BEFORE THE COMMITTEE TO REVIEW CIRCUIT COUNCIL CONDUCT

AND DISABILITY ORDERS

JUDICIAL CONFERENCE OF THE UNITED STATES

No. 98-372-001

In re: Complaints of Judicial Misconduct or Disability

COMMITTEE MEMORANDUM AND ORDER

This matter is before the Judicial Conference Committee to Review Circuit Council Conduct and Disability Orders pursuant to petitions for review received on March 16, 1998.[1]

Background

We will not attempt to recite in detail here all the long history of these proceedings. We merely summarize below some major aspects of that history that we deem especially relevant to our memorandum and order. In addition, we will not discuss the specifics of the factual underpinnings of the charges against the named judge and the judicial council's findings

---

[1]Under 28 U.S.C. § 372(c)(10), "A complainant, judge, or magistrate aggrieved by an action of the judicial council under paragraph (6) of this subsection [-- the paragraph under which the judicial council may take action on, or may dismiss, a complaint of judicial misconduct or disability following the report of a special investigating committee --] may petition the Judicial Conference of the United States for review thereof. The Judicial Conference, or the standing committee established under section 331 of this title, may grant a petition filed by a complainant, judge, or magistrate under this paragraph."

Section 331 of 28 U.S.C. provides, "The Conference is authorized to exercise the authority provided in section 372(c) of this title as the Conference, or through a standing committee. If the Conference elects to establish a standing committee, it shall be appointed by the Chief Justice and all petitions for review shall be reviewed by that committee."

The Judicial Conference has established this committee to be the standing committee authorized to act for the Judicial Conference under § 331 in proceedings of this kind. Pursuant to §§ 331 and 372(c)(10), this committee may grant or deny complainant's petitions for review, and the committee's orders in this respect are final and not appealable.

thereon. The judicial council has determined that, at least at the present time, these matters should remain confidential, and we defer to that determination.

On July 5, 1995, an attorney filed a complaint against United States District Judge John McBryde of the Northern District of Texas under section 372(c) alleging that the judge's conduct during a trial had been "obstructive, abusive and hostile." On September 13, 1995, Chief Judge Henry Politz of the Fifth Circuit appointed a special committee, consisting of himself and four other judges, to investigate the allegations of this complaint. He also identified as a complaint a letter he had received criticizing Judge McBryde's conduct in another case, and referred this identified complaint to the special committee for investigation. Subsequently, by orders dated January 31, 1996, and March 19, 1996, Chief Judge Politz identified as complaints three additional complaints or letters he had received objecting to Judge McBryde's conduct in these or other cases, and referred all three complaints to the special committee.

The special committee originally scheduled evidentiary hearings on these allegations to commence on May 19, 1997. On May 5, 1997, special committee counsel notified counsel for Judge McBryde of the witnesses the special committee intended to present, and stated that the special committee might add to the record transcripts and court decisions from thirteen cases handled by Judge McBryde that had not been the subject of any complaint. After the judge moved to strike these latter exhibits or, in the alternative, to continue the hearings, the special committee continued the hearings until August 25, 1997.

The special committee counsel on July 25, 1997, sent counsel for Judge McBryde a letter notifying the judge of a number of matters the investigation would be expanded to include, listed under the headings "conduct involving lawyers" and "conduct involving other judges." Each matter was accompanied by a paragraph of explanation.

Later, on August 20, 1997, the special committee's counsel faxed Judge McBryde's counsel a letter adding three additional witnesses, with a brief explanation of the subject matter about which each would testify. The letter added that the special committee's counsel might present evidence concerning the judge's unspecified conduct in another named case. After Judge McBryde protested that he needed more time to prepare to defend himself against all these additional allegations, further hearings were scheduled for September 29, 1997.

The special committee conducted evidentiary hearings from August 25, 1997, through August 29, 1997. On September 17, 1997, the special committee's counsel sent counsel for Judge McBryde a letter listing the four witnesses he intended to call at the resumed September

29 hearings, and setting forth the projected subject matter of the testimony of each. The hearings then resumed and concluded from September 29, 1997 through October 2, 1997.

The special committee submitted its report to the judicial council on December 4, 1997. The judicial council met to consider the report on December 17, 1997, and issued its Order and Public Reprimand on December 31, 1997.

The judicial council's Order and Public Reprimand ordered sanctions against Judge McBryde: (1) under 28 U.S.C. § 372(c)(6)(B)(vi), a public reprimand; (2) under 28 U.S.C. § 372(c)(6)(B)(iv), an order that no new cases be assigned to Judge McBryde for a period of one year; and (3) under 28 U.S.C. § 372(c)(6)(B)(vii), an order that Judge McBryde not participate for a period of three years in certain defined cases involving certain listed attorneys. The Order and Public Reprimand states, in part, as follows:

> "To the extent relevant to the action taken below, the Council adopts by a clear majority vote the Special Committee's Report, Findings of Fact, and Recommendations. Based thereon:
>
> "1. The Council hereby PUBLICLY REPRIMANDS Judge McBryde, pursuant to 28 U.S.C. § 372(c)(6)(B)(vi), for conduct prejudicial to the effective and expeditious administration of the business of the courts within the Circuit and inconsistent with Canon 2(A) and Canon 3(A)(3) of the Code of Conduct for United States Judges.
>
> "Judge McBryde has engaged in a continuing pattern of conduct evidencing arbitrariness and abusiveness that has brought disrepute on, and discord within, the federal judiciary. This conduct is unacceptable and damaging to the federal judiciary.
>
> "Judge McBryde's intemperate, abusive and intimidating treatment of lawyers, fellow judges, and others has detrimentally affected the effective administration of justice and the business of the courts in the Northern District of Texas. Judge McBryde has abused judicial power, imposed unwarranted sanctions on lawyers, and repeatedly and unjustifiably attacked individual lawyers and groups of lawyers and court personnel. This pattern of behavior has had a negative and chilling impact on the Fort Worth legal community and has, among other things, prevented lawyers and parties from conducting judicial proceedings in a manner consistent with the norms and aspirations of our system and is harmful to the reputation of the courts.
>
> "2. Pursuant to 28 U.S.C. § 372(c)(6)(B)(iv), no new cases are to be assigned to Judge McBryde for a period of one (1) year from the effective date of this Order; and

"3. Pursuant to 28 U.S.C. § 372(c)(6)(B)(vii), Judge McBryde, for a period of three (3) years from the effective date of this Order, is not to participate in (i) cases now pending before him (other than any as to which there are appellate proceedings) in which any of the attorneys listed on Attachment A are currently involved, and (ii) any and all cases filed after the effective date of this order in which the initial notice of appearance includes any of the attorneys listed on Attachment A."

The judicial council stayed implementation of its Order and Public Reprimand for thirty days so that Judge McBryde could appeal to, and seek to obtain an additional stay from, this committee. The council further directed that its Order and Public Reprimand would remain sealed during the period of any stay.

On motion by Judge McBryde, this committee issued an order on February 6, 1998 (modifying this committee's prior order of January 29, 1998), staying the judicial council's Order and Public Reprimand, with the exception of paragraph 3 thereof, on the condition that Judge McBryde file his intended petition for review of the judicial council's actions on or before March 16, 1998. This committee permitted paragraph 3, the directive that Judge McBryde not participate for a period of three years in certain defined cases involving certain listed attorneys, to take effect as of the February 6, 1998 date of this committee's order.

On March 16, 1998, Judge McBryde filed seven petitions for review of the judicial council's actions: five petitions for review of the judicial council's handling of each of the five complaints filed or identified against Judge McBryde; a petition for review of the judicial council's decision not to disqualify certain of its members from participating in its consideration of the special committee's report; and an omnibus petition for review treating all other aspects of the challenged actions of the judicial council. After this committee granted the judicial council's request to file a response to Judge McBryde's petitions, the council filed such a response on April 16, 1998. Subsequently Judge McBryde filed a reply to the judicial council's response and a supplemental memorandum, and the judicial council filed a response to the supplemental memorandum.

We now turn to our consideration of the petitions for review.

The Committee's Standard of Review

Judge McBryde and the judicial council dispute the standard of review that should be applied by this committee to a judicial council's findings of fact and to the judgments made by a judicial council in assessing the appropriateness of particular sanctions under the circumstances. According to the judge, the committee should undertake a searching, de novo review of all of the judicial council's determinations. The council responds "that at a

minimum, substantial deference should be accorded its factual findings and that something approaching an abuse of discretion standard should apply to the remedies adopted in the December 31 Order. . . . The Review Committee [should] take into account the extensive efforts undertaken in developing, evaluating, and acting upon the record in this matter."[2]

In its past decisions on petitions for review, this committee has never precisely articulated its standards for reviewing orders issued by circuit judicial councils under 28 U.S.C. § 372(c). The committee did, in no. 92-372-001 (1992), uphold a judicial council order because there was "substantial evidence in the record to support the Judicial Council's factual findings." This statement certainly makes clear that the committee was not reviewing the council's factual findings de novo.

A fair reading of the committee's past rulings suggests that the committee has not in the past applied either a de novo standard or an abuse-of-discretion standard in reviewing judicial council remedies, but something in between. The committee's most substantial assay at delineating a standard of review occurred in no. 87-372-001 (1987), in which the Tenth Circuit Judicial Council had split by a 3-3 vote on whether to accept the recommendation of the special committee that the judge be reprimanded. The committee stated as follows:

> "[H]ow much weight should be given to recommendations of the Special Committee, and how the committee should apply the standard of conduct set out in the statute against the record developed by the Special Committee and the Judicial Council is not altogether clear. The Special Committee is provided for by statute. Its duties are designated by statute. It is directed by statute to make findings and recommendations for appropriate action by the Judicial Council. Clearly, the report and recommendation of the Special Committee is entitled to be considered by the Council and this Review Committee and to be given such weight as the Judicial Council or this committee deems appropriate.
>
> "It is also clear that the Judicial Council and by virtue of the granting of a petition for review, this committee is free to accept or reject the recommendations of the Special Committee based on their perception of whether the record indicates that the conduct was prejudicial to the effective and expeditious administration of the business of the courts and to take any action whether or not recommended by the Special Committee to assure the effective and expeditious administration

[2] There is no dispute between Judge McBryde and the judicial council that the committee, like a court of appeals, will review determinations of law de novo.

> of the business of the courts. However, a fair reading of the statute also leads to the conclusion that the recommendations of the Special Committee are not to be regarded lightly.
>
> ". . . The committee finds that the recommendation of the Special Committee is supported by a reasonable and responsible reading of the record."

In no. 87-372-001 this committee was not addressing the degree of deference to be accorded findings and conclusions of a judicial council, but rather the weight to be given a special committee recommendation in a situation where the council vote had been deadlocked. This committee accorded the special committee's recommendation substantial deference. Presumably judicial council findings and conclusions, arrived at following consideration of the report of a special committee, should be accorded at least as much deference as mere special committee recommendations. Thus, no. 87-372-001 provides precedent for this committee to apply a standard of substantial deference to the judicial council's findings and choice of remedies, if not an abuse of discretion standard.

The statute contains nothing that is suggestive of any particular standard of review. The Judicial Conference Rules for the Processing of Petitions for Review do state, in Rule 13, "In recognition of the review nature of petition proceedings under 28 U.S.C. § 372(c)(10), no additional investigation shall ordinarily be undertaken by the Judicial Conference or the Committee. If such investigation is deemed necessary, the Conference or Committee may remand the matter to the circuit judicial council that considered the complaint, or may undertake any investigation found to be required."

As a practical matter, de novo review of factual findings would require, at least sometimes, that this committee conduct further investigation to see and hear the testifying witnesses itself. The policy of the Conference rules that additional investigation shall not ordinarily be undertaken, and when undertaken can be done by the judicial council on remand, further strongly suggests that the rules presuppose a standard of review of factual findings more deferential than the de novo standard urged by Judge McBryde. If ordinarily it is the special committee that actually sees and hears the witnesses, for the traditional reasons it would make little sense, and would be highly unusual, for this committee to review de novo fact findings of the special committee adopted by the judicial council.

The committee concludes, therefore, that intermediate standard- "substantial deference"-- should be applied to the judicial council's factual findings. The committee will accord the degree of deference the committee deems proper given the underpinnings of the particular factual determination. For example, a factual determination based on live testimony, or on inferences deriving from the circuit council's first hand knowledge of local personalities or circumstances, may therefore be accorded greater deference than a factual determination based solely on written materials equally available to the committee.

The committee will also apply a similar standard of "substantial deference" in the committee's review of the judicial council's remedies. De novo review of judicial council remedies, as urged by the named judge, would be inappropriate because it would fail to take any account of the familiarity of the judicial council members, on the spot, with the personalities and circumstances surrounding the allegations against the disciplined judge. A de novo standard would tend to undercut some of the very reasons why, under the current decentralized system of judicial discipline, disciplinary authority is primarily conferred upon local judges.

Procedural Issues

The special committee's expansion of the investigation. Judge McBryde points out that, for the most part, the judicial council's sanctions against him are not grounded upon any of the specific incidents alleged in the five complaints that were originally filed or identified against him. Instead, the lion's share of the special committee's findings adverse to Judge McBryde concerned matters not raised in those complaints that were reached as a result of the special committee's expansion of its investigation pursuant to Rule 9(A) of the Rules Governing Complaints of Judicial Misconduct or Disability adopted by the Judicial Council of the Fifth Circuit.

Rule 9(A) states as follows:

> "Each special committee will determine the extent of the investigation and the methods to be used. If the committee concludes that the judge may have engaged in misconduct beyond the scope of the complaint, it may expand that scope to encompass such misconduct, timely providing written notice of the expanded scope to the subject judge."

The statute itself does not expressly mention such expansion of a committee investigation. It simply states, "Each committee appointed under paragraph (4) of this subsection shall conduct an investigation as extensive as it considers necessary, and shall expeditiously file a comprehensive written report thereon with the judicial council of the circuit." 28 U.S.C. § 372(c)(5).

Judge McBryde argues that Rule 9(A) is improper because it is inconsistent with the statute. He reads the statute to mean that a special committee shall conduct an investigation of the complaint as extensive as it considers necessary, and no more.

Although the statute certainly does not expressly state that a special committee investigation may be expanded beyond the four comers of the original complaint, the statute

does say that "[e]ach judicial council . . . may prescribe such rules for the conduct of proceedings under this subsection . . . as each considers to be appropriate." 28 U.S.C. § 372(c)(11). The statute thereby invites each judicial council to adopt any reasonable elaboration of the statutory procedures that it thinks proper, as long as the result is not inconsistent with the statute.

The Fifth Circuit, in the light of its experience under the statute, has exercised the discretion preserved to it by Congress to determine that special committee expansion of an investigation should be permissible. That determination does not fly in the face of any express statutory commandment and therefore does not exceed the bounds of appropriate circuit discretion.

Suppose there had been no Fifth Circuit Rule 9(A). In the midst of a special committee investigation the chief judge could, in effect, expand the special committee's investigation by identifying a new complaint under the statute, assigning it to the existing special committee for investigation, and so notifying the judge complained against. The special committee in turn could simply consolidate the new complaint or complaints with the existing complaint or complaints. Under the Fifth Circuit rule, the special committee essentially does the same thing.[3]

---

[3] Under section 372(c)(l), it is true, the chief judge may identify a complaint "by written order stating reasons therefor," whereas Fifth Circuit Rule 9(A) requires that the judge complained against be accorded "timely . . . written notice of the expanded scope . . ." These two procedural requirements admittedly are not precisely co-extensive, since Rule 9(A) does not require the special committee to state its reasons for expanding the scope of the investigation. This is not an important difference. The reasons for expansion of an investigation will always be implicit: that the special committee has developed reason to believe there may have been conduct prejudicial to the effective and expeditious administration of the business of the courts, or some disability, not alleged in a complaint. Under Rule 9(A), therefore, the named judge is accorded the same fundamental procedural rights that the judge would have been accorded if the chief judge had identified a new complaint or complaints under the statute. In other words. Rule 9(A) is not rendered inconsistent with the statute by virtue of any failure to accord the named judge fundamental procedural rights the statute would mandate.

In fact, as Judge McBryde points out, in the three orders in which Chief Judge Politz identified four complaints against the named judge, Chief Judge Politz did not state his reasons for doing so, as section 372(c)(1) required him to do. This procedural error did not perpetrate any fundamental unfairness on the named judge; the reasons for identifying the complaints were plain enough. A technical, harmless error of this kind surely does not call into question all of the proceedings that followed.

The named judge arguably enjoys somewhat greater protection under Rule 9(A) than under a procedure of identifying additional complaints. Under Rule 9(A), a special committee of (in this case) five judges must agree to expand the investigation, whereas the statute permits the chief judge alone to identify a complaint and assign it for investigation by a special committee.

Judge McBryde further argues that even if Fifth Circuit Rule 9(A) is valid, "it requires that a committee may go outside the scope of a complaint only if it has specific information indicating misconduct by the judge; it by no means provides that a committee may engage in an unfettered investigation in order to develop such information in the first instance." This misconstrues the nature of the complaint investigation process.

Where the complaint suggests there may be a pattern of objectionable conduct, the special committee may conduct some inquiry into whether or not such a pattern may exist. If there appears to be evidence that it may indeed exist, the committee may then formally expand the investigation to include other instances in which the pattern of objectionable conduct may have manifested itself, with notice to the judge complained against as required by Fifth Circuit Rule 9(A).

Not only is it permissible for a special committee to do this, it is affirmatively desirable. An individual complainant will often be in a poor position to allege or substantiate patterns of misconduct beyond his or her particular experience with the judge complained against. Where a complaint has some apparent substance, often the special committee would be shirking its statutory responsibility for the effective and expeditious administration of the business of the courts if it failed to make some inquiry into whether there was indeed a pattern of similar objectionable conduct.[4]

This does not permit the special committee to conduct an "unfettered investigation" "outside the scope of the complaint," as Judge McBryde would have it. The committee's inquiry is confined to the pattern of conduct raised in the complaint. The judge is charged with

---

[4] The purpose of this complaint process is to promote the effective and expeditious administration of justice, and as such the process works in tandem with informal and corrective mechanisms. Thus, when the chief judge receives a complaint, whether formal or informal, that charges a judge with abusive treatment of counsel in a particular case and that appears to have some substance, it is entirely appropriate for the chief judge to inquire into whether or not the judge has engaged in a pattern of similar abusive conduct that has manifested itself in other proceedings. If the inquiry suggests there may indeed be such a pattern, the chief judge may properly identify a complaint to trigger an investigation of the matter, or the chief judge may choose to deal with the problem informally. There is no reason why the same kind of process cannot be followed once a complaint has been given to a special committee for investigation.

abusing counsel in a case; has he done so in other cases? Certainly the special committee cannot, in investigating a complaint of abusive treatment of counsel, conduct an inquiry into wholly unrelated matters such as whether the judge has demonstrated ethnic prejudice, engaged in ex parte contacts, or participated in political fundraising. But the special committee has not done so here.

In other words, Judge McBryde is correct when he argues that a special committee investigation is limited to the matters properly before the special committee, and that a special committee cannot range beyond the allegations of the complaint, fish for potential charges unrelated to the complaint, and then formally expand the investigation to encompass these new and unrelated charges. But the judge takes too narrow a view of what constitutes an investigation limited to the complaint. Where the complaint alleges abusive treatment of counsel, the special committee may permissibly inquire into other possible instances of such abuse, even though these other instances are not specified in the complaint. If evidence of a possible pattern of misconduct is found, the committee may then expand its investigation accordingly.

Judge McBryde complains that the judicial council ultimately ordered sanctions against him based entirely on incidents that were not the subject of any of the original five complaints filed or identified against him. Even if this assertion were true, it is of no consequence. The original five complaints unquestionably were sufficient under the statutory standards to justify the chief judge's appointment of a special committee to investigate their allegations. Once the special committee was in place, it properly expanded its investigation beyond the original five complaints. The matters raised in the expanded investigation were legitimately before the judicial council to precisely the same extent as the matters raised in the original complaints.

Notice to Judge McBryde of the expansion of the investigation. We will now turn to Judge McBryde's claim that the circuit council failed to give him timely and adequate notice of the expansion of its investigation, as Rule 9(A) requires.

On July 25, 1997, the special committee's counsel sent counsel for Judge McBryde a nine-page letter notifying the judge of a number of matters the investigation would be expanded to include, listed under the headings "conduct involving lawyers" and "conduct involving other judges." Each matter was accompanied by a paragraph of explanation. This was done in preparation for the special committee's hearings scheduled for August 25-29, 1997.

Only five days before the onset of those hearings, on August 20, 1997, the special committee's counsel faxed Judge McBryde's counsel a letter adding three additional witnesses, with a brief explanation of the subject matter about which each would testify. For two of the witnesses, this explanation consisted of a statement that the witness would testify about Judge McBryde’s conduct in a named case, without specifying the alleged conduct in question. The

letter added that the special committee's counsel might present evidence concerning the judge's unspecified conduct in another named case.

After Judge McBryde protested that he needed more time to prepare to defend himself against all these additional allegations, further hearings were scheduled for September 29, 1997. Thus, when he asked for more time, he was given more time, an additional month. The hearings resumed September 29, 1997, through October 2, 1997.

In the meantime, on September 17, 1997, the special committee's counsel sent counsel for the named judge a letter listing the four witnesses be intended to call at the resumed hearings, and setting forth the projected subject matter of the testimony of each. Only two of these witnesses were new.

It is hard to think that the amount of explanation given Judge McBryde as to each new matter to be investigated was deficient. The letters sent by the special committee's counsel gave plain notice of the subject matter to be investigated. Portions of the notice given, it is true, merely referred to the judge's unspecified conduct in a named case. As a practical matter, though, it is hard to think that the judge would not be aware of what was meant. Ideally, perhaps, a fuller description could have been given, but we are by no means convinced that the judge's rights actually were prejudiced by any failure to provide a more detailed explanation.

It is true that when the judge was notified on July 25 of the expansion of the investigation, the judge had only a month until August 25 to prepare a defense to these new charges. Subsequently, however. the committee scheduled new hearings for September 29 to give him an additional month. As for the additional matters specified in the special committee's counsel's August 20 fax, the judge had five weeks until September 29. Committee counsel's September 17 letter gave the judge only twelve days until the hearing, but it listed only two additional witnesses. On its face this seems adequate, and we see nothing specific in the judge's voluminous filings to suggest that the judge in fact was prejudiced by any lack of time to prepare.

Other procedural issues. Judge McBryde also objects to the lack of time he was afforded to file a response with the judicial council to the special committee's report and recommendation. He was served with a copy of the special committee report on December 4, 1997; with the judicial council scheduled to meet to consider the matter on December 17. This gave the judge less than two weeks to respond. The judge on December 8 filed a motion for enlargement of time to respond and for postponement of the meeting, which the special committee denied. When the judge did file a response, along with a motion to dismiss and a motion for recusal or disqualification, on December 15, the council members had only a day before their meeting to consider his filings.

At that December 15 meeting, however, no resolution was reached as to how to resolve the complaints against Judge McBryde. No vote was taken on the matter. The judge was given time to supplement his responses after the meeting, and he did file supplemental and "corrected" responses on December 22. The council's final order issued on December 31, so the council members had over two weeks to review and consider the judge's responses and motions before the matter was finally disposed of.

Considering that the special committee's report is 159 pages long and that it recommends, among other things, the one-year suspension of case assignments to an Article III judge, this is, to be sure, an expedited schedule. On the other hand, by December 15 counsel for Judge McBryde did manage to submit a 134-page response, a 62-page memorandum in support of their motion to dismiss, and a 93-page second motion for recusal or disqualification. It is hard to take seriously the judge's charge that he did not have an adequate opportunity to prepare a response to the special committee's report when his attorneys in fact generated almost 300 pages of responsive argument.

A little over two weeks, it is true, was not a long time for the members of the judicial council to review almost 300 pages of argument. The council, however, has discretion to set its deadlines without regard to the possibility that it will be inundated with argument far in excess of the length limitations ordinarily imposed upon parties to an appeal. Only in extraordinary circumstances would this committee review a circuit council's scheduling of its deliberations. If the council believed it had adequate time to consider the judge's arguments - and clearly it did believe so - we see no occasion here to look further.

Judge McBryde's other procedural objections lack substance. Since the judicial council did not rely on any finding with respect to them, all of the judge's grievances regarding them are moot.

The judge's quarrels with an October 19, 1995 hearing held by the special committee are all meritless because that hearing was not part of these section 372(c) proceedings. Judge McBryde had filed with the judicial council a request that the council redress the reassignment, by Chief Judge Jerry Buchmeyer of the United States District Court for the Northern District of Texas, of two cases from Judge McBryde to himself. The council decided to hold a hearing on Judge McBryde's request, and further decided that since a special committee already had been convened to consider independent section 372(c) complaints against the judge, it would be efficient and convenient for the special committee to conduct this hearing. The judge was informed from the outset that the purpose of the hearing was to consider the judge's request for assistance pursuant to the council's section 332 authority, and that it was not part of the section 372(c) complaint proceedings.

At the hearing, once Judge McBryde had testified, he was told he could not be present for the remainder of the testimony. This was done because the committee feared the other witnesses would be intimidated by his presence. Such a procedure would have been

impermissible in a section 372(c) proceeding as a violation of both the statute and the Fifth Circuit Rules, but it was perfectly within the discretion of the judicial council in the exercise of its section 332 authority.

At a later time, certainly, the judges who presided over this section 332 hearing may have been influenced in their handling of the section 372(c) investigation by testimony they heard there, just as Judge McBryde alleges. But there is nothing wrong with this. As we will discuss in the next section, these are quasi-administrative/quasi-judicial proceedings, not judicial ones. Judges may bring to bear in section 372(c) proceedings information and impressions they may have gained in prior attempts to resolve the problems at issue. In fact, the statutory scheme encourages them to do so.

Disqualification of Certain Judicial Council Members

Judge McBryde argues that Chief Judge Politz and a few other judges (the members of the special committee and a district judge from Judge McBryde's district) should have recused themselves from the judicial council in this matter. Judge McBryde points out that Judge Politz was involved in Chief Judge Buchmeyer's reassignment to himself of two cases from Judge McBryde's docket, although Judge Politz was not involved in the underlying cases themselves. Judge McBryde also argues that Judge Politz and the other judges he wanted disqualified brought to the judicial council's proceedings information they gained outside the formal section 372(c) process.

In December 1997 the judicial council, in response to Judge McBryde's motion, ruled unanimously that there was no cause for any of the challenged judges to be disqualified from participating in the council's proceedings. We do not review that determination de novo. It is a mixed question of law and fact, as to which we give substantial deference to the judicial council's finding.

Judge McBryde's position misapprehends the nature of a section 372(c) proceeding. A chief judge need not recuse from participation in complaint proceedings merely because the proceedings involve matters with which the chief judge was concerned in the course of performing his administrative responsibilities as chief judge. This will often be the case. Indeed, the current system of judicial discipline strongly encourages informal and corrective action by the chief judge to solve problems without resort to formal complaint proceedings. It would undermine this system if the chief judge were discouraged from doing his job at the informal and corrective stages for fear that he would later be required to recuse himself in any formal investigation.

In addition, an important reason that authority to investigate complaints is assigned to local judges under the current system is that local judges are expected to bring to bear their

knowledge of the judge complained against, the complainant, and local circumstances. Under this system, the chief judge is ordinarily expected to be involved in and to inform himself about the matter at an early or pre-complaint stage, and to use the information and impressions gained thereby to help shape any later decisions in formal complaint proceedings. This is not a traditional judicial proceeding, in which a judge must recuse himself if he has extra-judicial knowledge about the case at bar. This is a quasi-judicial, quasi-administrative proceeding. A judge need not recuse from judicial council participation merely because the judge has precisely the knowledge of local personalities and circumstances the system wants him to have.[5]

This conclusion is strongly suggested on the face of the statute itself. The Act gives the chief judge authority to identify complaints on the basis of available information, section 372(c)(1), and to conclude proceedings on the ground that appropriate corrective action has been taken, section 372(c)(3)(B). Yet the statute directs the chief judge to appoint himself to any special committee convened to investigate a complaint. Section 372(c)(4)(A). Clearly the statute does not contemplate that the chief judge ordinarily should be precluded from service at the investigatory stage because of earlier efforts to resolve the matter short of investigation.

Indeed, Fifth Circuit Rule 17(a) states that even where the chief judge identified the complaint (here, Chief Judge Politz identified several of the complaints against Judge McBryde), "A chief judge who has identified a complaint under rule 2(J) will not be automatically disqualified from participating in the consideration of the complaint but may disqualify as a matter of personal discretion. " Chief Judge Politz did not abuse that discretion by declining to disqualify here.

Judge McBryde makes much of the role Chief Judge Politz played in the dispute surrounding the reassignment of two cases to Chief Judge Buchmeyer. Assuming, arguendo, the truth of Judge McBryde's factual assertions regarding Chief Judge Politz's role in

---

[5] Indeed, even if Judge Politz's recusal were sought in a traditional judicial proceeding rather than in a section 372(c) proceeding, there is authority that the kind of knowledge Judge Politz brought to the proceeding still would not require recusal. In Duckworth v. Department of the Navy, 974 F.2d 1140 (9th Cir. 1992), the Ninth Circuit held that the fact that then-Chief Judge Wallace had previously dismissed a section 372(c) complaint filed by the plaintiff against the district judge in that case did not require Judge Wallace to recuse himself from sitting on the panel hearing the plaintiff's appeal. Although Judge Wallace did have some prior knowledge of facts relevant to the appeal by virtue of ruling on the misconduct complaint, this was not "extrajudicial" knowledge requiring recusal under 28 U.S.C. § 455. Instead, the court ruled that "[t]he administrative actions of a judge in his or her official capacity [are] judicial, rather than extrajudicial" for recusal purposes, id. at 1143, so that information obtained by a chief judge in performing administrative functions under section 372(c) is not disqualifying as "extrajudicial" knowledge.

attempting to settle that dispute, we see no impropriety. At that time a special committee already had been appointed to investigate complaints against Judge McBryde. Chief Judge Politz apparently attempted to persuade Judge McBryde to modify his behavior to moot the whole matter and spare both himself and the Fifth Circuit what might be a long and costly investigation. This is precisely the kind of attempt at suasion the system means to foster and encourage.

For the same reasons, there is no substance to Judge McBryde's disqualification claims vis a vis other judges besides Judge Politz. Members of a special committee who are also members of the judicial council need not ordinarily recuse themselves from judicial council consideration of the special committee's report. There is no exceptional circumstance here that would dictate recusal. The fact that judicial council members may have had knowledge of the matter gained outside the section 372(c) proceedings, but in their capacity as members of the council, does not disqualify them.

The Judicial Council's Findings

Merits-relatedness. A central theme of Judge McBryde's submissions to this committee has been that essentially all of the conduct for which he is to be sanctioned is "directly related to the merits of a decision or procedural ruling," section 372(c)(3)(A)(ii), and therefore not cognizable under the Act at all. In response to the argument that he is being sanctioned not for the substance of his rulings but for a pattern of conduct, he replies that a judge cannot be sanctioned because of a pattern of allegedly improper rulings, any more than a judge could be sanctioned for a single allegedly improper ruling. Allegations are no less merits-related, he contends, because they challenge the merits of many rulings and not just some particular one.

Although a judge indeed may not be sanctioned out of disagreement with the merits of rulings, a judge certainly may be sanctioned for a consistent pattern of abuse of lawyers appearing before him. The fact that that abuse is largely evidenced by the judge's rulings, statements, and conduct on the bench does not shield the abuse from investigation under the Act. To the contrary, allegations that a judge has been habitually abusive to counsel and others may be proven by evidence of conduct on the bench, including particular orders or rulings, that appears to constitute such abuse.

To say that abuse of lawyers, or other forms of misconduct, that finds expression in a judge's rulings may be remedied under the Act is not to say that a judge's rulings themselves may be challenged under the Act. That of course remains the sole province of the court of appeals.

For the same reasons, sanctions in these circumstances do not trammel judicial independence. The sanctions are not based upon the legal merits of the judge's orders and rulings on the bench, but on the pattern of conduct that is evidenced by those orders and rulings.

The same principle holds true when it is alleged that a judge has accepted a bribe, has been motivated by racial, ethnic, or religious bias, or has issued rulings as part of an improper vendetta or some other illicit or vindictive motive. A judge could not evade discipline for such a pattern of conduct by arguing that this was an attack on his rulings, and that if litigants believed his rulings were incorrect and the product of improper motivation, that was properly a matter for appeal, not for a misconduct proceeding. If a judge's behavior on the bench, including directives to counsel and litigants, were wholly beyond the reach of the Act, the Act would be gutted.

This view of the Act is amply supported by past decisions of this committee. In No. 94-372-001, 37 F.3d 1511 (1994), the complaint was that a district judge, in the course of recusing himself from a lawsuit in which the complainant was a party, issued a public order revealing that the reason for his recusal was that the complainant, whom the judge named, had previously filed a complaint of judicial misconduct against him under section 372(c). Complainant alleged that in so doing the judge violated the local D.C. Circuit rule imposing confidentiality on section 372(c) proceedings, including the identity of the complainant. This local rule served the purpose of protecting a complainant who desired confidentiality from fear of retaliation or other adverse consequences from the filing of a complaint.

The Judicial Council of the D.C. Circuit, by a 5-4 vote, dismissed the complaint in part because the judge's alleged misconduct arose "out of the performance of judicial duties as an Article Ill Judge." Indeed, the basis for the complaint was that certain aspects of the judge's order had constituted misconduct.

This committee soundly rejected the judicial council's position. This committee stated that the judicial council's

> "suggestion is based upon a misapprehension of the scope and purposes of § 372(c) and its cognizability provisions. . . .
>
> "It would exempt from the Act a wide range of conduct that has nothing to do with the merits of judicial rulings. Under the majority's formulation, for example, any misconduct by a judge that occurred while a judge was performing judicial duties – accepting bribes, uttering ethnic slurs, or communicating ex parte – would not be cognizable under the Act.

> "In fact, the central thrust of the Act is to make judges accountable for precisely this sort of conduct: conduct not related to the merits of rulings that arises in the course of the performance of judicial duties. . . ."

Id. at 1515.

In No. 88-372-001 (1988). this committee affirmed a reprimand (albeit reducing it from a public reprimand to a private reprimand) of a district judge for stating, in the course of a judicial proceeding, that he would not permit the complainant, a well-known attorney, to practice in his courtroom. On Judge McBryde's logic, the district judge's statement would amount to a ruling regulating the appearance of attorneys in that judge's court. Once this ruling was applied in a particular case in which the complainant sought to appear, the ruling could be reviewed by the court of appeals, and if improper it could be vacated. Instead, both the Judicial Council of the First Circuit and this committee assumed, without explicitly discussing the point, that since the judicial council had found the district judge's statement to have been made as part of a personal vendetta directed at the complainant, the statement was subject to discipline, regardless of whether it could be characterized as a judicial ruling.[6]

Judge McBryde cites a host of orders issued by chief judges dismissing complaints on grounds of merits-relatedness. In some of these, it is true, the complainant went beyond merely attacking the merits of rulings, and raised allegations that particular rulings had resulted from some form of illicit motive or were examples of improper conduct. In those cases, however, the complainant failed to provide adequate supporting factual substantiation to justify an investigation into his or her claims of improper animus or conduct. Absent such factual support, these complaints' allegations were reduced to mere attacks on the merits of the rulings themselves, and thus were properly dismissed. The instant matter, of course, is quite different in that the claims of improper conduct were supported by considerable substance.

The burden of proof. Judge McBryde argues that a judicial council may take the "drastic step" of punishing a federal judge only when the evidence is "clear and convincing" that the judge has committed conduct prejudicial to the effective and expeditious administration of the business of the courts. In his view, application of the preponderance-of-the-evidence

---

[6] Another instructive example – in a matter that did not come before this committee is No. 88-2101 (Jud. Council 11th Cir. 1990). There a magistrate judge was publicly reprimanded by the Judicial Council of the Eleventh Circuit for ordering U.S. Marshals to take into custody a criminal defense attorney and bring that attorney, in handcuffs and chains as required by the Marshals' policies, to a hearing before the magistrate judge. In a sense, this directive constituted a "ruling" by the magistrate judge. Yet the magistrate judge's conduct, as evidenced by this "ruling," was deemed sanctionable because it was so palpably abusive toward counsel.

burden of proof commonly employed in civil litigation would be inappropriate.

There is nothing in the statute or the Fifth Circuit Rules that addresses this question. Nor is this committee aware of any decision in the eighteen years of the Act – whether by this committee, a judicial council, or a chief judge – delineating such a standard.

Judge McBryde points to authority that a clear and convincing evidence standard governs disciplinary proceedings against attorneys, citing In re Medrano, 956 F.2d 101, 102 (5th Cir. 1992). It is generally true, also, that a clear and convincing evidence standard is applied in most states' disciplinary proceedings against state judges. See, e.g., In re Deming, 108 Wash. 2d 82, 109, 736 P.2d 639, 653 (1987).

Even so, it is by no means clear that the clear and convincing evidence standard is the appropriate one. There are important distinctions between attorney discipline and discipline of most state judges, on the one hand, and federal judicial discipline short of impeachment on the other. The Fifth Circuit noted in Medrano, supra, that "[a] disbarment proceeding is adversarial and quasi-criminal in nature," and therefore "[a] federal court may disbar an attorney only upon presentation of clear and convincing evidence sufficient to support the finding of one or more violations warranting this extreme sanction." Id. at 102. A section 372(c) proceeding against a federal judge is neither adversarial nor quasi-criminal. The functional equivalent of disbarment, i.e., removal of the judge from office, is beyond the authority of the judicial council. In most states, by contrast, the state judges do not enjoy a guarantee of life tenure, and removal from office is a possible outcome of the judicial discipline process.

It is of course true that suspension of the assignment of new cases to a judge for one year is a very severe sanction. Nonetheless these are not unequivocally "judicial" proceedings. They do not involve the adjudication of an Article Ill case or controversy. As this committee has stated, "While section 372(c) proceedings have an adjudicatory aspect, they also have an administrative and managerial character not present in traditional adjudication by courts." No. 93-372-001, 9 F.3d 1562, 1566 (1993). The circuit council's actions are taken in furtherance of the council's responsibilities for the administration of the courts. The matter is thus more administrative than quasi-criminal, so that a standard more exacting than the usual preponderance standard may not be necessary. It would be hard to argue that a chief judge and judicial council must be restrained by a clear and convincing evidence standard in whatever factual determinations they must make in the everyday process of administering the business of the circuit.

In any event, this committee need not determine this issue here. The evidence adduced by the special committee permits this committee to conclude that whether a preponderance standard or a clear and convincing evidence standard is applied, that standard was met here, as we will discuss in the next section.

The factual basis for the judicial council's sanctions. In its December 31, 1997 Order and Public Reprimand, the judicial council made the following findings of fact as to Judge McBryde's conduct:

> "Judge McBryde has engaged in a continuing pattern of conduct evidencing arbitrariness and abusiveness that has brought disrepute on, and discord within, the federal judiciary. This conduct is unacceptable and damaging to the federal judiciary.
>
> "Judge McBryde's intemperate abusive and intimidating treatment of lawyers, fellow judges, and others has detrimentally affected the effective administration of justice and the business of the courts in the Northern District of Texas. Judge McBryde has abused judicial power, imposed unwarranted sanctions on lawyers, and repeatedly and unjustifiedly attacked individual lawyers and groups of lawyers and court personnel. This pattern of behavior has had a negative and chilling impact on the Fort Worth legal community and has, among other things prevented lawyers and parties from conducting judicial proceedings in a manner consistent with the norms and aspirations of our system and is harmful to the reputation of the courts."

The judicial council, out of concern for the confidentiality interests of the witnesses who had testified before the special committee, opted not to make public any of the specific incidents that underlie this finding. As we conclude in the next section, this committee will not disturb the judicial council's determination that this degree of public disclosure, and not more, is appropriate at this time. This committee therefore cannot comment specifically on the evidence that supports the judicial council's findings, because that evidence remains confidential.

This committee has reviewed the record in detail, applying a review standard of substantial deference to the judicial council's fact finding. The committee concludes that whatever standard of proof might be required to support the judicial council's fact finding – whether a clear-and-convincing-evidence standard or a preponderance-of-the-evidence standard – the evidence adduced regarding Judge McBryde's patterns of conduct is more than sufficient to support the judicial council's findings. As to certain matters, the evidence is undisputed; as to many, Judge McBryde has disputed testimony and evidence against him. In all instances, however, there was more than ample evidence to permit the special committee, judging the credibility of the live witnesses before it, to reach the factual conclusions that it did.

The judge did, to be sure, present testimony from a number of lawyers who said they have been treated fairly by the judge, do not feel intimidated by him, and are happy to appear before him. The judge also presented testimony from jurors who have sat on cases presided over by him – including jurors who sat on cases alleged to exemplify the judge's pattern of mistreatment of counsel – who said that they saw no mistreatment, that they appreciated the

judge's efforts to move cases along, and that they enjoyed being impaneled on his jury. Even if this testimony is believed, however, there is nothing in it that undercuts the impressive mound of evidence that Judge McBryde has frightened and intimidated a significant portion of the local bar. The special committee and judicial council also were entitled to discount the testimony of jurors, who as laypersons without significant court experience cannot ordinarily be expected to understand the proper contours of the judge-counsel relationship and evaluate a judge's conduct in the light of that understanding.

The Judicial Council's Sanctions

The public reprimand. Judge McBryde argues that the public reprimand that the judicial council intends to issue would be improper because it does not adequately specify the conduct that gives rise to the reprimand. Although the special committee recommended that its long report be made public and appended to any public reprimand, the judicial council's order did not accept this recommendation, and would keep the report private. As a result, all that is public about the basis for the reprimand is the two-paragraph finding, that we quoted in the previous section, about the judge's conduct that appears in the text of the judicial council's Order and Reprimand. The council's public Order and Reprimand would not describe any of the specific incidents that underlie the reprimand.

To this Judge McBryde objects, stating, "Basic fairness dictates that if a man is to be held up before his community as a wrongdoer, there should at least be some explanation of what he has done and why it is wrong, so that the public can evaluate the merits of the reprimand and the subject of the reprimand can respond appropriately."

The judicial council's sanctions do not rest on only one or two specific incidents of misconduct, which one might ordinarily expect to be referred to in the text of a public reprimand. They are based instead on a broad pattern of conduct that manifested itself in many specific incidents, none of which standing alone may have justified a sanction. We think that where sanctions are based upon such a pattern of conduct, a judicial council may provide the public a short general description of the pattern of conduct, rather than a litany of all the specific underlying details.

Also, the judicial council argues in justification that "not releasing the Report protects the privacy interests of the many witnesses who participated in this proceeding and whose testimony and experiences are summarized in the Report." Given that the council's order does at least provide a general description of Judge McBryde's misconduct, this committee defers to the judicial council's judgment as to the need to protect the privacy interests of witnesses.

Judge McBryde has a remedy under 28 U.S.C. § 372(c)(14)(C) for his concern that more of the confidential proceedings be made public. If, under that section, he requests in

writing that all or any portion of the proceedings be made public, it can be done with the assent of the chief judge of the circuit. The chief judge's assent is required in order to protect any confidentiality interests that witnesses or complainants may have in the proceedings. If the chief judge were to grant such a request, in whole or in part, the chief judge could redact any materials to be made public in whatever manner the chief judge considered appropriate in order to preserve these privacy interests.

Judge McBryde argues that he has already pushed to make public the entire record of the proceedings, and the chief judge has not agreed. Judge McBryde does not wish to make public only the special committee report, with what he considers to be its one-sided view of the matter. Nonetheless, whatever the chief judge's position may have been in the past, Judge McBryde of course may renew his request in the future, when the circumstances surrounding the request conceivably may change.

The one-year suspension. Judge McBryde argues that the judicial council's order directing that no new cases be assigned to him for one year is an unconstitutional interference with the powers and prerogatives of an Article III judge.

As Judge McBryde acknowledges, however, this committee in the past has refused to consider challenges to the constitutionality of the Act, either on its face or as applied. In no. 84-372-001, which involved a complaint of sexual harassment filed by clerk's office employees against a judge, the judge argued before this committee that the Act was unconstitutional on its face and that it would violate the Constitution to apply the Act to punish the conduct he was found to have engaged in. This committee declined to entertain these contentions, stating:

> "We have no competence to adjudicate the facial constitutionality of the statute or its constitutional application to the speech of an accused judge, however inappropriate or offensive his words may be. We are not a court. Our decisions are not subject to review by the Supreme Court of the United States. We sit in review of the action of the Circuit Council. The courts of the United States are open for the adjudication of such questions."

We similarly decline to undertake constitutional adjudication here.[7]

[7] No court has ever adjudicated the constitutional validity of the Act's sanction of a temporary suspension, for a time certain, of the assignment of cases to a federal judge. Indeed, the instant matter is the first time this suspension sanction, as authorized by 28 U.S.C. § 372(c)(6)(B)(iv), has ever been invoked.

Chandler v, Judicial Council, 398 U.S. 74 (1970), did involve United States District Judge Stephen Chandler's challenge to a pre-Act order of the Judicial Council of the Tenth

Judge McBryde further contends that the statutory provision authorizing a judicial council to "order . . . that, on a temporary basis for a time certain, no further cases be assigned to any judge or magistrate whose conduct is the subject of a complaint, " 28 U.S.C. § 372(c)(6)(B)(iv), was intended by Congress to be used only for a "remedial" suspension of cases, whereas the judicial council's suspension here is impermissibly "punitive" in its goals.[8]

Circuit suspending the assignment of new cases to Judge Chandler. The Supreme Court, however, declined to reach the merits of this issue.

Judge McBryde quotes at length from Justices Black and Douglas who, in dissent in Chandler, argued that such a suspension worked an unconstitutional infringement on the independence of an Article III judge. The Court majority, by contrast, stated that for "a complex judicial system [to] function efficiently," judges need a "statutory framework and power whereby they might 'put their own house in order.' . . . But if one judge in any system refuses to abide by such reasonable procedures it can hardly be that the extraordinary machinery of impeachment is the only recourse." Id. at 85. Although the majority opinion drew back from attempting to define the permissible extent of a judicial council's power, it did state, We see no constitutional obstacle preventing Congress from vesting in the Circuit Judicial Councils, as administrative bodies, authority to make 'all necessary orders for the effective and expeditious administration of the business of the courts within [each] circuit.'" Id., at 86 n.7.

[8]Judge McBryde points to Senate legislative history, discussing an earlier version of the legislation that became the Judicial Conduct and Disability Act of 1980, 28 U.S.C. § 372(c), which stated,

> "It is important to point out the Committee's clear intention to use the word 'temporary' in this subsection. Serious constitutional problems may be raised concerning the power of the circuit council to prohibit the assignment of further cases to the judge in question. The use of the word 'temporary' is designed to convey the clear intention of the Committee that this sanction is to be used only on rare occasions and only as an interim sanction. For example, the refusal of the council to allow a judge to accept further cases while undergoing treatment for alcoholism or until the reduction of an excess backlog of cases are examples where this sanction may be invoked. "

S. Rep. No. 96-362 (96th Cong., 1st Sess. 1979) at 10, reprinted in 1980 U. S. Code Cong. & Ad. News 4315, 4323-24. Legislative history from the House side also stated, "It is the view of the Committee that all the sanctions relating to the discipline or disability treatment of tenured judges mentioned above are temporary in nature; implicitly, a judge who has recovered from a disease or who has remedied the conditions that caused the sanction can and should be

Thus, he argues, its use for punitive purposes is not only unconstitutional but also in excess of the statutory authority granted to judicial councils by the Act. The judicial council has conceded, in its filings before this committee, that indeed it did have both punitive and remedial goals in mind in invoking the sanction.

We need not consider Judge McBryde's objections to the punitive aspects of the suspension of case assignments because we decline to affirm the suspension insofar as it was intended to punish Judge McBryde for past misconduct. Even with substantial deference to the judicial council's firsthand judgment about what constitutes an appropriate punishment, this committee believes that the judicial council's public reprimand – a serious sanction – is a sufficient punishment for the judge's past pattern of abusive conduct.

We do, however, affirm the suspension, in modified form, as a remedial measure intended to ameliorate Judge McBryde's behavior in the future. The special committee made it clear in its report that it did intend the suspension of new case assignments to serve very substantial remedial purposes. The special committee expressed its concern that during the committee's hearings,

> "Judge McBryde evinced no reflection or remorse concerning the totality of his conduct. . . . Aside from one or two instances . . . . Judge McBryde refused to acknowledge the impropriety of his actions. His repeated responses that his actions were proper and appropriate bespeak both of denial and the probability that, absent self-reappraisal, such conduct will not abate.
>
> "Depriving Judge McBryde of new assignments for this period will not prevent continued abuse, but it will provide him some opportunity for deep reflection, which is necessary and desirable."

The judicial council adopted the special committee report in this regard, since the council adopted that report "to the extent relevant to the action below."

We have thoroughly reviewed the evidence and we find that it justifies the judicial council's conclusions that Judge McBryde has generally refused to acknowledge the impropriety of his actions, and that an "opportunity for deep reflection" is desirable to permit him to consider the need to reform his conduct in the future. The judge has yet to give any indication that he accepts he has a problem, and until he does so there is little hope for improvement. A lightening of his case load will permit him to engage in the "self-appraisal"

---

restored to office." H.R. Rep. No. 96-1313 (96th Cong., 2d Sess. 1980), at 12.

and "deep reflection" referred to by the special committee. The purpose of this suspension of new case assignments, therefore, is the same as in the case of a remedial suspension of new cases for a judge with a substance abuse problem, or with some other physical or mental problem, who refuses to take steps to confront the problem. Thus, we uphold the suspension as aimed at modifying Judge McBryde's pattern of behavior toward attorneys, court personnel, and others, not as punishing him for past misbehavior.

As formulated by the judicial council, the suspension is for the definite period of a year. In keeping with the purely remedial nature of the suspension, however, the suspension should not continue once it has fairly achieved its remedial purpose. The suspension should terminate in the event that, during the year, Judge McBryde shows significant signs of modifying his conduct. In the analogous situation of a one-year suspension of case assignments to a judge with a substance abuse problem, for example, one would expect the suspension to abate if the judge completed successful treatment for the problem within the year. We therefore modify the terms of the suspension of new case assignments in order to bring it within Judge McBryde's power to effect an end to the suspension before the expiration of a year.

The committee directs the judicial council to terminate the suspension of new case assignments before the expiration of the year if the council finds, either upon an application by Judge McBryde or on its own motion, that Judge McBryde's conduct indicates that he has seized the opportunity for self-appraisal and deep reflection in good faith, and that he has made substantial progress toward improving his conduct.

The committee notes, in affirming the one-year suspension as purely remedial, that we cannot be sure that all of the members of the judicial council who voted for the suspension (which was approved by a vote of 13 to 6) would have voted for a purely remedial suspension. It is possible that some council members may have supported the suspension only for purposes of punishment, or for both punitive and remedial purposes. Nonetheless we see no need to remand this matter to the judicial council for the council's consideration of the advisability of a purely remedial suspension. The judicial council of course may reconsider its suspension at any time it sees fit to do so. It goes without saying that if the judicial council concludes, for example, that a remedial suspension is not appropriate, that a one-year suspension is too lengthy for purely remedial purposes, or that the period of time that has elapsed since Judge McBryde learned of the council's decision to impose a public reprimand has been sufficient to give the judge an opportunity to reflect, this committee's affirmance of a one-year remedial suspension in no way precludes the judicial council from revisiting the matter.

The reassignment order. There is plenty of evidence in the record to support the judicial council's implicit conclusion that there was a significant risk that Judge McBryde might attempt to retaliate in some fashion against witnesses who had testified against him, or at least that witnesses reasonably perceived such a risk. The judicial council has a strong interest in protecting the integrity and effectiveness of its investigation, which could be seriously

hampered if witnesses believed they would be left unprotected against such retaliation. Thus, the judicial council ordered that "Judge McBryde, for a period of three (3) years from the effective date of this Order, is not to participate in (i) cases now pending before him (other than any as to which there are appellate proceedings) in which any of the attorneys listed on Attachment A are currently involved, and (ii) any and all cases filed after the effective date of this order in which the initial notice of appearance includes any of the attorneys listed on Attachment A."

Judge McBryde argues that the judicial council lacks authority to order the recusal of a judge from any case. Such authority, he asserts, is reserved to the court of appeals on review of determinations by the district judge on recusal motions properly brought under 28 U.S.C. §§ 144 and 455. These recusal decisions are decisions on the merits just like any other rulings banded down by a district judge. Thus, "[t]he complaint procedure may not be used to have a judge disqualified from sitting on a particular case. A motion for disqualification should be made in the case." Rule 1(e) of the Illustrative Rules Governing Complaints of Judicial Misconduct and Disability.

We do not quarrel with the proposition that it is for the courts, not for a non-court such as the judicial council, to determine the application of sections 144 and 455 in particular cases. That is not, however, what the council's reassignment order does.

A judicial council, exercising its authority under 28 U.S.C. § 372(c)(6)(B)(vii) to "order . . . . such other action as it considers appropriate under the circumstances," may reassign cases as a result of a complaint proceeding if to do so is appropriate to foster the effective and expeditious administration of judicial business. Such a reassignment order is an entirely different thing from recusal under the recusal statutes, and is not governed by the standards set out in those statutes.[9] The council properly exercised just such authority by issuing the order for the purpose of protecting the integrity of its proceedings by guarding its witnesses against what it concluded was a genuine or reasonably perceived risk of retaliation by Judge McBryde.

Judge McBryde counters that nevertheless the judicial council is not a court, cannot exercise judicial power, and cannot issue rulings that dispose of issues in Article III cases and controversies. If Congress has given the courts of appeals authority to order reassignment of a district judge on some basis other than application of the recusal statutes, there is no question that those courts may properly exercise that authority. If, however, case reassignment amounts

[9] The judicial council analogizes its reassignment order to an order issued by a court of appeals under 28 U.S.C. § 2106, which has been interpreted to permit the court of appeals to reassign cases from one district judge to another. Such an order under section 2106 is an entirely different thing from a recusal order under the recusal statutes. As such, a section 2106 order is adjudicated under a different standard than the recusal standards applicable under 28 U.S.C. §§ 144 and 455. Liteky v. United States, 510 U.S. 540, 554 (1994).

to a ruling in a case, involving exercise of the judicial power, then, the judge argues, the judicial council may not issue such an order.

The short answer is that the matter of case assignments is an administrative one, and does not involve the exercise of judicial power. Under 28 U.S.C. § 137, for example, where the judges of a district court do not agree on a system for case assignments among district judges, the judicial council, by exercise of its administrative authority, may impose a case assignment system. This does not inject the judicial council into judicial rulings in particular cases.

The council's reassignment order is akin to action under section 137. The council is exercising its administrative authority, not case-decisional authority, to protect the integrity of its proceedings by directing that Judge McBryde not participate in cases where his participation would threaten that integrity, i.e., in cases where witnesses adverse to him appear as counsel. Thus its action has nothing whatsoever to do with the circumstances of the particular cases in which those witnesses happen to appear. The council does not purport to direct Judge McBryde how to decide motions to recuse or how to apply the recusal statutes.

Only the judicial council is in a realistic position to take this action. The possibility of subsequent piecemeal rulings by the court of appeals, entered only months later in one or more cases, directing Judge McBryde not to participate in such cases would be less effective in protecting the integrity of the section 372(c) proceedings. Adverse witnesses awaiting such rulings would have much less assurance that they would be protected against feared retaliation.

Finally, Judge McBryde argues that the judicial council's reassignment order is unwise in its details and in its practical effects. He contends that the order gives the affected attorneys and their clients the kinds of opportunities for judge-shopping that the federal judicial system ordinarily frowns upon.

It is for the judicial council to determine how best to balance concerns about judge-shopping against the need it sees to protect witnesses against feared retaliation. The Act confers upon the judge complained against the right to seek Judicial Conference review in order to ensure the fairness and propriety of circuit council proceedings and orders affecting the judge's interests. When a judge argues that aspects of a council order – wholly apart from their impact on the judge – manifest an unwise and ill-considered approach to judicial administration, this begins to take the committee's review proceeding beyond its intended purpose.

This is not to say that this committee lacks authority to examine and modify the practical details and implementation of the council's reassignment order. We are loathe to exercise any such authority in the absence of some extraordinary circumstance, and we see nothing to justify such intervention here. As the council has pointed out, if the reassignment order causes problems, the council can issue additional supplemental orders to address them.

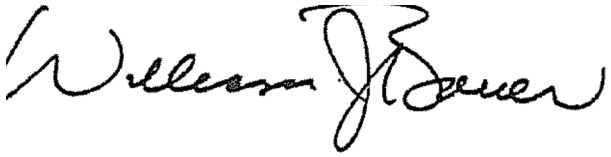
We have considered all of Judge McBryde's other arguments and find them meritless.

Conclusion

This committee affirms the December 31, 1997 Order and Public Reprimand issued by the Judicial Council of the Fifth Circuit in all respects except the following. Section 2 of the Order and Public Reprimand is modified to state: "Pursuant to 28 U.S.C. § 372(c)(6)(B)(iv), no new cases are to be assigned to Judge McBryde for a period of one (1) year from the effective date of this Order, unless and until the Council finds that Judge McBryde's conduct indicates that he has seized the opportunity for self-appraisal and deep reflection in good faith and that he has made substantial progress toward improving his conduct;".

This committee's stay of the judicial council's Order and Public Reprimand is hereby terminated.

FOR THE COMMITTEE



William J. Bauer
United States Circuit Judge[10]

September 18, 1998

[10] This opinion was prepared by Judge William J. Bauer, with United States Circuit Judge Stephanie K. Seymour, United States. Circuit Judge Cornelia G. Kennedy, United States District Judge Gordon Thompson, Jr., and United States District Judge Anthony A. Alaimo concurring.