legal authority and were based on ex parte communications. The judge's failure to explain was not a foible; it was part and parcel of a calculated effort to maintain the debtor in the Highland Avenue property rent-free for as long as possible, and elude what he doubtless feared would be the adverse personal consequences of such an admission.

Nor does the judge's statement contain a pledge not to repeat his wrongful conduct. What he says, with uncharacteristic coyness, is that "[h]e does not believe that any similar situation will occur in the future." Perhaps he does not believe that any similar situation will occur because he doesn't expect to encounter a similar set of facts; it is hardly a commitment to act differently in similar circumstances. It reflects poorly on this body that, after asking the district judge for a pledge, my colleagues settle for something as binding and precise as a weather forecast.[13]

Worse still, my colleagues turn a blind eye to evidence that the accused judge may have been less than forthright in his communications with the Judicial Council. Recall that his explanation for issuing the injunction was that he thought Canter was "contesting her right to occupancy [of the Highland property] in the divorce court," and he "re-imposed the stay to allow the state matrimonial court to deal with her claim." *See* p. 1186 *supra.* In its second motion to have the injunction lifted, the Trust informed the district judge that the matrimonial court *had* by then adjudicated the issue, and had concluded that Canter had no rights in the property. Attached to the motion was the order of the state divorce court, entered after a five-day trial, which included the following finding: "The court finds that neither Petitioner [n]or Respondent have any ownership interest in the residence located at ... Highland Avenue, Los Angeles, California 90036, so therefore, there is no community property interest in said property under any theory of community property law."

Had the judge been motivated, as he now claims, by the desire to maintain the status quo until ownership of the property was resolved by the matrimonial court, one would think he would have rescinded his order once he learned that the matrimonial court had resolved the issue against the

13. The fact that the judge does not speak to us directly, but in the third person through his lawyer, sheds further doubt on his sincerity. *Cf. In re Charges of Judicial Misconduct,* 404 F.3d at 691–92, 700 (complaints dismissed after judge writes his own letter of apology). I seriously doubt that many of my colleagues would be persuaded that a criminal defendant has accepted responsibility for his misconduct based on a statement from his lawyer that the defendant does not believe such a situation will arise again in the future. It does not inspire confidence in the federal judiciary when we treat our own so much better than we treat everyone else.

debtor. But no—nothing of the sort. What he did do was to summarily deny the motion and refuse to give reasons. *See* p. 1184 *supra*. By leaving the injunction in place after the debtor had been found to have no rights in the property, the judge enabled her to live there rent-free for another two years—until the court of appeals finally vacated the order by writ of mandamus. This sequence of events makes it perfectly clear that the judge was far more concerned with giving Deborah Canter a free place to live than with preserving any rights she may have had under state law.

The fact of the matter is that the judge's conduct here caused real harm. It certainly harmed innocent creditors to the tune of $50,000 or more. Worse, it harmed public confidence in the fair administration of justice in the courts of this circuit. The prohibition against ex parte communications, rules of procedure, principles of law—all of these are not trinkets that judges may discard whenever they become a nuisance. Rather, they are the mainstays of our judicial system, our guarantee to every litigant that we will administer justice, as our oath requires, "without respect to persons." 28 U.S.C. § 453.

"All of the foundations of judging—such as respect for the text of the law and precedent—reinforce the message of impartiality." M. Margaret McKeown, *Don't Shoot the Canons: Maintaining the Appearance of Propriety Standard*, 7 J.App. Prac. & Process 45, 53 (2005). When a judge acts in accordance with the rules of procedure, when he gives reasons for his orders, when he allows both sides equal and open access to him, when he follows the law, he ensures not merely that justice is done, but that it appears to have been done. When, on the other hand, a federal judge exercises the vast powers entrusted to him by Congress based on secret communications with one party, when he fails to give the opposing side an opportunity to speak, when he refuses to give reasons for his actions, when he does not cite legal authority, when he stubbornly and laconically sticks to his guns despite repeated requests for reconsideration or an explanation, he inevitably gives rise to the suspicion that he acted for personal and improper reasons rather than according to the rule of law.

The complaint here brought this matter to our attention and plausibly suggested an inappropriate motive for the judge's actions. Complainant is surely not alone in his suspicions, as evidenced by this exchange in the argument before the court of appeals on the mandamus petition:

> JUDGE THOMAS: But you didn't ask for a reimposition of the stay or the injunction, right?
>
> MR. SMYTH: No. That is correct. I did not. It was a surprise he suddenly did.
>
> JUDGE THOMAS: Surprised you. And you have no explanation as you stand here today of why he did it.
>
> MR. SMYTH: No. Just a guess.
>
> JUDGE THOMAS: And what's your guess?
>
> MR. SMYTH: That he, one, he possibly felt my client was being ill served and that I so readily stipulated to lift the stay. He had had her as a client, not a client, a . . .
>
> JUDGE THOMAS: Defendant.
>
> MR. SMYTH: And she gives the kind of little girl lost, doesn't know what she's doing, she needs protection, everyone's picking on her, and I think he probably stepped in because his thought was that her lawyer wasn't doing a good [job], so I'll just preserve the status quo, let her have her stay. But again, I'm just trying to guess, you know counsel asked [the judge] why, and . . .

When opposing counsel was asked a similar question, his silence spoke more eloquently than any statement might have:

> JUDGE RAWLINSON: Counsel what is your speculation as to why the Judge sua sponte lifted, reimposed the stay?
>
> MR. KATZ: Judge Rawlinson, I would prefer not to answer that question.

A judge must not put himself in a position where the parties to the dispute suspect him of acting out of personal motives rather than according to law. By his unorthodox behavior in this case, the district judge did precisely that and I, for one, cannot say that these suspicions are unfounded.[14]

The majority claims that the issues raised by the dissenters "are factually and legally complex" and that it is therefore "not surprising that all members of the Council do not agree on the correct resolution of these issues." Maj. at 1182. Perhaps it's not surprising that we disagree, but I *do* find it surprising that I still don't know *why* we disagree, because the majority refuses to engage the issues. Complexity of the issues does not excuse a tribunal from confronting them. I also find it surprising that, despite what the majority claims is its "close and diligent attention to this matter over a period of many months," *id.*, my colleagues can't even figure out whether the judge's conduct "crosses over the line from inappropriate conduct to misconduct," *id.* A Judicial Council order in a misconduct case is not a jury verdict; the accused judge and the public are entitled to a decision that resolves the issues presented, no matter how difficult or complex they may be. Unfortunately, the majority's exiguous order seems far more concerned with not hurting the feelings of the judge in question. But our first duty as members of the Judicial Council is not to spare the feelings of judges accused of misconduct. It is to maintain public confidence in the judiciary by ensuring that substantial allegations of misconduct are dealt with forthrightly and appropriately. This the majority has failed to do.

14. My colleagues are too quick to dismiss complainant's suggestion of an improper relationship between the district judge and the debtor as "entirely unfounded," maj. at 1180, or even "scurrilous," Winmill dissent at 1202. Here is what complainant says, after pointing out that he had conducted "a little district court docket research" and discovered that Deborah Canter had been placed on probation by the district judge:

> It would appear to a reasonable observer who knew all these facts that something inappropriate happened here, beyond what the court [of appeals] discussed. What I mean to say is that it appears that [the district judge] acted inappropriately to benefit an attractive female whom he oddly had placed on probation to himself, and, if this occurred, then it would constitute extreme judicial misconduct.
>
> It is requested that this matter be appropriately investigated to determine, among other things, the actual relationship between Deborah Canter and [the judge].

This is no different from what her own lawyer told the court of appeals, *see* p. 1197 *supra*, or our investigator, *see* p. 1189 *supra*. Unfortunately, the judge's otherwise inexplicable actions invite such speculation. Whether the judge acted out of a misplaced sense of chivalry toward what he saw as a damsel in distress or for some other reason, I don't know. What I do know is that he did not act for judicially appropriate reasons and this alone justifies complainant's suggestion that the judge may have "acted inappropriately." I am well aware of the numerous misconduct complaints by disgruntled litigants who claim that they lost because the judge had some secret relationship with the prevailing party. Such complaints are routinely—and properly—dismissed by the Chief Judge because the accused judges followed normal procedures and there is no evidence whatsoever to support the allegations. This case is quite different because the district judge did *not* follow normal procedures and thus forfeited the presumption of regularity that normally attaches to judicial actions.

We are all human and do things we have reason to regret later. The transgression here, however, was particularly egregious and protracted, and despite numerous opportunities to do so, the district judge has steadfastly refused to own up to it. I therefore cannot agree either with the Chief Judge's conclusion that no misconduct occurred or the majority's conclusion that there has been sufficient corrective action to justify dismissal of the complaint. Rather, I believe that serious misconduct has been clearly established [15] and discipline must be imposed consisting of nothing less than a public reprimand and an order that the district judge compensate the Trust for the damage it suffered as a result of the judge's unlawful injunction.

I also believe that the aggrieved creditors are entitled to an apology from the judges of our circuit for the cost, grief and inconvenience they suffered in one of our courts because of the district judge's unprofessional behavior. The judge who committed the misconduct refuses to offer such an apology and it is therefore up to us. Because I cannot speak for the Judicial Council, a majority of whose members see far too little wrong with what the district judge here did, I offer mine.

Appendix: Judicial Council Order (Dec. 18, 2003)

JUDICIAL COUNCIL OF THE NINTH CIRCUIT

In re: COMPLAINT OF JUDICIAL MISCONDUCT

No. 03–89037

ORDER

Before: ALARCÓN, KOZINSKI, THOMAS, McKEOWN and W. FLETCHER, Circuit Judges, and PATEL, HUFF, COUGHENOUR, HATTER and SHANSTROM, District Judges.

A complaint of judicial misconduct was filed against a district judge of this circuit pursuant to 28 U.S.C. § 351–64. Complainant, an attorney who was not involved in the matters alleged in the complaint, claims that the district judge committed misconduct in the handling of a bankruptcy matter, which has been the subject of an adverse ruling by the Court of Appeals. *See In re Canter*, 299 F.3d 1150 (9th Cir. 2002). Specifically, complainant alleges that the district judge acted improperly in withdrawing the reference from the bankruptcy court and then re-imposing the automatic stay that the bankruptcy court had vacated on the motion of certain creditors. Re-imposition of the stay precluded the creditors from enforcing an unlawful-detainer judgment that would have entitled them to immediate possession of premises occupied by the debtor. The Chief Judge dismissed the complaint, noting that "[a] complaint will be dismissed if it is directly related to the merits of a judge's ruling or decision in the underlying case." Chief Judge Order at 2 (citing 28 U.S.C. § 352(b)(1)(a)(ii); 9th Cir. Misconduct R. 4(c)(1)).

While legal error alone will not amount to misconduct, the converse is not necessarily true: Misconduct can cause error. That a judge's ruling can be, or has been, subject to appellate review does not automatically insulate the judge's conduct from disciplinary proceedings. Jeffrey M. Shaman, Steven Lubet & James J. Alfini, *Ju-*

15. I reach this conclusion without taking into account the unresolved issue as to whether the debtor communicated with the judge via a secret letter after her January 24, 2000, probation review meeting. While I believe that issue deserves further investigation for the reasons I explain above, I agree with Judge Winmill that misconduct has been established based on the public record and the judge's own admissions.

Appendix: Judicial Council Order (Dec. 18, 2003)—Continued

dicial Conduct and Ethics § 2.02, at 36 (3d ed. 2000) ("In some instances ... legal error may amount to judicial misconduct calling for sanctions...."). If the misconduct claimed consists of nothing more than the judge's erroneous ruling, the complaint will be deemed to be "directly" related to the subject of the underlying proceeding, and must be dismissed summarily by the Chief Judge. However, where the complainant presents solid evidence that the judge's ruling was the result of "conduct prejudicial to the effective and expeditious administration of the business of the courts," 28 U.S.C. § 351(a), then such underlying conduct will not be deemed "directly" related to the merits of the ruling and the Chief Judge must make an initial determination whether it amounts to misconduct. In so doing, she must bear in mind that "[t]he purpose of the complaint procedure is to improve the administration of justice in the federal courts by taking action when judges engage in conduct that does not meet the standards expected of federal judicial officers." 9th Cir. Misconduct R. 1(a).

Complainant alleges, and the public record supports these allegations, that the district judge withdrew the reference from the bankruptcy court and re-imposed the stay without a motion from any party. The district judge gave no explanation for his actions, despite repeated inquiries from the aggrieved creditors. At the time of the bankruptcy proceeding, the debtor was on probation in a criminal case presided over by the district judge. The district judge had placed the debtor-defendant under his personal supervision, which means that he met with her and the probation officer personally at 120-day intervals. Probation office records indicate that there had been a meeting between the debtor, the probation officer and the district judge

Appendix: Judicial Council Order (Dec. 18, 2003)—Continued

less than a month before the judge withdrew the case from the bankruptcy court. In response to an inquiry from our council, the debtor's bankruptcy attorney claimed that, unbeknownst to him, his secretary had drafted a letter from the debtor to the district judge, asking for his help in preventing her eviction. According to the secretary, the letter was delivered by the debtor "a day or two before ... [the district judge] withdrew the reference," and the next time they saw each other, the debtor told her "the letter had 'worked.'" Though this information is based on hearsay and should be investigated further, it suggests the district judge may have withdrawn the reference in response to a direct plea for help from the debtor.

In response to our inquiry, the district judge gives the following explanation:

> I felt ... [the bankruptcy case] was related to my program of working with probationers to help their rehabilitation. I have been doing this for more than 25 years and have been told by the Probation Officer that it is a successful program. In this case a person who was a probationer in a criminal case informed me that the home in which she and her husband were living at the time of their divorce had been given to them by her husband's parents. She was still living in the house with her 8 year old daughter and was in divorce proceedings. She was contesting her right to occupancy in the divorce court and I felt it should be finalized there so I re-imposed the stay to allow the state matrimonial court to deal with her claim. From her explanation of the proceedings in the state court it appeared to me that her counsel had abandoned her interest so it could not be adequately presented to the state court....
>
> ....

Appendix: Judicial Council Order (Dec. 18, 2003)—Continued

> I have no exact memory of any specific conversation with ... [the debtor] concerning the withdrawal of the reference in the bankruptcy matter. But what I can re-construct from the records I have in the criminal case is that at a 120 day meeting with ... [the debtor] in connection with her performance of community service[, she] advised me that there was an unlawful detainer action pending in the Municipal Court to evict her from the property in which she and her minor daughter were living that was nominally owned by ... [the creditors] but was given to them when she married her then estranged husband.

The district judge's explanation confirms what complainant alleges and the evidence suggests: The district judge withdrew the reference in a bankruptcy case that was not previously assigned to him, and entered an order in that case based upon information he obtained ex parte from an individual who benefitted directly from that order.

It is well established that a judge may not exercise judicial power based on secret communications from one of the parties to the dispute. *United States v. Thompson*, 827 F.2d 1254, 1258–59 (9th Cir.1987). The district judge did not, either before or after his ruling, disclose to the parties that this ex parte communication had taken place, its substance or the fact that it formed the basis of his ruling.

While parties do not have a due process right to the random assignment of cases, a judge may not assign a case in order to affect its outcome. *See Cruz v. Abbate*, 812 F.2d 571, 574 (9th Cir.1987). The judge here withdrew the reference and assigned the case to himself for the very purpose of granting the debtor relief from her imminent eviction. The debtor, represented by her counsel, had stipulated to a judgment requiring her to vacate the premises, and the unlawful-detainer court had entered the judgment. The district judge acted based on his belief that the dispute over possession of the property should be "finalized" in the divorce proceeding rather than the unlawful-detainer proceeding, because "it appeared to ... [him] that her counsel had abandoned her interest so it could not be adequately presented to the state court." However, we are not aware of any authority for a bankruptcy court to determine whether parties in state court proceedings were adequately represented by their counsel. Nor are we aware of any authority allowing the district court to allocate jurisdiction between two state courts dealing with related subject matter.

That the district judge believed his actions would help his probationer's rehabilitation is of no consequence. A judge may not use his authority in one case to help a party in an unrelated case. Exercise of judicial power in the absence of any arguably legitimate basis can amount to misconduct.

The line between abuse of discretion and misconduct is not always clear. It depends, rather, on the balancing of a variety of factors. *See* Shaman, *supra*, § 2.02. We need not decide whether that line was crossed in this case. We hold only that the Chief Judge erred in dismissing the complaint as frivolous or unsubstantiated; it is plainly neither. We therefore vacate the Chief Judge's dismissal order and remand to the Chief Judge for further proceedings consistent with our order.

Judges HUFF, COUGHENOUR, HATTER and SHANSTROM would affirm the order of dismissal.

WINMILL, District Judge, dissenting:

I agree with the majority opinion that we should affirm the Chief Judge's finding that the allegations of an inappropriate personal relationship are baseless. Indeed, the charges are not only baseless, but scurrilous and contemptible.

There remains, however, persuasive evidence of misconduct that has not been addressed by either the Chief Judge or the majority. The majority approaches this issue by finding that if any misconduct has been committed, it was corrected by (1) the finding in *Canter* that the district judge committed an abuse of discretion, *In re Canter*, 299 F.3d 1150, 1152 (9th Cir. 2002); (2) the district judge's referral of the case to another judge who ultimately sent the case back to the bankruptcy court, and (3) the district judge's apology.

I disagree with both the methodology of this approach and its conclusions. It is impossible to determine if misconduct has been corrected until the misconduct is precisely identified. Once the misconduct is identified in this case, it becomes clear that it has never been corrected.

The analysis must begin by asking whether there is misconduct. The complaint alleges that the district judge committed misconduct by enjoining the eviction of Ms. Canter on the basis of ex parte information without giving anyone notice or a chance to respond. The record supports this charge. In letters to the Council, the district judge himself explains that on the basis of ex parte information he received from Ms. Canter, he decided to benefit her by enjoining a state court judgment evicting her from the home in which she was residing. Ms. Canter did not own that residence, and the district judge gave the owners no notice and no opportunity to be heard. By staying the eviction, the district judge allowed Ms. Canter to occupy "the property rent-free for almost three years, resulting in a $35,000 loss of rental income." *Canter*, 299 F.3d at 1154.

Dispensing an ex parte favor without notice or an opportunity to be heard is "conduct prejudicial to the effective ... administration of the business of the courts." *See* 28 U.S.C. § 351(a); *see also Rule 14(f) of the Rules of the Judicial Council of the Ninth Circuit Governing Complaints of Judicial Misconduct or Disability.* This phrase includes "improperly engaging in discussions with ... parties to cases in the absence of representatives of opposing parties, and other abuses of judicial office." *Id. at Rule 1(c).* The district judge's conduct appears to fall precisely within this definition. His conduct also appears to violate Canon 3(a)(4) of the Code of Conduct for United States Judges, which directs judges to accord to the parties a "full right to be heard according to the law."

Of course, the Canons are only guidelines, and so not all violations of the Canons amount to misconduct. *In re Charge of Judicial Misconduct*, 62 F.3d 320 (9th Cir.1995). However, dispensing an ex parte favor, without giving anyone notice or an opportunity to be heard, goes beyond a disregard for guidelines, and strikes at the very heart of due process. It is not merely "prejudicial" but is outright destructive "to the effective administration of the business of the courts."

Once the misconduct is identified in this way, the three corrective actions identified by the majority can be seen in a different light. First, the finding in *Canter* that the district judge abused his discretion is a resolution of an appellant's legal claim, not an admonishment of a judge's conduct. Indeed, *Canter* never addressed in any way the misconduct issue before us.

Second, the district judge's referral to another judge for review did not occur until seventeen months had passed from the date the stay of eviction was entered. This action did nothing to correct the original misconduct of staying the eviction based upon an ex parte communication and without notice or an opportunity to be heard.

Finally, while it is commendable that the district judge apologized for failing to explain his actions, that apology misses the mark. The misconduct is not the failure to explain, but the granting of an ex parte favor without giving anyone notice or a chance to respond. The district judge has never apologized for that. Because the district judge's apology fails to address the misconduct, it cannot be deemed corrective action.

Judge Kozinski's dissent reveals in much more detail the powerful and persuasive evidence of misconduct in this case. Ultimately, however, I cannot join his dissent because the district judge has had no opportunity to provide a defense. While the district judge submitted letters in response to questions, he has never been given a full opportunity to present his defense.

Given that, we should invoke our authority under Rule 5 to "return the matter to the Chief Judge for further action," and direct the Chief Judge to use her authority under Rule 4(e) to appoint a Special Committee, constituted as provided in Rule 9, to resolve the issues raised here. Under Rule 11, the Special Committee has the authority to hold hearings where the district judge may put on a full defense, including witnesses if necessary.

The record in this case creates a stark appearance of misconduct. A further investigation is absolutely necessary, and therefore I cannot join in the majority opinion. At the same time, I cannot join in Judge Kozinski's dissent: If we rush to judgment, we deny to the district judge the very due process that he is accused of denying to others. By allowing the district judge a formal opportunity to respond to these very serious charges, we preserve his rights and confront the misconduct issue directly. For these reasons, I have filed this separate dissent.

CHARLOTTE'S OFFICE BOUTIQUE, INC., Petitioner–Appellant,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent–Appellee.

No. 04–71325.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted July 11, 2005.

Filed Oct. 7, 2005.

Background: Corporate taxpayer petitioned for review of IRS's determination that it was liable for unpaid employment taxes for its royalty payments to shareholder, as well as additions to tax. The Tax Court, 121 T.C. 89, 2003 WL 21783383, denied IRS's motion to dismiss, and, T.C. Memo. 2004-43, 2004 WL 350591, ruled in favor of IRS's proposed computation for additions to tax. Taxpayer appealed.

Holdings: The Court of Appeals, Callahan, Circuit Judge, held that:

(1) Tax Court had jurisdiction over all years included in notice of determination, regardless of IRS's concession

EXHIBIT I

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
312 NORTH SPRING STREET
LOS ANGELES, CALIFORNIA 90012

CHAMBERS OF
ANUEL L. REAL
JUDGE

TELEPHONE:
894-5267

August 10, 2004

Don Smaltz, Esq.
Spiegel, Liao & Kagay
3323 Crownview Drive
Rancho Palos Verdes, California 90275

Dear Don:

You've asked me to respond in writing to the following questions with the understanding that my response would be included in a brief you will be filing on my behalf with Chief Judge Schroeder.

1. Did I ever receive any letter, or written communication of any sort from Ms. Maristina Canter or anyone acting for her concerning my intervening on her behalf to prevent her eviction?

The answer is NO. I have never received any letter or other document from Ms. Canter or any one acting on her behalf concerning her eviction other than pleadings filed in the bankruptcy proceeding which are a matter of public record.

2. Did I ever meet alone with Ms. Maristina Canter?

The answer is NO. I have never met alone with Ms. Canter at any time. The only time I ever met her was either in the presence of the probation officer assigned to her case, and in open court when she was present with her counsel.

EXHIBIT I

3. Is it my recollection that the events regarding a January 24, 2000, chambers meeting with Ms. Canter and her probation officer as recited at paragraph 7 of Probation Officer Limbach's declaration dated August 5, 2004, are accurate?

The answer is YES. I believe the events he states there are accurate, and they accord with my memory.

Cordially,

Manuel L. Real
United States District Judge

EXHIBIT J

DECLARATION OF ERIC L. DOBBERTEEN

I, Eric L. Dobberteen, hereby declare and state as follows:

1. I am a member of the State Bar of California, and a partner in Arnold & Porter LLP, counsel for Judge Manuel L. Real.

2. On July 24, 2006, I personally interviewed Michelle Yi Smyth in the presence of my colleague, Stephen Miller at the law offices of Andrew Smyth.

3. Michelle Smyth told us that she is married to Andrew Smyth, the former attorney for Deborah Canter. Michelle works for Andrew Smyth as a secretary.

4. We asked Michelle Smyth questions about a purported "letter" to Judge Real that she had allegedly typed on behalf of Deborah Canter.

5. Ms. Smyth told us that she had not typed a letter to Judge Real but instead had typed a declaration containing the title "Declaration of Deborah Canter," on twenty-eight line pleading paper that is used for court filings and the declaration was approximately two pages long.

6. Ms. Smyth recalled the declaration was not addressed to or directed to Judge Real. She said she has no recollection what month or year she typed this declaration, and that she did not have a copy in her files.

7. Ms. Smyth stated that the substance of the declaration included: Ms. Canter was cheated out of sufficient money for alimony and child support; that her husband had cheated her by not placing her name on the title after he promised he would do so; that Ms. Canter had been a housewife for years and needed time to prepare herself for the work place; and that her eviction should be delayed so that she could attend school and become more qualified for employment.

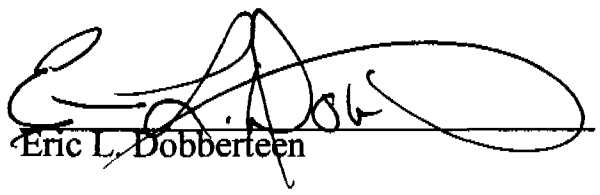
8. Ms. Smyth said Deborah Canter signed the document in her presence and that the declaration contained the usual "signed under penalty of perjury" statement found on court-filed declarations.

9. Ms. Smyth said that much later she told her husband of this event.

10. Mr. Miller and I also separately interviewed Mr. Andrew Smyth on July 24, 2006. During that interview Mr. Smyth told us that he did not believe there was any kind of improper relationship between Judge Real and Ms. Canter; that following Judge Real's withdrawal of the bankruptcy court reference, Smyth had discussed with Ms. Canter her relationship with Judge Real; and that she had denied any impropriety.

11. Mr. Smyth also told us that he recalled a telephone conversation with Ms. Canter's criminal attorney (Guy Iverson) during which call Mr. Iverson asked Mr. Smyth if he (Smyth) would file a pleading of some kind in the bankruptcy court regarding the use of the Pre-Sentence Report from Ms. Canter's criminal case. Mr. Smyth also told us that Mr. Iverson mentioned in this same call that he (Iverson) intended to file something in the criminal case about the improper use of the criminal case in the civil cases involving Ms. Canter.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct, and that this declaration was executed at Los Angeles, California on September 19, 2006.



Eric L. Dobberteen

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