IN THE SUPREME COURT OF THE UNITED STATES

No. _____

CYRUS MARK SANAI,
Petitioner,
v.
D. JOSHUA STAUB, an individual; FREDERICK BENNETT, an individual; PHU CAM NGUYEN, an individual; CHRISTOPHER MCINTIRE,
Respondents,

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
NO. 19-55427

CYRUS MARK SANAI,
Petitioner,
v.
MARK BORENSTEIN, an individual;
Respondent,

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
NO. 19-55429

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CYRUS SANAI
SANAIS
9440 SANTA MONICA BOULEVARD #301
BEVERLY HILLS, CA 90210
Telephone (310) 717-9840
cyrus@sanaislaw.com

RECEIVED
JAN 27 2021
OFFICE OF THE CLERK
SUPREME COURT, U.S.

TABLE OF CONTENTS OF APPENDIX

APPENDIX	Document	Page
APPENDIX A	Memorandum Order of the Ninth Circuit Court of Appeals Filed April 13, 2020 in Appeal 19-55427.	A1
APPENDIX B	Memorandum Order of the Ninth Circuit Court of Appeals Filed April 13, 2020 in Appeal 19-55429.	B1
APPENDIX C	Order Denying Petition for Rehearing Filed Filed September 24, 2020 in Appeal 19-55427	C1
APPENDIX D	Order Denying Petition for Rehearing Filed Filed September 24, 2020 in Appeal 19-55429	D1
APPENDIX E	Order of District Court Dismissing Action Entered in Action	E1
APPENDIX F	Order of District Court Denying Motion for Disclosure	F1
APPENDIX G	Order of District Court Denying Motion for Recusal	G1
APPENDIX H	Order of District Court Denying Motion for New Trial or to Amend or Vacate Judgment	H1

APPENDIX I	Order of District Court Dismissing Action Entered in Action	I1
APPENDIX J	Order of District Court Denying Motion for Disclosure	J1
APPENDIX K	Motion for Disclosure and Recusal of Ninth Circuit Judges filed	K1
APPENDIX L	Request for Judicial Notice	L1
APPENDIX M	Motion for Disclosure and Recusal of Ninth Circuit Judges filed	M1
APPENDIX N	Request for Judicial Notice	N1
APPENDIX O	Relevant Statutes and Rules	O1

APPENDIX A

NOT FOR PUBLICATION

FILED

APR 13 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CYRUS MARK SANAI, an individual, Plaintiff-Appellant, v. D. JOSHUA STAUB, an individual; et al., Defendants-Appellees.	No. 19-55427 D.C. No. 2:18-cv-02136-RGK-E MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
R. Gary Klausner, District Judge, Presiding

Submitted April 7, 2020**

Before: TASHIMA, BYBEE, and WATFORD, Circuit Judges.

Attorney Cyrus Mark Sanai appeals pro se from the district court's judgment dismissing his 42 U.S.C. § 1983 action alleging constitutional claims. We have jurisdiction under 28 U.S.C. § 1291. We review for an abuse of discretion the district court's dismissal for failure to prosecute. *Al-Torki v. Kaempen*, 78 F.3d

---

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

1381, 1384 (9th Cir. 1996). We affirm.

The district court did not abuse its discretion by dismissing Sanai's action because Sanai failed to file proof of timely service of the complaint on all defendants after being warned that failure to do so would result in dismissal. *See id.* (discussing factors to be considered before dismissing an action for failure to prosecute).

The district court did not abuse its discretion by denying Sanai's post-judgment motion to vacate or amend the judgment because Sanai failed to demonstrate any basis for such relief. *See Sch. Dist. No. 1J, Multnomah Cty., Or. v. ACandS, Inc.*, 5 F.3d 1255, 1262-63 (9th Cir. 1993) (standard of review and grounds for relief under Federal Rule of Civil Procedure 59(e) or 60(b)).

Because we affirm the district court's dismissal of Sanai's action for failure to prosecute, we do not consider his challenges to the district court's interlocutory orders regarding recusal and judicial disclosure. *See Al-Torki*, 78 F.3d at 1386 ("[I]nterlocutory orders, generally appealable after final judgment, are not appealable after a dismissal for failure to prosecute, whether the failure to prosecute is purposeful or is a result of negligence or mistake." (citation and internal quotation marks omitted)).

//

//

Each judge on this panel declined the request to recuse.

All pending motions and requests are denied.

AFFIRMED.

APPENDIX B

B2

JS-6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	18-cv-05663-RGK-E	Date	October 24, 2018
Title	*Sanai v. McDonnell*		

Present: The Honorable	R. GARY KLAUSNER, UNITED STATES DISTRICT JUDGE	
Sharon L. Williams (Not Present)	Not Reported	N/A
Deputy Clerk	Court Reporter / Recorder	Tape No.
Attorneys Present for Plaintiff:	Attorneys Present for Defendant:	
Not Present	Not Present	

Proceedings: **(IN CHAMBERS)** ORDER re: **Defendant McDonnell's Motion to Dismiss (DE 44)** and **Defendant Borenstein's Motion to Dismiss (DE 45)**

I. INTRODUCTION

Plaintiff is currently subject to a contempt order in Superior Court of Los Angeles County ("Superior Court"), and a bench warrant has been issued for his arrest. Following the contempt hearing, Plaintiff filed petitions for writ of mandate, writ of habeas corpus, and a stay of the contempt order in the California Court of Appeal. Plaintiff alleges that these proceedings are ongoing. Nevertheless, Plaintiff brings this action against Superior Court Judge Mark Borenstein ("Borenstein") and Los Angeles County Sheriff James McDonnell ("McDonnell") (collectively, "Defendants") seeking an injunction that would stay enforcement of the contempt order. Plaintiff also seeks declaratory judgment that the state court proceedings against him violated his due process rights.

Presently before the Court are Defendants' Motions to Dismiss Plaintiff's First Amended Complaint ("FAC") pursuant to Federal Rule of Civil Procedure ("Rule") 12(b)(1) and Rule 12(b)(6). For the following reasons, the Court **GRANTS** the motions.

II. FACTUAL BACKGROUND[1]

Plaintiff is the attorney of record for the plaintiff in an ongoing state court matter captioned as *United Grand Corp. v. Malibu Hillbillies, LLC*, No. BC 554172 (L.A. Super. Ct. Aug. 8, 2014) ("*United Grand*"). Defendant McDonnell is a Los Angeles County Sheriff in charge of detentions for civil contempt cases. Defendant Borenstein is a judge in the Superior Court.

On January 5, 2017, in the *United Grand* action, Plaintiff filed a notice of motion and motion for sanctions and an *ex parte* application asking the court to recognize an automatic stay. (FAC ¶ 44, ECF No. 41; Pl.'s Opp'n Borenstein Mot. Dismiss at 8, ECF No. 54.) Plaintiff alleges that Defendant Borenstein sua sponte imposed sanctions on Plaintiff for requesting sanctions in the *ex parte* application without supporting law or argument. (FAC ¶ 41.) Plaintiff asserts that Defendant Borenstein fabricated

[1] For purposes of the Motions to Dismiss, the Court accepts as true all factual allegations in the FAC.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. 18-cv-05663-RGK-E Date October 24, 2018

Title ***Sanai v. McDonnell***

the record to impose sanctions against Plaintiff. Plaintiff further alleges that Defendant Borenstein; the Court Counsel for the Superior Court; Judge Elizabeth Grimes, who sits on the Second District of the California Court of Appeal; and several other judges are a part of a wide-ranging conspiracy within the Superior Court to punish and disbar Plaintiff. (*Id.*)

When Plaintiff did not pay the sanctions, Defendant Borenstein held Plaintiff in contempt and ultimately sentenced him to imprisonment until he complied with the sanction orders. (FAC ¶ 45.) On April 12, 2018, Plaintiff petitioned the Second District of the California Court of Appeal for (1) writ of mandate, (2) writ of habeas corpus, and (3) an immediate stay of the contempt order. (FAC ¶ 59–61.) On April 23, 2018, the Court of Appeal denied Plaintiff's request for an immediate stay of the contempt order, and the California Supreme Court denied review of Plaintiff's petition for an immediate stay of the contempt order on April 25, 2018. (FAC ¶ 59.) The petition for writs of mandate and habeas corpus remain ongoing in the Court of Appeal. (*Id.*)

On June 27, 2018, Plaintiff filed the instant action in this District asserting claims for (1) writ of habeas corpus, (2) relief under 42 U.S.C. § 1983 ("§ 1983"), and (3) declaratory judgment. On June 28, 2018, the Honorable Stephen V. Wilson denied Plaintiff's *ex parte* application for a temporary restraining order, and on August 1, 2018, Judge Wilson denied Plaintiff's *ex parte* application for a preliminary injunction.

On August 20, 2018, Plaintiff filed a FAC alleging the same claims as the original complaint. Shortly after, the matter was transferred to this Court.

III. JUDICIAL STANDARD

A. Rule 12(b)(1)

Federal courts are courts of limited jurisdiction and presumptively lack jurisdiction over civil actions. *Kokkenen v. Guardian Life Ins. C. of Am.*, 511 U.S. 375, 377 (1994). The party who invokes jurisdiction bears the burden of establishing subject matter jurisdiction. *Id.*

A motion to dismiss under Rule 12(b)(1) may be "facial" or "factual." *See Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). In a facial attack, the challenger asserts the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction. *Id.* The court must assume the factual allegations in the complaint are true and construe them in the light most favorable to the plaintiff. *See Warren v. Fox Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003). However, the court need not accept as true legal conclusions pled as factual allegations. *Id.* A Rule 12(b)(1) motion will be granted if, on its face, the complaint fails to allege grounds for federal subject matter jurisdiction as required by Rule 8(a). *See id.*

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. 18-cv-05663-RGK-E Date October 24, 2018

Title *Sanai v. McDonnell*

B. Leave to Amend

If a court chooses to dismiss the complaint, it must then decide whether to grant leave to amend. Leave to amend shall be freely given when justice so requires, but the ultimate decision to grant leave remains "within the sound discretion of the [district] court." Fed. R. Civ. P. 15(a); *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 185–86 (9th Cir. 1990). However, when any amendment would be futile, the Court may dismiss the complaint with prejudice. *Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995).

IV. DISCUSSION

Defendants move to dismiss all of Plaintiff's claims for lack of subject matter jurisdiction or, in the alternative, for failure to state a claim upon which relief can be granted. The Court addresses each claim in turn.

A. Claim 1: Writ of Habeas Corpus

Defendant McDonnell contends—and Plaintiff does not dispute—that Plaintiff lacks standing to seek a writ of habeas corpus in federal court. (Def. McDonnell's Mot. to Dismiss at 9, ECF No. 44; Pl.'s Opp'n McDonnell Mot. Dismiss at 5, ECF No. 53.) Indeed, 28 U.S.C. § 2254, which governs habeas corpus relief, requires that a prisoner seeking habeas relief be "in custody." 28 U.S.C. § 2254(a). Since Plaintiff is not currently in custody, Plaintiff lacks standing to bring a habeas corpus claim.

Accordingly, the Court **DISMISSES** Plaintiff's claim for writ of habeas corpus.

B. Claims 2 and 3: Injunctive and Declaratory Relief under 42 U.S.C. § 1983

In his second and third claims,[2] Plaintiff seeks an order enjoining the enforcement of Defendant Borenstein's contempt order. Plaintiff also seeks declaratory judgment stating that the contempt hearing and the subsequent petition proceedings in state court violated his civil rights. The Court addresses each in turn.

1. *Injunctive Relief*

Plaintiff seeks preliminary injunctive relief staying the enforcement of Defendant Borenstein's contempt order. After Defendant Borenstein found Plaintiff in contempt, but prior to the instant action, Plaintiff filed—in the Second District of the California Court of Appeal—petitions for writ of habeas corpus, writ of mandate, and a stay of the contempt order. The Court of Appeal denied Plaintiff's request for a stay on the contempt order. Plaintiff then petitioned the California Supreme Court, which denied

[2] Since Plaintiff's second and third claims for declaratory judgment are seemingly identical, the Court addresses the claims together.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. 18-cv-05663-RGK-E Date October 24, 2018

Title ***Sanai v. McDonnell***

review. Therefore, judgment on Plaintiff's request for a stay of the contempt order is final in state court.

The *Rooker-Feldman* doctrine bars federal district courts from reviewing a state court's final judgment. *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983). This doctrine applies to cases where the state court judgment was rendered before the federal proceeding commenced. *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280, 284 (2005). Here, the California Supreme Court denied Plaintiff's petition for a stay of the contempt order on April 25, 2018. Plaintiff filed the Complaint in the instant action in federal court on June 27, 2018. As such, Plaintiff's request for a stay of the contempt order was final before Plaintiff commenced this federal proceeding. The Court is therefore barred by the *Rooker-Feldman* doctrine from exercising jurisdiction as to Plaintiff's request for a stay of the contempt order.

2. *Declaratory Judgment*

Plaintiff also seeks declaratory relief under § 1983, requesting that the Court declare: (1) Defendant Borenstein and other co-conspirators are barred from conducting any legal proceedings involving Plaintiff; (2) Plaintiff does not have any feasible means of litigating his state or constitutional claims in *United Grand* before Defendant Borenstein, the Second District of the California Court of Appeal, or other attorneys represented by the Court Counsel for the Superior Court; (3) Plaintiff does not have a meaningful right to be heard in the state court proceedings because his due process rights have not been and likely will not be met; and (4) it is unlawful to imprison Plaintiff until he has an opportunity to be heard by an impartial tribunal. (FAC at 34–36.)[3]

Defendants contend that the Court should dismiss Plaintiff's declaratory judgment claims under the *Younger* abstention doctrine. It is well-established that federal courts should abstain from litigation which implicates issues that are the subject of an ongoing state criminal prosecution. *Younger v. Harris*, 401 U.S. 37, 45 (1971). The United States Supreme Court has extended the *Younger* doctrine to civil actions as well. *See Huffman v. Pusue, Ltd.*, 420 U.S. 592, 611–12 (1975). Thus, federal courts abstain from state court proceedings under *Younger* in three "exceptional circumstances" that involve important state interests: (1) state criminal prosecutions; (2) civil enforcement proceedings; and (3) "civil proceedings involving certain orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions." *Sprint Comm'ns, Inc. v. Jacobs*, 571 U.S. 69, 73 (2013) (citing *New Orleans Public Service, Inc. v. Council of City of New Orleans*, 491 U.S. 350, 367–68 (1989)).

In a § 1983 action, *Younger* principles apply where (1) the existence of an ongoing state judicial proceeding; (2) the implication of an important state interest; (3) whether there is an adequate opportunity to raise constitutional challenges in the state court proceeding; and (4) whether the federal action would enjoin the state proceeding. *Logan v. U.S. Bank Nat. Ass'n*, 722 F.3d 1163, 1167 (9th Cir.

[3] Plaintiff's declaratory judgment includes several parties not presently before the Court. The Court therefore lacks jurisdiction to declare anything as to those parties. Accordingly, the Court analyzes Plaintiff's declaratory judgment claims only as to Defendant Borenstein and Defendant McDonnell.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. 18-cv-05663-RGK-E Date October 24, 2018

Title ***Sanai v. McDonnell***

2013).

Here, the Court must apply *Younger* principles to Plaintiff's declaratory judgment claims. Plaintiff essentially seeks declaratory judgment finding that the state contempt proceedings violated his civil rights and declaring that Defendant Borenstein be disqualified from cases involving Plaintiff because of his bias against Plaintiff. Based on the facts, as alleged in the FAC, all four *Younger* principles to apply in the instant action.

First, Plaintiff's petitions for writ of mandate and writ of habeas corpus are currently ongoing at the California Court of Appeal, and the *United Grand* matter is also ongoing in Superior Court.

Second, the declaratory relief that Plaintiff seeks involves two important state interests. State contempt proceedings "lie at the core of the state's administration of justice." *Juidice v. Vail*, 430 U.S. 327, 335 (1977). The state court also has significant interest in determining when a state court judge should be disqualified.

Third, Plaintiff had, and still has, an adequate opportunity to raise his constitutional challenges in the state court proceedings. Plaintiff need not have actually raised his constitutional challenges in those proceedings. *Id.* at 337. Plaintiff "need be accorded only an opportunity" to do so, and "failure to avail [himself] of such opportunities does not mean that the state procedures were inadequate." *Id.* Plaintiff had an opportunity to raise his constitutional challenges in the Superior Court contempt hearing. Plaintiff can also raise his constitutional challenges in the ongoing Court of Appeal proceedings, the California Supreme Court, and the United States Supreme Court.

Fourth, Plaintiff's request for declaratory relief would effectively enjoin the state proceedings. The *Younger* abstention doctrine applies to requests for declaratory judgment when "a declaratory judgment will result in precisely the same interference with and disruption of state proceedings" as an injunction. *Samuels v. Mackell*, 401 U.S. 66 (1971). Issuing a declaratory judgment to the extent requested by Plaintiff would enjoin Defendant Borenstein from presiding over cases involving Plaintiff, and any declaratory judgement against Defendant McDonnell would enjoin the enforcement of the contempt order and bench warrant.

Plaintiff contends that he does not have an adequate opportunity to raise his constitutional challenges in state court because Defendant Borenstein and Judge Grimes are biased against him. Plaintiff therefore argues that the *Gibson v. Berryhill* exception to *Younger* applies here. In *Gibson v. Berryhill*, the Supreme Court created an exception to *Younger*, enjoining state administrative proceedings because the defendants presiding over the plaintiffs' proceedings were biased against the plaintiffs. 411 U.S. 564, 578–79 (1972) (enjoining Alabama's Board of Optometry's disqualification hearing against individual licensed optometrists). The Supreme Court explained that "those with substantial pecuniary interest in legal proceedings should not adjudicate" those disputes. *Id.* at 579 (finding that defendants had substantial financial interest in disqualifying plaintiffs).

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. 18-cv-05663-RGK-E Date October 24, 2018

Title *Sanai v. McDonnell*

Here, Plaintiff conclusively alleges that Defendant Borenstein, Court Counsel for the Superior Court, and Judge Grimes are biased against him. Plaintiff alleges that these individuals and several others are involved in an elaborate conspiracy to punish and disbar him. As to Defendants Borenstein and McDonnell specifically, however, Plaintiff fails to allege that they have personal or financial interest in his demise. While Plaintiff alleges that Judge Grimes had a direct interest in a previous lawsuit involving Plaintiff and that Superior Court Judge David Sotelo had been promised a transfer if he punished Plaintiff, Plaintiff does not allege that Defendant Borenstein or Defendant McDonnell will benefit personally or financially for harassing or punishing him. Plaintiff merely alleges that Judge Sotelo "worked with Judge Mark Borenstein to craft a plan," and that Plaintiff was denied constitutional rights "based on animus against [Plaintiff] by both Borenstein and Grimes." (FAC ¶¶ 44, 69.) Because the Court need not accept as true legal conclusions pled as factual allegations, the Court finds that Plaintiff does not sufficiently plead that Defendant Borenstein was biased against Plaintiff. *See Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003). Therefore, the *Gibson v. Berryhill* exception to *Younger* does not apply.

Plaintiff also contends that the *Dombrowski v. Pfister* exception to the *Younger* abstention doctrine applies to the instant action. 380 U.S. 479 (1965). *Dombrowski*, however, dealt with overbroad state statutes. *Id.* at 1118. Here, Plaintiff does not allege that a state statute is overly broad, vague, or unconstitutional. The *Dombrowski* exception therefore does not apply.

For the foregoing reasons, the Court finds that the *Younger* principles apply to the instant action. The Court must abstain from hearing Plaintiff's claims for declaratory judgment. Accordingly, the Court **DIMISSES** Plaintiff's second and third claims.

Since the Court finds that it lacks subject matter jurisdiction over Plaintiff's claims, it need not address Defendants' arguments for immunity or dismissal under Rule 12(b)(6).

C. Leave to Amend

As explained above, leave to amend is denied only if it is clear that amendment would be futile, and that "the deficiencies of the complaint could not be cured by amendment." *Noll v. Carlson*, 809 F.2d 1446, 1448 (9th Cir. 1987). Since Plaintiff's state court petition is still ongoing, he can raise his constitutional claims against Defendants in those actions. Therefore, even if the Court grants leave to amend, any amendment would be futile. *Younger* will still require the Court to abstain and dismiss Plaintiff's claims.

As such, the Court **DISMISSES** Plaintiff's FAC **without leave to amend**.

JS-6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	18-cv-05663-RGK-E	Date	October 24, 2018
Title	***Sanai v. McDonnell***		

V. CONCLUSION

In light of the foregoing, the Court **GRANTS** Defendants' Motions to Dismiss (DE 44, 45) and **DISMISSES** Plaintiff's FAC. Plaintiff's Motion to Vacate (DE 58) is **DENIED as moot**.

IT IS SO ORDERED.

Initials of Preparer _____

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

AUG 24 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

CYRUS MARK SANAI, an individual, Plaintiff-Appellant, v. D. JOSHUA STAUB, an individual; et al., Defendants-Appellees.	No. 19-55427 D.C. No. 2:18-cv-02136-RGK-E Central District of California, Los Angeles ORDER

Before: TASHIMA, BYBEE, and WATFORD, Circuit Judges.

The panel has voted to deny the petition for panel rehearing.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35.

Sanai's petition for panel rehearing and petition for rehearing en banc (Docket Entry No. 25) are denied.

Sanai's request for judicial notice (Docket Entry No. 25) is denied.

No further filings will be entertained in this closed case.

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

AUG 24 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

CYRUS MARK SANAI, an individual, Plaintiff-Appellant, v. MARK BORENSTEIN, an individual; DOES, 1 through 10, inclusive, Defendants-Appellees.	No. 19-55429 D.C. No. 2:18-cv-05663-RGK-E Central District of California, Los Angeles ORDER

Before: TASHIMA, BYBEE, and WATFORD, Circuit Judges.

The panel has voted to deny the petition for panel rehearing.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35.

Sanai's petition for panel rehearing and petition for rehearing en banc (Docket Entry No. 47) are denied.

Sanai's request for judicial notice (Docket Entry No. 47) is denied.

No further filings will be entertained in this closed case.

APPENDIX E

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. 2:18-cv-02136-RGK-E Date January 25, 2019

Title ***Sanai v. Staub, et al.***

Present: The Honorable R. GARY KLAUSNER, UNITED STATES DISTRICT JUDGE

Sharon L. Williams	Not Reported	N/A
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiff:	Attorneys Present for Defendants:
Not Present	Not Present

Proceedings: **(IN CHAMBERS) Order Re: Plaintiff's Motion to Vacate Order (DE 23)**

I. INTRODUCTION and FACTUAL BACKGROUND

On March 14, 2018, Cyrus Sanai ("Plaintiff") filed an action in this Court against Defendants D. Joshua Staub, Frederick Bennett, Phy Cam Nguyen, and Christopher McIntire (collectively, "Defendants") seeking (1) relief under 42 U.S.C. § 1983 and (2) declaratory judgment. Plaintiff did not file proofs of service.

On October 24, 2018, the Court ordered Plaintiff to show cause as to why the case should not be dismissed for lack of prosecution. On November 5, 2018, after considering Plaintiff's response, the Court dismissed the case finding no good cause for Plaintiff's failure to prosecute.

Presently before the Court is Plaintiff's Motion for to Vacate Order pursuant to Federal Rule Civil Procedure 60. Plaintiff requests that the Court vacate its Order dismissing the case for lack of prosecution. For the following reasons, the Court **DENIES** the motion.

II. JUDICIAL STANDARD

A court has discretion to reconsider a judgment or order pursuant to Federal Rule of Civil Procedure 60. *Sch. Dist. No. 1J Multnomah Cty., Or. v. ACandS, Inc.*, 5 F.3d 1255, 1262 (9th Cir. 1993). Absent unusual circumstances, reconsideration is only appropriate where the court is presented with newly discovered evidence, the court committed clear error or the decision was manifestly unjust, or there has been an intervening change in controlling law. *Id.* at 1263.

Local Rule 7-18 supplements the Federal Rules and states:

> A motion for reconsideration of the decision on any motion may be made only on the grounds of (a) a material difference in fact or law from that presented to the Court before such decision that in the exercise of reasonable diligence could not have been known to the party moving for reconsideration at the time of such decision, or (b) the emergence of new material facts or a change of law occurring after the time of such decision, or (c) a manifest

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	2:18-cv-02136-RGK-E	Date	January 25, 2019
Title	*Sanai v. Staub, et al.*		

showing of a failure to consider material facts presented to the Court before such decision. No motion for reconsideration shall in any manner repeat any oral or written argument made in support of or in opposition to the original motion.

C.D. Cal. L.R. 7-18.

III. DISCUSSION

Having reviewed Plaintiff's motion and supporting declaration, the Court denies Plaintiff's motion because Plaintiff fails to introduce any new facts, new law, or any other compelling reason to justify reconsideration.

Reconsideration is appropriate only where (1) the Court is presented with newly discovered evidence, (2) the Court committed clear error or the initial decision was manifestly unjust, or (3) there has been an intervening change in controlling law. *Dixon v. Wallowa Cty.*, 336 F.3d 1013, 1022 (9th Cir. 2003) (internal citation omitted); *see also* Fed. R. Civ. P. 60.

In his motion, Plaintiff takes issue with the Court's order denying Plaintiff's request that the Court disclose certain facts relating to its relationship with Defendants. Plaintiff also takes issue with the Honorable Christina A. Snyder's denial of Plaintiff's *Ex Parte* Application for Recusal. However, Plaintiff fails to introduce new evidence or show that the Court clearly erred in dismissing Plaintiff's case for lack of prosecution. Plaintiff, instead, merely re-argues that the Court should release certain documents or exercise recusal.

Accordingly, the Court finds that Plaintiff fails to present any justifiable reason to warrant vacatur of the Court's dismissal for lack of prosecution.

V. CONCLUSION

For the foregoing reasons, the Court **DENIES** Plaintiff's Motion to Vacate Order (DE 23).

IT IS SO ORDERED.

_____ : _____

Initials of Preparer _____

APPENDIX F

F2

JS-6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	18-cv-05663-RGK-E	Date	October 24, 2018
Title	***Sanai v. McDonnell***		

Present: The Honorable	R. GARY KLAUSNER, UNITED STATES DISTRICT JUDGE	
Sharon L. Williams (Not Present)	Not Reported	N/A
Deputy Clerk	Court Reporter / Recorder	Tape No.
Attorneys Present for Plaintiff:	Attorneys Present for Defendant:	
Not Present	Not Present	

Proceedings: **(IN CHAMBERS)** ORDER re: **Defendant McDonnell's Motion to Dismiss (DE 44)** and **Defendant Borenstein's Motion to Dismiss (DE 45)**

I. INTRODUCTION

Plaintiff is currently subject to a contempt order in Superior Court of Los Angeles County ("Superior Court"), and a bench warrant has been issued for his arrest. Following the contempt hearing, Plaintiff filed petitions for writ of mandate, writ of habeas corpus, and a stay of the contempt order in the California Court of Appeal. Plaintiff alleges that these proceedings are ongoing. Nevertheless, Plaintiff brings this action against Superior Court Judge Mark Borenstein ("Borenstein") and Los Angeles County Sheriff James McDonnell ("McDonnell") (collectively, "Defendants") seeking an injunction that would stay enforcement of the contempt order. Plaintiff also seeks declaratory judgment that the state court proceedings against him violated his due process rights.

Presently before the Court are Defendants' Motions to Dismiss Plaintiff's First Amended Complaint ("FAC") pursuant to Federal Rule of Civil Procedure ("Rule") 12(b)(1) and Rule 12(b)(6). For the following reasons, the Court **GRANTS** the motions.

II. FACTUAL BACKGROUND[1]

Plaintiff is the attorney of record for the plaintiff in an ongoing state court matter captioned as *United Grand Corp. v. Malibu Hillbillies, LLC*, No. BC 554172 (L.A. Super. Ct. Aug. 8, 2014) ("*United Grand*"). Defendant McDonnell is a Los Angeles County Sheriff in charge of detentions for civil contempt cases. Defendant Borenstein is a judge in the Superior Court.

On January 5, 2017, in the *United Grand* action, Plaintiff filed a notice of motion and motion for sanctions and an *ex parte* application asking the court to recognize an automatic stay. (FAC ¶ 44, ECF No. 41; Pl.'s Opp'n Borenstein Mot. Dismiss at 8, ECF No. 54.) Plaintiff alleges that Defendant Borenstein sua sponte imposed sanctions on Plaintiff for requesting sanctions in the *ex parte* application without supporting law or argument. (FAC ¶ 41.) Plaintiff asserts that Defendant Borenstein fabricated

[1] For purposes of the Motions to Dismiss, the Court accepts as true all factual allegations in the FAC.

the record to impose sanctions against Plaintiff. Plaintiff further alleges that Defendant Borenstein; the Court Counsel for the Superior Court; Judge Elizabeth Grimes, who sits on the Second District of the California Court of Appeal; and several other judges are a part of a wide-ranging conspiracy within the Superior Court to punish and disbar Plaintiff. (*Id.*)

When Plaintiff did not pay the sanctions, Defendant Borenstein held Plaintiff in contempt and ultimately sentenced him to imprisonment until he complied with the sanction orders. (FAC ¶ 45.) On April 12, 2018, Plaintiff petitioned the Second District of the California Court of Appeal for (1) writ of mandate, (2) writ of habeas corpus, and (3) an immediate stay of the contempt order. (FAC ¶ 59–61.) On April 23, 2018, the Court of Appeal denied Plaintiff's request for an immediate stay of the contempt order, and the California Supreme Court denied review of Plaintiff's petition for an immediate stay of the contempt order on April 25, 2018. (FAC ¶ 59.) The petition for writs of mandate and habeas corpus remain ongoing in the Court of Appeal. (*Id.*)

On June 27, 2018, Plaintiff filed the instant action in this District asserting claims for (1) writ of habeas corpus, (2) relief under 42 U.S.C. § 1983 ("§ 1983"), and (3) declaratory judgment. On June 28, 2018, the Honorable Stephen V. Wilson denied Plaintiff's *ex parte* application for a temporary restraining order, and on August 1, 2018, Judge Wilson denied Plaintiff's *ex parte* application for a preliminary injunction.

On August 20, 2018, Plaintiff filed a FAC alleging the same claims as the original complaint. Shortly after, the matter was transferred to this Court.

III. JUDICIAL STANDARD

A. Rule 12(b)(1)

Federal courts are courts of limited jurisdiction and presumptively lack jurisdiction over civil actions. *Kokkenen v. Guardian Life Ins. C. of Am.*, 511 U.S. 375, 377 (1994). The party who invokes jurisdiction bears the burden of establishing subject matter jurisdiction. *Id.*

A motion to dismiss under Rule 12(b)(1) may be "facial" or "factual." *See Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). In a facial attack, the challenger asserts the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction. *Id.* The court must assume the factual allegations in the complaint are true and construe them in the light most favorable to the plaintiff. *See Warren v. Fox Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003). However, the court need not accept as true legal conclusions pled as factual allegations. *Id.* A Rule 12(b)(1) motion will be granted if, on its face, the complaint fails to allege grounds for federal subject matter jurisdiction as required by Rule 8(a). *See id.*

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. 18-cv-05663-RGK-E Date October 24, 2018

Title *Sanai v. McDonnell*

B. Leave to Amend

If a court chooses to dismiss the complaint, it must then decide whether to grant leave to amend. Leave to amend shall be freely given when justice so requires, but the ultimate decision to grant leave remains "within the sound discretion of the [district] court." Fed. R. Civ. P. 15(a); *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 185–86 (9th Cir. 1990). However, when any amendment would be futile, the Court may dismiss the complaint with prejudice. *Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995).

IV. DISCUSSION

Defendants move to dismiss all of Plaintiff's claims for lack of subject matter jurisdiction or, in the alternative, for failure to state a claim upon which relief can be granted. The Court addresses each claim in turn.

A. Claim 1: Writ of Habeas Corpus

Defendant McDonnell contends—and Plaintiff does not dispute—that Plaintiff lacks standing to seek a writ of habeas corpus in federal court. (Def. McDonnell's Mot. to Dismiss at 9, ECF No. 44; Pl.'s Opp'n McDonnell Mot. Dismiss at 5, ECF No. 53.) Indeed, 28 U.S.C. § 2254, which governs habeas corpus relief, requires that a prisoner seeking habeas relief be "in custody." 28 U.S.C. § 2254(a). Since Plaintiff is not currently in custody, Plaintiff lacks standing to bring a habeas corpus claim.

Accordingly, the Court **DISMISSES** Plaintiff's claim for writ of habeas corpus.

B. Claims 2 and 3: Injunctive and Declaratory Relief under 42 U.S.C. § 1983

In his second and third claims,[2] Plaintiff seeks an order enjoining the enforcement of Defendant Borenstein's contempt order. Plaintiff also seeks declaratory judgment stating that the contempt hearing and the subsequent petition proceedings in state court violated his civil rights. The Court addresses each in turn.

1. *Injunctive Relief*

Plaintiff seeks preliminary injunctive relief staying the enforcement of Defendant Borenstein's contempt order. After Defendant Borenstein found Plaintiff in contempt, but prior to the instant action, Plaintiff filed—in the Second District of the California Court of Appeal—petitions for writ of habeas corpus, writ of mandate, and a stay of the contempt order. The Court of Appeal denied Plaintiff's request for a stay on the contempt order. Plaintiff then petitioned the California Supreme Court, which denied

[2] Since Plaintiff's second and third claims for declaratory judgment are seemingly identical, the Court addresses the claims together.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. 18-cv-05663-RGK-E Date October 24, 2018

Title ***Sanai v. McDonnell***

review. Therefore, judgment on Plaintiff's request for a stay of the contempt order is final in state court.

The *Rooker-Feldman* doctrine bars federal district courts from reviewing a state court's final judgment. *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983). This doctrine applies to cases where the state court judgment was rendered before the federal proceeding commenced. *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280, 284 (2005). Here, the California Supreme Court denied Plaintiff's petition for a stay of the contempt order on April 25, 2018. Plaintiff filed the Complaint in the instant action in federal court on June 27, 2018. As such, Plaintiff's request for a stay of the contempt order was final before Plaintiff commenced this federal proceeding. The Court is therefore barred by the *Rooker-Feldman* doctrine from exercising jurisdiction as to Plaintiff's request for a stay of the contempt order.

2. *Declaratory Judgment*

Plaintiff also seeks declaratory relief under § 1983, requesting that the Court declare: (1) Defendant Borenstein and other co-conspirators are barred from conducting any legal proceedings involving Plaintiff; (2) Plaintiff does not have any feasible means of litigating his state or constitutional claims in *United Grand* before Defendant Borenstein, the Second District of the California Court of Appeal, or other attorneys represented by the Court Counsel for the Superior Court; (3) Plaintiff does not have a meaningful right to be heard in the state court proceedings because his due process rights have not been and likely will not be met; and (4) it is unlawful to imprison Plaintiff until he has an opportunity to be heard by an impartial tribunal. (FAC at 34–36.)[3]

Defendants contend that the Court should dismiss Plaintiff's declaratory judgment claims under the *Younger* abstention doctrine. It is well-established that federal courts should abstain from litigation which implicates issues that are the subject of an ongoing state criminal prosecution. *Younger v. Harris*, 401 U.S. 37, 45 (1971). The United States Supreme Court has extended the *Younger* doctrine to civil actions as well. *See Huffman v. Pusue, Ltd.*, 420 U.S. 592, 611–12 (1975). Thus, federal courts abstain from state court proceedings under *Younger* in three "exceptional circumstances" that involve important state interests: (1) state criminal prosecutions; (2) civil enforcement proceedings; and (3) "civil proceedings involving certain orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions." *Sprint Comm'ns, Inc. v. Jacobs*, 571 U.S. 69, 73 (2013) (citing *New Orleans Public Service, Inc. v. Council of City of New Orleans*, 491 U.S. 350, 367–68 (1989)).

In a § 1983 action, *Younger* principles apply where (1) the existence of an ongoing state judicial proceeding; (2) the implication of an important state interest; (3) whether there is an adequate opportunity to raise constitutional challenges in the state court proceeding; and (4) whether the federal action would enjoin the state proceeding. *Logan v. U.S. Bank Nat. Ass'n*, 722 F.3d 1163, 1167 (9th Cir.

[3] Plaintiff's declaratory judgment includes several parties not presently before the Court. The Court therefore lacks jurisdiction to declare anything as to those parties. Accordingly, the Court analyzes Plaintiff's declaratory judgment claims only as to Defendant Borenstein and Defendant McDonnell.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. 18-cv-05663-RGK-E Date October 24, 2018

Title ***Sanai v. McDonnell***

2013).

Here, the Court must apply *Younger* principles to Plaintiff's declaratory judgment claims. Plaintiff essentially seeks declaratory judgment finding that the state contempt proceedings violated his civil rights and declaring that Defendant Borenstein be disqualified from cases involving Plaintiff because of his bias against Plaintiff. Based on the facts, as alleged in the FAC, all four *Younger* principles to apply in the instant action.

First, Plaintiff's petitions for writ of mandate and writ of habeas corpus are currently ongoing at the California Court of Appeal, and the *United Grand* matter is also ongoing in Superior Court.

Second, the declaratory relief that Plaintiff seeks involves two important state interests. State contempt proceedings "lie at the core of the state's administration of justice." *Juidice v. Vail*, 430 U.S. 327, 335 (1977). The state court also has significant interest in determining when a state court judge should be disqualified.

Third, Plaintiff had, and still has, an adequate opportunity to raise his constitutional challenges in the state court proceedings. Plaintiff need not have actually raised his constitutional challenges in those proceedings. *Id.* at 337. Plaintiff "need be accorded only an opportunity" to do so, and "failure to avail [himself] of such opportunities does not mean that the state procedures were inadequate." *Id.* Plaintiff had an opportunity to raise his constitutional challenges in the Superior Court contempt hearing. Plaintiff can also raise his constitutional challenges in the ongoing Court of Appeal proceedings, the California Supreme Court, and the United States Supreme Court.

Fourth, Plaintiff's request for declaratory relief would effectively enjoin the state proceedings. The *Younger* abstention doctrine applies to requests for declaratory judgment when "a declaratory judgment will result in precisely the same interference with and disruption of state proceedings" as an injunction. *Samuels v. Mackell*, 401 U.S. 66 (1971). Issuing a declaratory judgment to the extent requested by Plaintiff would enjoin Defendant Borenstein from presiding over cases involving Plaintiff, and any declaratory judgement against Defendant McDonnell would enjoin the enforcement of the contempt order and bench warrant.

Plaintiff contends that he does not have an adequate opportunity to raise his constitutional challenges in state court because Defendant Borenstein and Judge Grimes are biased against him. Plaintiff therefore argues that the *Gibson v. Berryhill* exception to *Younger* applies here. In *Gibson v. Berryhill*, the Supreme Court created an exception to *Younger*, enjoining state administrative proceedings because the defendants presiding over the plaintiffs' proceedings were biased against the plaintiffs. 411 U.S. 564, 578–79 (1972) (enjoining Alabama's Board of Optometry's disqualification hearing against individual licensed optometrists). The Supreme Court explained that "those with substantial pecuniary interest in legal proceedings should not adjudicate" those disputes. *Id.* at 579 (finding that defendants had substantial financial interest in disqualifying plaintiffs).

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. 18-cv-05663-RGK-E Date October 24, 2018

Title ***Sanai v. McDonnell***

Here, Plaintiff conclusively alleges that Defendant Borenstein, Court Counsel for the Superior Court, and Judge Grimes are biased against him. Plaintiff alleges that these individuals and several others are involved in an elaborate conspiracy to punish and disbar him. As to Defendants Borenstein and McDonnell specifically, however, Plaintiff fails to allege that they have personal or financial interest in his demise. While Plaintiff alleges that Judge Grimes had a direct interest in a previous lawsuit involving Plaintiff and that Superior Court Judge David Sotelo had been promised a transfer if he punished Plaintiff, Plaintiff does not allege that Defendant Borenstein or Defendant McDonnell will benefit personally or financially for harassing or punishing him. Plaintiff merely alleges that Judge Sotelo "worked with Judge Mark Borenstein to craft a plan," and that Plaintiff was denied constitutional rights "based on animus against [Plaintiff] by both Borenstein and Grimes." (FAC ¶¶ 44, 69.) Because the Court need not accept as true legal conclusions pled as factual allegations, the Court finds that Plaintiff does not sufficiently plead that Defendant Borenstein was biased against Plaintiff. *See Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003). Therefore, the *Gibson v. Berryhill* exception to *Younger* does not apply.

Plaintiff also contends that the *Dombrowski v. Pfister* exception to the *Younger* abstention doctrine applies to the instant action. 380 U.S. 479 (1965). *Dombrowski*, however, dealt with overbroad state statutes. *Id.* at 1118. Here, Plaintiff does not allege that a state statute is overly broad, vague, or unconstitutional. The *Dombrowski* exception therefore does not apply.

For the foregoing reasons, the Court finds that the *Younger* principles apply to the instant action. The Court must abstain from hearing Plaintiff's claims for declaratory judgment. Accordingly, the Court **DIMISSES** Plaintiff's second and third claims.

Since the Court finds that it lacks subject matter jurisdiction over Plaintiff's claims, it need not address Defendants' arguments for immunity or dismissal under Rule 12(b)(6).

C. Leave to Amend

As explained above, leave to amend is denied only if it is clear that amendment would be futile, and that "the deficiencies of the complaint could not be cured by amendment." *Noll v. Carlson*, 809 F.2d 1446, 1448 (9th Cir. 1987). Since Plaintiff's state court petition is still ongoing, he can raise his constitutional claims against Defendants in those actions. Therefore, even if the Court grants leave to amend, any amendment would be futile. *Younger* will still require the Court to abstain and dismiss Plaintiff's claims.

As such, the Court **DISMISSES** Plaintiff's FAC **without leave to amend**.

F8

JS-6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. 18-cv-05663-RGK-E Date October 24, 2018

Title ***Sanai v. McDonnell***

V. CONCLUSION

In light of the foregoing, the Court **GRANTS** Defendants' Motions to Dismiss (DE 44, 45) and **DISMISSES** Plaintiff's FAC. Plaintiff's Motion to Vacate (DE 58) is **DENIED as moot**.

IT IS SO ORDERED.

Initials of Preparer

APPENDIX G

G2

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	2:18-cv-05663-RGK-E	Date	October 17, 2018
Title	*Sanai v. McDonnell*		

Present: The Honorable	R. GARY KLAUSNER, UNITED STATES DISTRICT JUDGE	
Sharon L. Williams	Not Reported	N/A
Deputy Clerk	Court Reporter / Recorder	Tape No.
Attorneys Present for Plaintiff:	Attorneys Present for Defendants:	
Not Present	Not Present	

Proceedings: **(IN CHAMBERS) Order Re: Plaintiff's Ex Parte Application (DE 62), Amended Ex Parte Application (DE 63), and Amended Ex Parte Application (DE 64)**

On October 16, 2018, Plaintiff Cyrus Sanai ("Plaintiff") filed an ex parte application seeking various judicial disclosures. On October 17, Plaintiff filed two amended ex parte applications seeking the same. Plaintiff's ex parte applications (DE 62, DE 63, and DE 64) are hereby **DENIED**.

IT IS SO ORDERED.

_____ : _____

Initials of Preparer _____

APPENDIX H

H2

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL **'O'**

Case No.	2:18-cv-02136-RGK(Ex)	Date	March 20, 2018
Title	CYRUS SANAI v. D. JOSHUA STAUB ET AL.		

Present: The Honorable	CHRISTINA A. SNYDER	
Catherine Jeang	Not Present	N/A
Deputy Clerk	Court Reporter / Recorder	Tape No.
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:	
Not Present	Not Present	

Proceedings: (IN CHAMBERS) - PLAINTIFF'S SECOND EX PARTE APPLICATION FOR RECUSAL AND ALTERNATIVE MOTION FOR RECONSIDERATION (Dkt. 13, filed March 18, 2018)

I. INTRODUCTION

Plaintiff Cyrus Sanai moves the Court to reconsider its March 16, 2018 order denying the requested recusal of the Honorable R. Gary Klausner in the matter of Cyrus Sanai v. D. Joshua Staub et al, No. 2:18-cv-02136-RGK-E. Dkt. 13 ("Motion"). Sanai moves again for recusal under 28 U.S.C. section 455 and requests reconsideration under Local Rule 7–18.

The case before Judge Klausner concerns Sanai's request for declaratory judgment under 42 U.S.C. § 1983. Dkt. 1 ("Compl."). In particular, Sanai requests declaratory judgment that Sanai has the "right to attack" Los Angeles County Superior Court Judge Mark A. Borenstein's orders and his conduct in certain contempt proceedings against Sanai, on the grounds that Judge Borenstein lacks impartiality under Cal. Code Civ. P. § 170.1 et seq. See Compl.

II. DISCUSSION

Local Rule 7–18 sets forth the grounds upon which the Court may reconsider the decision on any motion:

> A motion for reconsideration of the decision on any motion may be made only on the grounds of: (a) a material difference in fact or law from that presented to the Court before such decision that in the exercise of reasonable diligence could not have been known to the party moving for reconsideration

H3

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL **'O'**

Case No.	2:18-cv-02136-RGK(Ex)	Date	March 20, 2018
Title	CYRUS SANAI v. D. JOSHUA STAUB ET AL.		

> at the time of such decision, or (b) the emergence of new material facts or a change of law occurring after the time of such decision, or (c) a manifest showing of a failure to consider material facts presented to the Court before such decision. No motion for reconsideration shall in any manner repeat any oral or written argument made in support of or in opposition to the original motion.

C.D. Cal. L.R. 7–18.

In support of his request for reconsideration, Sanai contends that he searched the Pacer system after the March 16, 2018 order for cases involving Judge Klausner. Motion at 5. Sanai states that "[w]hen he did so again, he accidentally put in a different search name, looking for 'Gary Klausner' instead of 'Robert Gary Klausner.' This accident proved fortuitous, because there are at least three federal proceedings in which Judge Klausner, while a Superior Court judge, was sued in [federal] court, but under the name 'Gary Klausner.' " Id. Sanai attaches copies of the docket sheets from these three cases and contends that these cases demonstrate that Frederick Bennett represented Judge Klausner personally.[1] Id. Upon review of the docket sheets for these federal proceedings, it appears that Frederick Bennett represented Judge Klausner and numerous other judicial officers of the Los Angeles County Superior Court in three multi-defendant federal proceedings. See Dkt. 13 & Exs. A, B, C.

Sanai contends that the instant motion relies on different factual grounds than the original motion to disqualify Judge Klausner, so this is "arguably [] not a motion for reconsideration." Id. at 5–6. Sanai further contends that even if the instant motion is a motion for reconsideration, 28 U.S.C. section 455(e) "does not permit waiver of a grounds of disqualification except under strict conditions," and that "no waiver of the right to disqualify [Judge Klausner] can have occurred based on the relationship until full disclosure is made" regarding Judge Klausner's relationship to Bennett. Id. at 6. Sanai argues that restrictions on reconsideration set forth in Local Rule 7–18 are "overridden" by 28 U.S.C. section 455(e).

---

[1] Sanai seeks to disqualify Judge Klausner because of Judge Klausner's purported familiarity with Bennett, who is named as a defendant in Sanai's underlying complaint. Dkt. 8 at 2. Bennett was Court Counsel of the Los Angeles County Superior Court from 1998 to date, and was former County Counsel who represented the Los Angeles Superior Court through 2002. Id.

H4

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

	CIVIL MINUTES - GENERAL		'O'
Case No.	2:18-cv-02136-RGK(Ex)	Date	March 20, 2018
Title	CYRUS SANAI v. D. JOSHUA STAUB ET AL.		

Last, Sanai asserts that this motion also satisfies the standard for reconsideration insofar as reasonable diligence—"a search of Pacer in the Central District and Ninth Circuit under Judge Klausner's true name"—did not yield any lawsuits in which Judge "Robert Gary Klausner" was sued. Id. at 6. Sanai also contends that this Court's March 16, 2018 order "constituted new facts and new law." Id.

It appears that Sanai's request for recusal generally repeats the arguments made in support of his March 15, 2018 request for recusal. In order to obtain recusal of Judge Klausner in the first instance, Sanai was obligated to point to some extrajudicial source of bias—such as a personal bias. See United States v. Hernandez, 109 F.3d 1450, 1454 (9th Cir. 1997). The Court concluded that Sanai failed to demonstrate that Judge Klausner's impartiality might reasonably be questioned, and here, the Court finds that Sanai fails to demonstrate grounds for reconsideration of this conclusion. Exercise of reasonable diligence could have revealed the three federal proceedings involving Judge Klausner that Sanai contends he inadvertently discovered, particularly because Sanai's search terms merely included what Sanai argues is part of Judge Klausner's "true name." Moreover, plaintiff does not allege the emergence of new material facts or a change of law occurring since March 16, 2018, or a manifest showing of failure to consider material facts before the Court. Given these circumstances, and because reconsideration is an extraordinary remedy that should not be granted absent highly unusual circumstances,[2] the Court **DENIES** Sanai's request for reconsideration.

III. CONCLUSION

In accordance with the foregoing, the Court **DENIES** Sanai's request for reconsideration.

IT IS SO ORDERED.

	00 : 00
Initials of Preparer	CMJ

[2] See 398 Orange St. Partners v. Arnold, 179 F.3d 656, 665 (9th Cir. 1999).

APPENDIX I

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. 18-cv-05663-RGK-E Date March 26, 2019

Title *Sanai v. McDonnell, et al*

Present: The Honorable R. GARY KLAUSNER, UNITED STATES DISTRICT JUDGE

Sharon L. Williams (Not Present)	Not Reported	N/A
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiff:	Attorneys Present for Defendant:
Not Present	Not Present

Proceedings: **(IN CHAMBERS) ORDER re: Plaintiff's Motion to Vacate Judgment and Order of Dismissal (DE 88)**

On August 20, 2018, Cyrus Sanai ("Plaintiff") filed a First Amended Complaint ("FAC") against then-Sheriff James McDonnell and Superior Court Judge Mark Borenstein (collectively, "Defendants") alleging claims for: (1) writ of habeas corpus, (2) relief under 42 U.S.C. § 1983, and (3) declaratory judgment. On October 24, 2018, the Court granted Defendants' motions to dismiss the FAC. Plaintiff then filed a Motion for New Trial and to Vacate Order of Dismissal, arguing that the Court erred in finding that it lacked subject matter jurisdiction. The Court denied the motion on January 25, 2019, finding that the *Rooker-Feldman* doctrine barred the Court from exercising jurisdiction over Plaintiff's claims.

Presently before the Court is Plaintiff's Motion to Vacate Judgment and Order of Dismissal. A court has discretion to reconsider a judgment or order pursuant to Federal Rule of Civil Procedure 59(e) or 60(b). *Sch. Dist. No. 1J Multnomah Cty., Or. v. ACandS, Inc.*, 5 F.3d 1255, 1262 (9th Cir. 1993). Absent unusual circumstances, reconsideration is only appropriate where the court is presented with newly discovered evidence, the court committed clear error, the decision was manifestly unjust, or there has been an intervening change in controlling law. *Id.* at 1263. Plaintiff's motion simply re-argues that the Court erred in finding that the *Rooker-Feldman* applies in this action. In doing so, Plaintiff fails to establish that the Court committed clear error.

The Court therefore **DENIES** Plaintiff's Motion to Vacate Judgment and Order of Dismissal (DE 88). Accordingly, Plaintiff's *ex parte* application requesting a temporary restraining order and preliminary injunction (DE 99) is **denied as moot**.

IT IS SO ORDERED.

_____ : _____

Initials of Preparer _____

APPENDIX J

J2

JS-6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	18-cv-05663-RGK-E	Date	October 24, 2018
Title	*Sanai v. McDonnell*		

Present: The Honorable	R. GARY KLAUSNER, UNITED STATES DISTRICT JUDGE	
Sharon L. Williams (Not Present)	Not Reported	N/A
Deputy Clerk	Court Reporter / Recorder	Tape No.
Attorneys Present for Plaintiff:	Attorneys Present for Defendant:	
Not Present	Not Present	

Proceedings: **(IN CHAMBERS)** ORDER re: **Defendant McDonnell's Motion to Dismiss (DE 44)** and **Defendant Borenstein's Motion to Dismiss (DE 45)**

I. INTRODUCTION

Plaintiff is currently subject to a contempt order in Superior Court of Los Angeles County ("Superior Court"), and a bench warrant has been issued for his arrest. Following the contempt hearing, Plaintiff filed petitions for writ of mandate, writ of habeas corpus, and a stay of the contempt order in the California Court of Appeal. Plaintiff alleges that these proceedings are ongoing. Nevertheless, Plaintiff brings this action against Superior Court Judge Mark Borenstein ("Borenstein") and Los Angeles County Sheriff James McDonnell ("McDonnell") (collectively, "Defendants") seeking an injunction that would stay enforcement of the contempt order. Plaintiff also seeks declaratory judgment that the state court proceedings against him violated his due process rights.

Presently before the Court are Defendants' Motions to Dismiss Plaintiff's First Amended Complaint ("FAC") pursuant to Federal Rule of Civil Procedure ("Rule") 12(b)(1) and Rule 12(b)(6). For the following reasons, the Court **GRANTS** the motions.

II. FACTUAL BACKGROUND[1]

Plaintiff is the attorney of record for the plaintiff in an ongoing state court matter captioned as *United Grand Corp. v. Malibu Hillbillies, LLC*, No. BC 554172 (L.A. Super. Ct. Aug. 8, 2014) ("*United Grand*"). Defendant McDonnell is a Los Angeles County Sheriff in charge of detentions for civil contempt cases. Defendant Borenstein is a judge in the Superior Court.

On January 5, 2017, in the *United Grand* action, Plaintiff filed a notice of motion and motion for sanctions and an *ex parte* application asking the court to recognize an automatic stay. (FAC ¶ 44, ECF No. 41; Pl.'s Opp'n Borenstein Mot. Dismiss at 8, ECF No. 54.) Plaintiff alleges that Defendant Borenstein sua sponte imposed sanctions on Plaintiff for requesting sanctions in the *ex parte* application without supporting law or argument. (FAC ¶ 41.) Plaintiff asserts that Defendant Borenstein fabricated

[1] For purposes of the Motions to Dismiss, the Court accepts as true all factual allegations in the FAC.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. 18-cv-05663-RGK-E Date October 24, 2018

Title *Sanai v. McDonnell*

the record to impose sanctions against Plaintiff. Plaintiff further alleges that Defendant Borenstein; the Court Counsel for the Superior Court; Judge Elizabeth Grimes, who sits on the Second District of the California Court of Appeal; and several other judges are a part of a wide-ranging conspiracy within the Superior Court to punish and disbar Plaintiff. (*Id.*)

When Plaintiff did not pay the sanctions, Defendant Borenstein held Plaintiff in contempt and ultimately sentenced him to imprisonment until he complied with the sanction orders. (FAC ¶ 45.) On April 12, 2018, Plaintiff petitioned the Second District of the California Court of Appeal for (1) writ of mandate, (2) writ of habeas corpus, and (3) an immediate stay of the contempt order. (FAC ¶ 59–61.) On April 23, 2018, the Court of Appeal denied Plaintiff's request for an immediate stay of the contempt order, and the California Supreme Court denied review of Plaintiff's petition for an immediate stay of the contempt order on April 25, 2018. (FAC ¶ 59.) The petition for writs of mandate and habeas corpus remain ongoing in the Court of Appeal. (*Id.*)

On June 27, 2018, Plaintiff filed the instant action in this District asserting claims for (1) writ of habeas corpus, (2) relief under 42 U.S.C. § 1983 ("§ 1983"), and (3) declaratory judgment. On June 28, 2018, the Honorable Stephen V. Wilson denied Plaintiff's *ex parte* application for a temporary restraining order, and on August 1, 2018, Judge Wilson denied Plaintiff's *ex parte* application for a preliminary injunction.

On August 20, 2018, Plaintiff filed a FAC alleging the same claims as the original complaint. Shortly after, the matter was transferred to this Court.

III. JUDICIAL STANDARD

A. Rule 12(b)(1)

Federal courts are courts of limited jurisdiction and presumptively lack jurisdiction over civil actions. *Kokkenen v. Guardian Life Ins. C. of Am.*, 511 U.S. 375, 377 (1994). The party who invokes jurisdiction bears the burden of establishing subject matter jurisdiction. *Id.*

A motion to dismiss under Rule 12(b)(1) may be "facial" or "factual." *See Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). In a facial attack, the challenger asserts the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction. *Id.* The court must assume the factual allegations in the complaint are true and construe them in the light most favorable to the plaintiff. *See Warren v. Fox Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003). However, the court need not accept as true legal conclusions pled as factual allegations. *Id.* A Rule 12(b)(1) motion will be granted if, on its face, the complaint fails to allege grounds for federal subject matter jurisdiction as required by Rule 8(a). *See id.*

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. 18-cv-05663-RGK-E Date October 24, 2018

Title *Sanai v. McDonnell*

B. Leave to Amend

If a court chooses to dismiss the complaint, it must then decide whether to grant leave to amend. Leave to amend shall be freely given when justice so requires, but the ultimate decision to grant leave remains "within the sound discretion of the [district] court." Fed. R. Civ. P. 15(a); *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 185–86 (9th Cir. 1990). However, when any amendment would be futile, the Court may dismiss the complaint with prejudice. *Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995).

IV. DISCUSSION

Defendants move to dismiss all of Plaintiff's claims for lack of subject matter jurisdiction or, in the alternative, for failure to state a claim upon which relief can be granted. The Court addresses each claim in turn.

A. Claim 1: Writ of Habeas Corpus

Defendant McDonnell contends—and Plaintiff does not dispute—that Plaintiff lacks standing to seek a writ of habeas corpus in federal court. (Def. McDonnell's Mot. to Dismiss at 9, ECF No. 44; Pl.'s Opp'n McDonnell Mot. Dismiss at 5, ECF No. 53.) Indeed, 28 U.S.C. § 2254, which governs habeas corpus relief, requires that a prisoner seeking habeas relief be "in custody." 28 U.S.C. § 2254(a). Since Plaintiff is not currently in custody, Plaintiff lacks standing to bring a habeas corpus claim.

Accordingly, the Court **DISMISSES** Plaintiff's claim for writ of habeas corpus.

B. Claims 2 and 3: Injunctive and Declaratory Relief under 42 U.S.C. § 1983

In his second and third claims,[2] Plaintiff seeks an order enjoining the enforcement of Defendant Borenstein's contempt order. Plaintiff also seeks declaratory judgment stating that the contempt hearing and the subsequent petition proceedings in state court violated his civil rights. The Court addresses each in turn.

1. *Injunctive Relief*

Plaintiff seeks preliminary injunctive relief staying the enforcement of Defendant Borenstein's contempt order. After Defendant Borenstein found Plaintiff in contempt, but prior to the instant action, Plaintiff filed—in the Second District of the California Court of Appeal—petitions for writ of habeas corpus, writ of mandate, and a stay of the contempt order. The Court of Appeal denied Plaintiff's request for a stay on the contempt order. Plaintiff then petitioned the California Supreme Court, which denied

[2] Since Plaintiff's second and third claims for declaratory judgment are seemingly identical, the Court addresses the claims together.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. 18-cv-05663-RGK-E Date October 24, 2018

Title ***Sanai v. McDonnell***

review. Therefore, judgment on Plaintiff's request for a stay of the contempt order is final in state court.

The *Rooker-Feldman* doctrine bars federal district courts from reviewing a state court's final judgment. *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983). This doctrine applies to cases where the state court judgment was rendered before the federal proceeding commenced. *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280, 284 (2005). Here, the California Supreme Court denied Plaintiff's petition for a stay of the contempt order on April 25, 2018. Plaintiff filed the Complaint in the instant action in federal court on June 27, 2018. As such, Plaintiff's request for a stay of the contempt order was final before Plaintiff commenced this federal proceeding. The Court is therefore barred by the *Rooker-Feldman* doctrine from exercising jurisdiction as to Plaintiff's request for a stay of the contempt order.

2. *Declaratory Judgment*

Plaintiff also seeks declaratory relief under § 1983, requesting that the Court declare: (1) Defendant Borenstein and other co-conspirators are barred from conducting any legal proceedings involving Plaintiff; (2) Plaintiff does not have any feasible means of litigating his state or constitutional claims in *United Grand* before Defendant Borenstein, the Second District of the California Court of Appeal, or other attorneys represented by the Court Counsel for the Superior Court; (3) Plaintiff does not have a meaningful right to be heard in the state court proceedings because his due process rights have not been and likely will not be met; and (4) it is unlawful to imprison Plaintiff until he has an opportunity to be heard by an impartial tribunal. (FAC at 34–36.)[3]

Defendants contend that the Court should dismiss Plaintiff's declaratory judgment claims under the *Younger* abstention doctrine. It is well-established that federal courts should abstain from litigation which implicates issues that are the subject of an ongoing state criminal prosecution. *Younger v. Harris*, 401 U.S. 37, 45 (1971). The United States Supreme Court has extended the *Younger* doctrine to civil actions as well. *See Huffman v. Pusue, Ltd.*, 420 U.S. 592, 611–12 (1975). Thus, federal courts abstain from state court proceedings under *Younger* in three "exceptional circumstances" that involve important state interests: (1) state criminal prosecutions; (2) civil enforcement proceedings; and (3) "civil proceedings involving certain orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions." *Sprint Comm'ns, Inc. v. Jacobs*, 571 U.S. 69, 73 (2013) (citing *New Orleans Public Service, Inc. v. Council of City of New Orleans*, 491 U.S. 350, 367–68 (1989)).

In a § 1983 action, *Younger* principles apply where (1) the existence of an ongoing state judicial proceeding; (2) the implication of an important state interest; (3) whether there is an adequate opportunity to raise constitutional challenges in the state court proceeding; and (4) whether the federal action would enjoin the state proceeding. *Logan v. U.S. Bank Nat. Ass'n*, 722 F.3d 1163, 1167 (9th Cir.

[3] Plaintiff's declaratory judgment includes several parties not presently before the Court. The Court therefore lacks jurisdiction to declare anything as to those parties. Accordingly, the Court analyzes Plaintiff's declaratory judgment claims only as to Defendant Borenstein and Defendant McDonnell.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. 18-cv-05663-RGK-E Date October 24, 2018

Title ***Sanai v. McDonnell***

2013).

Here, the Court must apply *Younger* principles to Plaintiff's declaratory judgment claims. Plaintiff essentially seeks declaratory judgment finding that the state contempt proceedings violated his civil rights and declaring that Defendant Borenstein be disqualified from cases involving Plaintiff because of his bias against Plaintiff. Based on the facts, as alleged in the FAC, all four *Younger* principles to apply in the instant action.

First, Plaintiff's petitions for writ of mandate and writ of habeas corpus are currently ongoing at the California Court of Appeal, and the *United Grand* matter is also ongoing in Superior Court.

Second, the declaratory relief that Plaintiff seeks involves two important state interests. State contempt proceedings "lie at the core of the state's administration of justice." *Juidice v. Vail*, 430 U.S. 327, 335 (1977). The state court also has significant interest in determining when a state court judge should be disqualified.

Third, Plaintiff had, and still has, an adequate opportunity to raise his constitutional challenges in the state court proceedings. Plaintiff need not have actually raised his constitutional challenges in those proceedings. *Id.* at 337. Plaintiff "need be accorded only an opportunity" to do so, and "failure to avail [himself] of such opportunities does not mean that the state procedures were inadequate." *Id.* Plaintiff had an opportunity to raise his constitutional challenges in the Superior Court contempt hearing. Plaintiff can also raise his constitutional challenges in the ongoing Court of Appeal proceedings, the California Supreme Court, and the United States Supreme Court.

Fourth, Plaintiff's request for declaratory relief would effectively enjoin the state proceedings. The *Younger* abstention doctrine applies to requests for declaratory judgment when "a declaratory judgment will result in precisely the same interference with and disruption of state proceedings" as an injunction. *Samuels v. Mackell*, 401 U.S. 66 (1971). Issuing a declaratory judgment to the extent requested by Plaintiff would enjoin Defendant Borenstein from presiding over cases involving Plaintiff, and any declaratory judgement against Defendant McDonnell would enjoin the enforcement of the contempt order and bench warrant.

Plaintiff contends that he does not have an adequate opportunity to raise his constitutional challenges in state court because Defendant Borenstein and Judge Grimes are biased against him. Plaintiff therefore argues that the *Gibson v. Berryhill* exception to *Younger* applies here. In *Gibson v. Berryhill*, the Supreme Court created an exception to *Younger*, enjoining state administrative proceedings because the defendants presiding over the plaintiffs' proceedings were biased against the plaintiffs. 411 U.S. 564, 578–79 (1972) (enjoining Alabama's Board of Optometry's disqualification hearing against individual licensed optometrists). The Supreme Court explained that "those with substantial pecuniary interest in legal proceedings should not adjudicate" those disputes. *Id.* at 579 (finding that defendants had substantial financial interest in disqualifying plaintiffs).

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. 18-cv-05663-RGK-E Date October 24, 2018

Title ***Sanai v. McDonnell***

Here, Plaintiff conclusively alleges that Defendant Borenstein, Court Counsel for the Superior Court, and Judge Grimes are biased against him. Plaintiff alleges that these individuals and several others are involved in an elaborate conspiracy to punish and disbar him. As to Defendants Borenstein and McDonnell specifically, however, Plaintiff fails to allege that they have personal or financial interest in his demise. While Plaintiff alleges that Judge Grimes had a direct interest in a previous lawsuit involving Plaintiff and that Superior Court Judge David Sotelo had been promised a transfer if he punished Plaintiff, Plaintiff does not allege that Defendant Borenstein or Defendant McDonnell will benefit personally or financially for harassing or punishing him. Plaintiff merely alleges that Judge Sotelo "worked with Judge Mark Borenstein to craft a plan," and that Plaintiff was denied constitutional rights "based on animus against [Plaintiff] by both Borenstein and Grimes." (FAC ¶¶ 44, 69.) Because the Court need not accept as true legal conclusions pled as factual allegations, the Court finds that Plaintiff does not sufficiently plead that Defendant Borenstein was biased against Plaintiff. *See Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003). Therefore, the *Gibson v. Berryhill* exception to *Younger* does not apply.

Plaintiff also contends that the *Dombrowski v. Pfister* exception to the *Younger* abstention doctrine applies to the instant action. 380 U.S. 479 (1965). *Dombrowski*, however, dealt with overbroad state statutes. *Id.* at 1118. Here, Plaintiff does not allege that a state statute is overly broad, vague, or unconstitutional. The *Dombrowski* exception therefore does not apply.

For the foregoing reasons, the Court finds that the *Younger* principles apply to the instant action. The Court must abstain from hearing Plaintiff's claims for declaratory judgment. Accordingly, the Court **DIMISSES** Plaintiff's second and third claims.

Since the Court finds that it lacks subject matter jurisdiction over Plaintiff's claims, it need not address Defendants' arguments for immunity or dismissal under Rule 12(b)(6).

C. Leave to Amend

As explained above, leave to amend is denied only if it is clear that amendment would be futile, and that "the deficiencies of the complaint could not be cured by amendment." *Noll v. Carlson*, 809 F.2d 1446, 1448 (9th Cir. 1987). Since Plaintiff's state court petition is still ongoing, he can raise his constitutional claims against Defendants in those actions. Therefore, even if the Court grants leave to amend, any amendment would be futile. *Younger* will still require the Court to abstain and dismiss Plaintiff's claims.

As such, the Court **DISMISSES** Plaintiff's FAC **without leave to amend**.

JS-6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. 18-cv-05663-RGK-E Date October 24, 2018

Title ***Sanai v. McDonnell***

V. CONCLUSION

In light of the foregoing, the Court **GRANTS** Defendants' Motions to Dismiss (DE 44, 45) and **DISMISSES** Plaintiff's FAC. Plaintiff's Motion to Vacate (DE 58) is **DENIED as moot**.

IT IS SO ORDERED.

_____ : _____

Initials of Preparer _____

APPENDIX K

K2

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL **'O'**

Case No.	2:18-cv-05663-RGK-Ex	Date	October 24, 2018
Title	CYRUS SANAI v. JAMES MCDONNELL; ET AL.		

Present: The Honorable CHRISTINA A. SNYDER

Catherine Jeang	Not Present	N/A
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Not Present	Not Present

Proceedings: **(IN CHAMBERS)** - PLAINTIFF'S EX PARTE MOTION TO DISQUALIFY JUDGE R. GARY KLAUSNER (Dkt. 66, filed October 18, 2018)

I. INTRODUCTION AND BACKGROUND

On June 27, 2018, plaintiff Cyrus Sanai filed this action against defendants Sheriff James McDonnell; Judge Mark Borenstein; and Does 1 through 10. Dkt. 1. On August 20, 2018, plaintiff filed a First Amended Complaint ("FAC"). Dkt. 41. In filing this action, plaintiff seeks "a halt on the cumulative filing of sanctions and the sentence of personal imprisonment imposed on him by [Judge] Borenstein in order to litigate the statutory and due process issues presented by Judge Borenstein's conduct[,]" and to have the appellate proceedings "be conducted before a panel of the California Court of Appeal that is not biased against Sanai." FAC at 3.

On October 16, 2018, plaintiff filed an ex parte motion for disclosure of facts relevant to the disqualification of Honorable R. Gary Klausner. Dkt. 62. Plaintiff moved for Judge Klausner to: (1) disclose all facts regarding his relationship with the employees and judicial officers identified in the first amended complaint, including Frederick Bennett and Elizabeth Grimes; (2) to state whether or not Judge Klausner has personal knowledge of the truth or falsity of any of the allegations set forth in the complaint in this action; (3) disclose any and all cases in which Judge Klausner was represented by Bennett; and (4) to make available for review certain files in the District Court's off-site storage at no charge. Id. at 2. On October 17, 2018, plaintiff filed two amended ex parte motions seeking the same. Dkts. 63, 64. On October 17, 2018, Judge Klausner denied plaintiff's ex parte applications. Dkt. 65.

K3

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL **'O'**

Case No.	2:18-cv-05663-RGK-Ex	Date	October 24, 2018
Title	CYRUS SANAI v. JAMES MCDONNELL; ET AL.		

On October 18, 2018, plaintiff filed the instant ex parte motion to disqualify Judge Klausner for denying his ex parte application and amended ex parte applications. Dkt. 66 ("Mot."). Plaintiff moves for disqualification under 28 U.S.C. § 455 ("Section 455").

II. DISCUSSION

Under Section 455, judges must disqualify themselves "in any proceeding in which [their] impartiality might reasonably be questioned." Id. § 455(a). The substantive standard for disqualification under Section 455 is "whether a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned." United States v. Studley, 783 F.2d 934, 939 (9th Cir. 1986) (citation omitted). "The 'reasonable person' in this context means a 'well-informed, thoughtful observer,' as opposed to a 'hypersensitive or unduly suspicious person.'" Clemens v. U.S. Dist. Court for Central Dist. Of California, 428 F.3d 1175 (9th Cir. 2005) (citing In re Mason, 916 F.2d 384, 386 (7th Cir. 1990)). Moreover, the alleged bias cannot result from mere disagreement, however vehement, with a judge's rulings; instead, "the alleged bias must stem from an 'extrajudicial source.'" United States v. Hernandez, 109 F.3d 1450, 1454 (9th Cir. 1997) (quoting Liteky v. United States, 510 U.S. 540, 548 (1994)). "[O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." Liteky, 510 U.S. at 555.

In the instant motion, plaintiff makes various assertions in support of his contention that Judge Klausner must be disqualified from the instant matter. At the core of plaintiff's motion is his disagreement with Judge Klausner's ruling denying his request for certain disclosures, which is not a proper basis for disqualification. Cf. United States v. Azhocar, 581 F.2d 735, 739 (9th Cir. 1978) ("Adverse rulings do not constitute the requisite bias or prejudice of [28 U.S.C. § 144].") (citing Berger v. United States, 255 U.S. 22, 34 (1921)). Nonetheless, the Court addresses plaintiff's arguments in turn.

Plaintiff argues that: (1) Judge Klausner may have a relationship with Frederick Bennett, who plaintiff contends is a "key witness" in the action, (2) that Judge Klausner "may have personally taken legal positions as a defendant . . . that would cause a reasonable person to doubt that he could now address the same subject matter," and (3) that Judge Klausner may have personal knowledge of the facts alleged in the first amended complaint. Mot. at 2, 6–7. It appears that in 1993 and 1994, two cases—Rudder v. Klausner et al., 2:93-cv-03790-SVW-GHKA, and Thymes et al. v. Mallano et

K4

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL **'O'**

Case No.	2:18-cv-05663-RGK-Ex	Date	October 24, 2018
Title	CYRUS SANAI v. JAMES MCDONNELL; ET AL.		

al., No. 2:94-cv-05715-IH-AJW—were brought against Judge Klausner in his capacity as a Los Angeles County Superior Court judge ("Klausner Cases"). See Dkt. 66-1, Declaration of Cyrus Sanai ¶ 3, Exs. A, B. Bennett appears to have represented Judge Klausner in these cases in his capacity as Court Counsel for the Los Angeles County Superior Court. See id. Both cases were dismissed at the pleading stage. See id.

Plaintiff fails to otherwise sufficiently set forth facts that would lead a reasonable person to conclude that Judge Klausner's impartiality might reasonably be questioned. Given the nature of these two lawsuits and Bennett's role as counsel for the Los Angeles County Superior Court, there is no reasonable basis to believe that Judge Klausner has a "familial, financial, or similarly close" relationship with Bennett that should result in disqualification. See Pellegrini v. Merchant, 2017 WL 735740 (E.D. Cal. 2017) (A "judge need not recuse himself as long as the judge does not have a familial, financial, or similarly close relationship with the party or witness."). To the extent Judge Klausner has worked with Bennett in the past, "judges are not required to recuse when they have a casual relationship with a victim, attorney, witness, or litigant appearing before the court. Courts have recognized that elevation to the bench does not and should not require withdrawal from society." U.S. v. Sundrud, 397 F. Supp. 2d 1230, 1233 (C.D. Cal. 2005).

With respect to plaintiff's speculation regarding Judge Klausner's potentially adverse "litigation positions" in the Klausner Cases, the Court finds that a well-informed, thoughtful observer would not question Judge Klausner's impartiality on the basis of the legal arguments put forward in his defense twenty years ago in cases unrelated to the action before him.

Plaintiff's contention that Judge Klausner may have personal knowledge of the facts alleged in the first amended complaint also fails because the two cases against Judge Klausner were initiated in 1993 and 1994, and plaintiff initiated the instant lawsuit in 2018. The allegations in plaintiff's first amended complaint reach far back in time, but the earliest event did not take place until 1999, well after the initiation of the Klausner Cases.

Plaintiff also argues that he should not have to pay the customary fee to review files related to the Klausner Cases that are stored offsite. Plaintiff does not make the argument that he cannot afford the cost of retrieving and copying the off-site files. Rather, he contends that Judge Klausner should provide the files for free because "it is the obligation of the Court to make disclosure." Mot. at 9. Plaintiff further argues that

K5

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL **'O'**

Case No.	2:18-cv-05663-RGK-Ex	Date	October 24, 2018
Title	CYRUS SANAI v. JAMES MCDONNELL; ET AL.		

Judge Klausner's denial of his request to provide such files at no cost is itself a basis to question his impartiality. The Court reiterates that adverse rulings are not a proper basis for disqualification. See Azhocar, 581 F.2d at 739. Moreover, given the implausibility of plaintiff's contention that the Klausner Cases provide a reasonable basis to question Judge Klausner's impartiality, the Court does not find that Judge Klausner was obligated to provide the case files to plaintiff. To the extent plaintiff wants to review the offsite files, he can follow the applicable procedures to do so.

III. CONCLUSION

In accordance with the foregoing, the Court **DENIES** plaintiff's request for disqualification.

IT IS SO ORDERED.

	00 : 00
Initials of Preparer	CMJ

APPENDIX L

L2

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	2:18-cv-05663-RGK-E	Date	October 17, 2018
Title	***Sanai v. McDonnell***		

Present: The Honorable R. GARY KLAUSNER, UNITED STATES DISTRICT JUDGE

Sharon L. Williams	Not Reported	N/A
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiff:	Attorneys Present for Defendants:
Not Present	Not Present

Proceedings: **(IN CHAMBERS) Order Re: Plaintiff's Ex Parte Application (DE 62), Amended Ex Parte Application (DE 63), and Amended Ex Parte Application (DE 64)**

On October 16, 2018, Plaintiff Cyrus Sanai ("Plaintiff") filed an ex parte application seeking various judicial disclosures. On October 17, Plaintiff filed two amended ex parte applications seeking the same. Plaintiff's ex parte applications (DE 62, DE 63, and DE 64) are hereby **DENIED**.

IT IS SO ORDERED.

_____ : _____

Initials of Preparer _____

APPENDIX M

UNITED STATES COURT OF APPEALS
For the Ninth Circuit

No. 19-55427

CYRUS SANAI, an individual

Plaintiff, and Appellant

vs.

D. JOSHUA STAUB, an individual; FREDERICK BENNETT, an individual; PHU CAM NGUYEN, an individual; CHRISTOPHER MCINTIRE, an individual and DOES 1 through 10, inclusive,

Defendants;

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
HONORABLE ROBERT GARY KLAUSNER
DISTRICT COURT CASE NO. CV 18-2136-RGK-E

AMENDED MOTION FOR DISQUALIFICATION AND RECUSAL OF JUDGES AND DISCLOSURE

Cyrus M. Sanai, SB#150387
SANAIS
433 North Camden Drive
Suite 600
Beverly Hills, California, 90210
Telephone: (310) 717-9840
cyrus@sanaislaw.com

MOTION FOR DISQUALIFICATION AND RECUSAL OF JUDGES AND DISCLOSURE

I. MOTION

For the reasons set forth below, Appellant Cyrus Sanai ("Sanai") hereby files a motion to disqualify the following Circuit Judges: Berzon, Thomas, Goodwin, Wallace, Schroeder, D. Nelson, Canby, O'Scannlain, Fernandez, Kleinfield, Tashima, Graber, McKeown, Wardlaw, Fletcher, Fisher, Gould, Paez, Tallman, Rawlinson, Clifton, Bybee, Callahan, Bea, M.D. Smith, Jr., Ikuta, N. R. Smith, Murguia, Christen, Nguyen, and Watford.

This motion also moves that the other Circuit Judges, namely, Farris, Leavy, Trott, Hawkins, Silverman, Hurwitz, Owens, Friedland, Bennett, R.D. Nelson, Miller, Bress and Bade, as well as any of the Circuit Judges for whom recusal is requested but who declines to recuse, make the following disclosures on the record:

1. Whether or not they are friends of disgraced former Circuit Judge Alex Kozinski;
2. Whether they had any knowledge, direct or indirect, of

Kozinski's sexual harassment and distribution of pornography within the Court prior to December 2017;

3. Whether they have had any contact, direct or indirect with Kozinski since his resignation or would otherwise consider himself or herself as his friend;

4. Whether they in any way participated or supported the efforts to censure Appellant Sanai, disbar Appellant Sanai, or interfere in the employment of anyone at the request of Kozinski or Circuit Judge Reinhardt.

5. The dates, if any, the judge served on the Judicial Council.

6. The relationship any judge has with Frederick Bennett or any other Defendant.

This motion is amended to address some typographical and numbering errors, and update the status of the unsuccessful efforts of the Judicial Council to have Sanai disbarred. *See* Sanai Decl. ¶35.

II. BACKGROUND TO APPEAL

This appeal involves a question of first impression in the Ninth Circuit Court of Appeal: where a party provides admissible of evidence

of a past or existing professional or personal relationship between a federal judge and a party to the litigation, must the federal judge disclose the material facts concerning the relationship, including whether it is still ongoing?

The Sixth and Eleventh Circuit have answered this question in the affirmative.

> We believe instead that litigants (and, of course, their attorneys) should assume the impartiality of the presiding judge, rather than pore through the judge's private affairs and financial matters. Further, judges have an ethical duty to "disclose on the record information which the judge believes the parties or their lawyers might consider relevant to the question of disqualification." *Porter v. Singletary,* 49 F.3d 1483, 1489 (11th Cir. 1995). . . . [The judge] possibly did not consider the matter sufficiently relevant to merit disclosure, but his non-disclosure did not vest in [the parties] a duty to investigate him.

Am. Textile Mfrs. Inst., Inc. v. Limited, Inc., 190 F.3d 729, 741 (6th Cir. 1999).

Neither the Ninth Circuit nor the United States Supreme Court has ever addressed this issue. This appeal presents this issue, and the scope of appellate disqualification in the federal courts in the wake of *Williams v. Pennsylvania* (2016) 579 U.S. ____, 136 S.Ct. 1899, 195 L.Ed.2d 99 and *Caperton v. A.T. Massey Coal Co.* (2009) 556 U.S. 868,

129 S.Ct. 2252, 173 L.Ed.2d 1208.

This case involves the relationship between the district court judge, R. Gary Klausner and defendant Frederick Bennett. The latter represented the former multiple times in Judge Klausner's prior job, and it appears Judge Klausner hired Bennett in this position. *See* Motions for Recusal, Dock. Nos. 8, 13, 28. Judge Klausner refused to recuse and refused to disclose anything about this relationship. *See* Dock. Nos. 30, 19. A motion to recuse was denied by a different district court judge on the grounds, *inter alia,* that insufficient evidence was presented abot the relationship. Dock. No. 12.

The action was dismissed by Judge Klausner for failure to serve any defendant. Dock. Nos 22, 27. Motions to vacate the dismissal and the subsequent dismissal judgment, and for recusal were filed. Dock. Nos. 23, 28. The trial court denied the motion to vacate the dismissal order, but entered judgment of dismissal. Dock. Nos. 26, 27. A timely appeal of the dismissal judgment and orders denying the motion to vacate the order of dismissal and the motion to vacate the judgment of dismissal was filed. Docket No. 31.

The same issue of a prior attorney-client relationship between defendant Bennett and a judge arises in respect of Circuit Judge Nguyen. She was a judge on the Los Angeles County Superior Court from 2002 to 2009, when Bennett served as "Court counsel", frequently acting as the attorney for individual judges.

This motion for disqualification arises from Justice Nguyen's relationship with defendant Bennett and the still ongoing fallout of disgraced former Chief Judge of the Ninth Circuit Alex Kozinski's efforts to turn his chambers into a Pasadena branch of the Pussycat Theater.

II. THE LONG-RUNNING HISTORY OF JUDICIAL RETALIATION RELATED TO THE DISCLOSURE OF CIRCUIT JUDGE KOZINSKI'S USE USE OF PORNOGRAPHY AND SEXUAL HARASSMENT

As set forth in the attached declaration and exhibits, public information would case a reasonable person to believe that all but twelve of the Circuit Judges in this Court were aware that Circuit Judge Alex Kozinski distributed pornography for his own pleasure and

as a tool of sexual harassment; protected Kozinski when his behavior was questioned by L. Ralph Mecham, former head of the United States Administrative Office of the Courts; actively thwarted investigation of Judge Kozinski by refusing to follow Chief Justice Roberts' order to transfer Sanai's judicial misconduct complaint against Kozinski and others relating to this matter to the Third Circuit investigating committee; assigned the complaints to Kozinski's best friend on the Court, the late Judge Reinhardt; and retaliated against Sanai by censuring him and unsuccessfully seeking his disbarment. *See* Decl. ¶¶2 *et seq.*

III. ANY REASONABLE PERSON WOULD BELIEVE THAT CROSSING OR OFFENDING AN APPELLATE JUDGE WOULD IMPAIR THE TRIBUNAL'S IMPARTIALITY

The efforts to ignite proceedings to disbar Sanai were initially unsuccessful, but after repeated pressure by Kozinski's acolyte, Cathy Catterson, the Office of Chief Trial Counsel filed charges, and the State Bar Court held a trial. The result? Sanai was exonerated on all but one charge, and that charge is going to trial next year. Decl.¶¶31-5. In

particular, after repeatedly urging the Office of Chief Trial Counsel to disbar Sanai, the Judicial Council refused to cooperate with the prosecution of the charge, and activively fought subpoenas; the Judicial Council refused to even provide copies of the judicial misconduct complaint filed by Sanai.

The result was that the charges that Catterson brought were dismissed in 2015 with a finding that Sanai's judicial misconduct complaints, to the extent they could be determined from public records, were entirely justified and proper. Decl. ¶33. However, the bar proceedings instigated by Catterson at the direction of the judicial council raised a new issue for Sanai—documents disclosed by the Bar's Trial Counsel revealed that defendant Bennett, on behalf of then Superior Court Judge Elizabeth Grimes, had filed a secret bar complaint against Sanai as agent for attorneys in his family litigation, and in that communication admitted that he was acting on behalf of Judge Grimes. Bennett, acting as Grimes' attorney, had explicitly denied that his formal, unsuccessful bar complaint against Sanai had been filed on her behalf to the Commission on Judicial Appointments in

2010, when Sanai opposed her appointment to the California Court of Appeal.

The meritoriousness of Sanai's misconduct complaints was confirmed three years later when a Washington Post national security reporter, having heard rumors about Judge Kozinski, contacted Sanai and others and published a blockbuster pair of articles showing that Kozinski had been openly sexually harassing his clerks and third parties for years, with this pornography-laded server exposed by Sanai 13 years previously a major tool. M. Zapotosky, Prominent appeals court Judge Alex Kozinski accused of sexual misconduct" *The Washington Post,* Dec. 8, 2017. This exposure had four major consequences.

First, Judge Kozinski resigned in disgrace. Second, Judge Kozinski's former clerk and daughter in law, Leslie Hakala, was the subject of direct retaliation by Kozinski after he resigned through Cicuit Judge Reinhardt and Ikuta. Decl. ¶37. Ms. Hakala was married to Judge Kozinski's eldest son Yale, and she was a long-time employee of the SEC in Los Angeles. Approximately four years ago she obtained a

coveted partnership at K&L Gates; approximately three years ago her marriage fell apart, and she filed for divorce from Yale Kozinski. The divorce was extremely bitter, as Ms. Hakala was the breadwinner. When the Washington Post articles came out last November, her counsel sought to subpoena Judge Kozinski to obtain information about his treatment of Ms. Hakala in the context of the legal battles. The younger Kozinski then acceded to Ms. Hakala's demands and the divorce was settled. After Hakala played the #metoo card and the divorce was finalized, several judges with personal relationship with attorneys at K&L Gates, including Judge Kozinski's close friend, the late Stephen Reinhardt, and Kozinski's former clerk Sandra Ikuta, independently told K&L Gates partners that Ms. Hakala's continued presence at the firm would injure its representation of its clients in federal court. Ms. Hakala was then fired.

Third, the federal courts assembled a working group that proposed changes to the federal ethics and judicial misconduct proceeding rules. Though these rules were heavily criticized, including by Sanai and Mr. Mecham, they were passed.

Fourth, inspired by the working group, research attorneys within the California Court of Appeal issues an internal petition to take similar steps within the California Court of Appeal. *See* Carter Stoddard, "Petition Sparked Johnson Investigation" *Daily Journal,* August 13, 2019 at 1. When Second Appellate District Judge Elwood Lui inquired whether this petition was directed at a particular person, the lawyer organizing the petition identified an incident in 2012 where Justice Johnson's research attorney found evidence that someone had been using her office for sex on the weekends. "Judges Get Whatever They Want, Atty Tells Misconduct Panel", *law360.com,* August 12, 2019 (quoting research attorney Katherine Wohn). Justice Lui then made further inquiries, and heard direct testimony of sexual harassment from a California Highway Patrol officer. Justice Lui sent an email setting out his finding to the entire Appellate Court by accident, which email was then leaked to the Daily Journal. This unleashed a torrent of reports about Johnson.

All of the women who had suffered from Justice Johnson's behavior kept quiet because they were afraid of judicial retaliation.

The *In Re Johnson* case demonstrates that virtually no one believed that the Commission on Judicial Performance could police the misconduct of appellate justices. The entire world has learned that attorneys working in the Second Appellate District, California Highway Patrol officers working to protect the judges, attorneys working outside the Court, and even the Justices themselves believe that there is a culture and practice of judicial retaliation for crossing or offending a justice as to which there is no protection and no remedy by any institution in California, including this Commission. This has been attested to in testimony documented in two legal journals, law360.com and the *Daily Journal. See, e.g.* Carter Stoddard, "Women describe fear of retaliation by state justice" *Daily Journal*, August 7, 2019 at 1 (describing fear of judicial retaliation); Carter Stoddard, "Women lawyers, clerks say justice made crude remarks " *Daily Journal*, August 6, 2019 at 1 ("I was concerned about retaliation"—Roberta Burnette, sole practitioner); Carter Stoddard, "CHP officer says justice propositioned her repeatedly", *Daily Journal*, August 14, 2019 at 1 ("I didn't want the retaliation"—Tatiana Sauquillo, CHP officer); ; Carter

Stoddard, "Justice paints complicated relationship with colleague", *Daily Journal*, August 8, 2019 at 1 ("Several women testified they didn't speak up about this behavior because of fear of retaliation or blow-back from the legal community"). These facts would cause any reasonable person to believe that the Ninth Circuit would not treat whistle-blowers any differently.

IV. JUDICIAL DISQUALIFICATION LAW

Judicial disqualification of circuit judges is determined on a statutory and due process standards. The statutory standard,

> Title 28 U.S.C. 455 provides in relevant part:
>
> > "(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
> > ....
> > Scienter is not an element of a violation of 455(a). The judge's lack of knowledge of a disqualifying circumstance may bear on the question of remedy, but it does not eliminate the risk that "his impartiality might reasonably be questioned" by other persons. To read 455(a) to provide that the judge must know of the disqualifying facts, requires not simply ignoring the language of the provision - which makes no mention of knowledge - but further requires concluding that the language in subsection (b)(4) - which expressly provides that the judge must know of his or her

> interest - is extraneous. A careful reading of the respective subsections makes clear that Congress intended to require knowledge under subsection (b)(4) and not to require knowledge under subsection (a).

Liljeberg v. Health Svcs. Acq. Corp., 486 U.S. 847, 858-9 (1988)

The due process standard is whether an observor, knowing the publicly available facts, would find that there is a dangerous risk of an absence of impartiality. *Williams, supra*; *Caperton, supra.* Under *Williams,* disqualification in an appellate court is infectious; one disqualified judge or justice who sits on the court requires reversal of any rulings. There is no requirement that disqualification be proved by admissible evidence. *See, e.g. Caperton* (relying on hearsay records).

The facts of both the Kozinski case and Johnson case show that any reasonable person would doubt the impartiality of an appellate tribunal where the litigant or lawyer has offended a member of the tribunal by validly accused a member of misconduct.

The record in this Court's handling of Sanai's complaints against Kozinski show direct retaliation—Sanai was censured for, *inter alia,* validly accusing members of the Ninth Circuit Judicial Council of covering up for Kozinski due to their desire to keep his sexual

harassment out of the press. The fact that the Judicial Council demanded that a bar proceeding be held against Sanai, but refused to show the entirely accurate accusations in his misconduct complaint, demonstrated that the censure order and subsequent efforts before the Bar was frivolous, harassing conduct to punish whistle-blowing.

Most of the victims and witnesses to Judge Kozinski's conduct kept quiet until after he was exposed; many still fear retaliation by his friends on the Ninth Circuit and the Judicial Council. *See* M. Zapatosky, "Nine more women say judge subjected them to inappropriate behavior, including four who say he touched or kissed them," *The Washington Post,* December 15, 2017 ("Many of Kozinski's accusers have talked only on the condition that their names and other identifying information not be published, out of fear that he might retaliate against them or the institutions for which they work.") Even after Kozinski resigned they decline to come forward and with good reason. Kozinski, through his friends on the Court such as Circuit Judges Ikuta, Bea, Schroeder and McKeown, still has the power to

destroy people's careers, as he demonstrated with his former daughter-in-law. *See* Decl ¶37.

V. ANALYSIS OF DISQUALIFICATION

Disqualification of the following judges is required because they have been publicly identified as friends of Judge Kozinski or were his clerks: Schroder, O'Scannlain, McKeown, Paez, Fletcher, Bybee, Bea, Ikuta and Watford. Decl. ¶39.

Disqualification of the following Circuit Judges is required as they served on the Judicial Council from 1999 to date, and were aware (or a reasonably person would conclude they were aware) of Judge Kozinski's pornography issues, and later, sexual harassment, and either did nothing or actively refused to authorize investigations. Thomas, Berzon, Wallace, Schroeder, Canby, Kleinfeld, Tashima, Graber, McKeown, Fletcher, Fisher, Gould Paez, Rawlinson, Clifton, Bybee, Callahan, M. D. Smith, N.R. Smith, Murguia, and Christen. Decl.¶40.

Disqualification of the following judges is required because they had chambers in Pasadena and had been informed (or a

reasonable person would believe they had to have been informed) by their clerks of the pornography distribution that Kozinski engaged in within the Court. Goodwin, Nelson, Fernandez, Tashima, Wardlaw, Fisher, Paez, Ikuta, Nguyen and Watford. Decl.¶41.

Disqualification of the following judges is required because they were directly involved in retaliation against Appellant or Leslie Hakala and in covering up Kozinski's misconduct after hisfirst judicial misconduct complaint. Thomas, Schroeder, Berzon, Gould, McKeown, Tallman, and Rawlinson. Decl.¶42.

Disqualification of the following judges is required because they were subjects of valid judicial misconduct complaints which were wrongfully dismissed in order to cover up the full extent of Judge Kozinski's misconduct. Thomas, Berzon, Schroeder, Fernandez, Graber, McKeown, Fletcher, Fisher, Tallman and Rawlinson. Decl.¶43.

The following sui generis grounds for disqualification are as follows: As to Circuit Judge McKeown, she was the subject of

direct criticism by Appellant and Mr. Mecham in the production of the inadequate working group rule revisions. Judge Tallman because of his personal relationship with Appellant and his family. Decl.¶44. As discussed above, Judge Nguyen served on the Los Angeles County Superior Court and had some kind of professional and possibly personal relationship with Defendant Bennett. A chart is attached at the end of the declaration to assist in figuring out the specific reasons for disqualification.

V. DISCLOSURE IS REQUIRED FOR THOSE CIRCUIT JUDGES FOR WHICH DISQUALIFICATION IS NOT REQUESTED.

Sanai has not identified reasons to disqualify Circuit Judges Farris, Leavey, Trott, Hawkins, Silverman, Owens, Friedland, R.D. Nelson, Miller, Bade and Bress or Bennett; however, Circuit Judge Bennett must disclose if he is related to Frederick Bennett. If any judge believes that disqualification is not called for or the facts asserted are wrong, such judge should file a statement as to the true facts and answer the questions set forth above as to the judge's relationship with

Kozinski and his prior misconduct, Frederick Bennett, or in the case of Judge Nguyen her relationship with Bennett.

Other circuit have recognized a duty to on the record information which the parties or lawyers might consider relevant to the question of judicial disqualification.

> We believe instead that litigants (and, of course, their attorneys) should assume the impartiality of the presiding judge, rather than pore through the judge's private affairs and financial matters. Further, judges have an ethical duty to "disclose on the record information which the judge believes the parties or their lawyers might consider relevant to the question of disqualification." *Porter v. Singletary,* 49 F.3d 1483, 1489 (11th Cir. 1995). . . . [The judge] possibly did not consider the matter sufficiently relevant to merit disclosure, but his non-disclosure did not vest in [the parties] a duty to investigate him.

Am. Textile Mfrs. Inst., Inc. v. Limited, Inc., 190 F.3d 729, 741 (6th Cir. 1999).

The obligation to uncover conflicts and disclose them is on the jurist. *Ceats, Inc. v. Continental Airlines, Inc.,* 755 F. 3d 1356 (Fed. Cir. 2014) (magistrate judge has duty to disclose relationship with law firm under obligations analogous to 28 U.S. §455). This includes an obligation to disclose matters in the public record. *Listecki v. Official Comm. of Unsecured Creditors,* 780 F.3d 731, 750-1 (7th Cir. 2015).

VI. CONCLUSION.

The circuit judges should either recuse or provide the disclosures requested in Section I above.

Dated: October 9, 2019,

SANAIS

By:/s Cyrus Sanai
Appellant

DECLARATION OF CYRUS SANAI

1. I am an attorney admitted in California and to this Court. I am the Appellant in this lawsuit. The following matters are from personal knowledge or are made based on information disclosed to me by persons with personal knowledge, including L. Ralph Mecham and federal court clerks and employees who have spoken to me.

2. The Ninth Circuit was aware no later than 1998 that it had a significant and ever growing problem involving employees of the federal judiciary using government-owned computers to download pornography. A true and correct copy of G. Walters, Memorandum of Circuit Executive, April 23, 1998, is attached hereto as Exhibit 1. The heaviest user of pornography for browsing purposes was Circuit Judge Alex Kozinski. When the United States Administrative Office of the Courts, and the former circuit executive Greg Walters, proposed firewalls and blocking software, Kozinski opposed it. The Judicial Conference took responsibility for this program and implemented a monitoring system that showed significant and increasing downloading of music and video

files, some of which the late Judge Edwin Nelson believed included child pornography.

3. In 2001, the monitoring system was disabled unilaterally in San Francisco. Who did this is a matter of dispute. L. Ralph Mecham told me, and publicly accused Judge Kozinski, of taking this action personally and suggests that this constituted criminal activity. A true and correct copy of his accusation is attached hereto as Exhibit 2. The late Judge Nelson ascribed it to the Ninth Circuit's executive committee acting unilaterally. Recently Judge Sidney Thomas claimed in an article that the entire Ninth Circuit Judicial Council unanimously approved the action. Whatever the case, it appears clear that Judge Kozinski was the moving force behind this action. While I had no personal knowledge of the circumstances behind the disabling of this software, Mr. Mecham's direct knowledge of this issue suggests that he is telling the truth. Even if the Ninth Circuit's Judicial Council or Executive Committee did approve what Judge Kozinski did, it is undisputed that the 11th Circuit and 10th Circuit had no idea this was being done; more important, if the motivation of the action was to allow

de facto unfettered access to pornography by crippling the monitoring system, then the action was wrongful no matter how many judges approved it.

4. Kozinski was losing the war, and directly attacked Mecham in print in the Wall Street Journal. See A. Kozinski, Privacy on Trial, *Wall Street Journal,* September 21, 2001, a true and correct copy of which is attached hereto as Exhibit 3. In that article, Judge Kozinski represented to the world the following:

> The policy Judge Nelson seeks to defend as benign and innocuous would radically transform how the federal courts operate. At the heart of the policy is a warning–very much like that given to federal prisoners–that every employee must surrender privacy as a condition of using common office equipment. Like prisoners, judicial employees must acknowledge that, by using this equipment, their "consent to monitoring and recording is implied with or without cause." Judicial opinions, memoranda to colleagues, phone calls to your proctologist, faxes to your bank, e-mails to your law clerks, prescriptions you fill online–you must agree that bureaucrats are entitled to monitor and record them all.
>
> This is not how the federal judiciary conducts its business. For us, confidentiality is inviolable. No one else–not even a higher court–has access to internal case communications, drafts or votes. Like most judges, I had assumed that keeping case deliberations confidential was a bedrock principle of our judicial system. But under the proposed policy, every federal judge will have to agree that

> court communications can be monitored and recorded, if some court administrator thinks he has a good enough reason for doing so.
>
> Another one of our bedrock principles has been trust in our employees. I take pride in saying that we have the finest work force of any organization in the country; our employees show loyalty and dedication seldom seen in private enterprise, much less in a government agency. It is with their help–and only because of their help–that we are able to keep abreast of crushing caseloads that at times threaten to overwhelm us. But loyalty and dedication wilt in the face of mistrust. The proposed policy tells our 30,000 dedicated employees that we trust them so little that we must monitor all their communications just to make sure they are not wasting their work day cruising the Internet.
>
> How did we get to the point of even considering such a draconian policy? Is there evidence that judicial employees massively abuse Internet access? Judge Nelson's memo suggests there is, but if you read the fine print you will see that this is not the case.
>
> Even accepting the dubious worst-case statistics, only about 3% to 7% of Internet traffic is non-work related.

5. Kozinski's statements were misleading, and the Judicial Council knew it. The problem that the Ninth Ciruit was facing was not pornography viewed by employees on their own, it was Kozinski's own bizarre sexual fetishes. However, none of the Judicial Council at the time stepped forward to correct Judge Kozinski's false statements.

6. While Kozinski succeeded in keeping open access to pornography,

he soon realized that there was no way to stop internal tracking of his access to pornography. Kozinski utilized pornography for three purposes. First, his sexual titillation. Second, he enjoyed using it as a tool to harass women. Third it was a way of testing women's limits to his sexual approaches.

7. From at least 1998, the Ninth Circuit Judicial Council was aware, from information provided to it by Greg Walters, that Kozinski was the heaviest user of pornography. In addition, his close friends on the bench, in particular Judges Reinhardt and Ikuta, were aware of it and had watched it with him. All of Judge Kozinski's clerks had been made to watch the pornography, and Kozinski had invited, or in some cases, as a "joke", compelled, other clerks from other chambers in Pasadena to watch pornography. All of the Circuit Judges who had chambers in Pasadena were aware from being informed by their clerks of Judge Kozinski's behavior in this regard. In addition, beginning in that time period, professors at elite law schools began receiving feedback from clerks and externs about Kozinski's predilections.

8. After 2001, Judge Kozinski, realizing that his pornography

viewing would be easily tracked by system administrators, decided on a new mechanism for viewing and distributing pornography. He set up a home server and placed his favorite, curated pornography and other materials on it, along with his public writings and other material he wanted to distribute outside the Court email system. This server, set up around 2002, made it impossible for the internet service monitoring system to determine what it was that Kozinski was accessing on his site, since all that would be reported would be accesses to Kozinski's website.

9. In 2005 I submitted an opinion piece to *The Recorder* of San Francisco concerning the ongoing controversy over citation of unpublished opinions.[1] I addressed a matter of great public interest that was about to be decided by the Judicial Conference, then-proposed (and now adopted) Federal Rule of Appellate Procedure 32.1. Judge Kozinski's testimony to Congress on this subject was cited by me as representing the view of those opposing citation of unpublished opinions, and Howard Bashman's commentary was quoted as representative of the side favoring citation. I also urged the Court to

grant more rehearings en banc to settle perceived or actual conflicts in Ninth Circuit authority, starting with the conflicts surrounding the Court's *Rooker-Feldman* precedent.

10. It was while researching Judge Kozinski's views on the subject of citation of unpublished appellate dispositions that I first came across alex.kozinski.com, specifically the directory alex.kozinski.com/articles/. There were numerous links discoverable by Google to articles in this directory, some of which had clearly been supplied by Judge Kozinski himself.

11. Four days after my article was published, the Judicial Conference decided the issue in favor of permitting citations. Judge Kozinski was quoted condemning this move by the Judicial Conference, and expressing his hope that the Supreme Court would reject it.[2]

12. Two days later, Judge Kozinski published his response to my article in *The Recorder*.[3] Judge Kozinski laid out a response to the

---

1 C. Sanai, *Taking the Kozinski Challenge,* The Recorder, September 16, 2005
2 Tony Mauro, *Cites to Unpublished Opinions Ok'd,* Legal Times, September 21, 2005
3 Alex Kozinski, *Kozinski Strikes Back,* The Recorder, September 23, 2005, a true and correct copy of which is attached as Exhibit 4.

arguments in the pending petition and a novel analysis of the Ninth Circuit's past precedent concerning the *Rooker-Feldman* doctrine.

13. Judge Kozinski's article did not address the primary subject of my article, which is the citation policy of the Ninth Circuit. It ignored my discussion of the debate between the majority and dissent over what constitutes binding precedent in the Ninth Circuit.[4] Instead, Judge Kozinski focused the first part of his article solely on refuting my contentions that there is a severe conflict in the Ninth Circuit's authority concerning the *Rooker-Feldman* doctrine. He began the second part of his article as follows:

> Despite his colorful language, Mr. Sanai's article raises no legitimate question about whether the Ninth Circuit has been derelict in following circuit or Supreme Court precedent. But the article does raise serious issues of a different sort. Mr. Sanai's article urges us to "grant en banc rehearing of the next decision, published or unpublished, which asks the court to resolve the split among *H.C.*, *Napolitano* and *Mothershed*." A petition for en banc rehearing raising this very issue crossed my desk just as Mr. Sanai's article appeared in print. The name of the case? *Sanai v. Sanai*. A mere coincidence of names? Not hardly. The petition, signed by Mr. Sanai, cites the same cases and makes the same arguments as his article — including the

[4] *See Barapind v. Enomoto,* 400 F.3d 740, 751 fn. 8 (9th Cir. 2005)(en banc)

reference to "Catch-22."

Kozinski Strikes Back, supra.

14. Judge Kozinski placed case-related documents on his personal website, www.alex.kozinski.com, and had the web version of his article link to the .pdf file of the selection of these documents on his website. Subsequently, Judge Kozinski's wife revealed that Judge Kozinski's actions was motivated not just be the Sanai litigation, but also by the exceptionally rare removal for misconduct of a well-connected Los Angeles County Superior Court Judge from a completely separate case, *Sanai v. Saltz*.[5]

15. I filed a judicial misconduct complaint against Judge Kozinski in October of 2005. The order concerning the complaint was issued on December 19, 2006, more than 14 months later.[6] It terminated the complaint on the grounds (a) that corrective action had been taken as to Judge Kozinski's publication in the Recorder, and (b) there was no evidence of any website controlled by Judge Kozinski which held such

[5] *See* Letter from Judge Kozinski's wife, Marci Tiffany, patterico.com/2008/06/16/alex-kozinskis-wife-speaks-out.

[6] *In Re Complaint of Judicial Misconduct (Kozinski),* No. 05-89098 (2006)

materials.

16. A key fact in the complaint was that Judge Kozinski had scanned in documents from the record of the case, and linked the documents to the on-line versions of his article at the website "law.com". Various .pdf scans were placed on alex.kozinski.com.[7]

17. The Recorder and law.com site makes its web-based articles available for a period of one year, then erases them. Accordingly, the Kozinski article and the link to the .pdf files he had published are no longer accessible on the site.

18. Judge Schroeder wrote that her limited inquiry "found no posting

[7] However, though the evidence of Judge Kozinski's publication of case-related materials is no longer on the law.com site, it was available on the well-known blog How Appealing, which is financed by the law.com site but run separately by Howard Bashman. Amazingly enough, after almost twenty years, the online version of the article captured by Mr. Bashman is still found at http://pda-appellateblog.blogspot.com/2005_09_01_pda-appellateblog_archive.html. The on-line version of the article has a link, "read the pdf". This link points to the link /alex.kozinski.com/judge.thibodeau.pdf. The site alex.kozinski.com itself has been rendered inaccessible; the "How Appealing" link is a proxy server snapshot that is holding an image of the original link.

of complainant's case-related information on any website maintained by the judge", a finding she could only have made without fear of immediate contradiction after the article was erased on the law.com site. She was not aware, however, that Bashman would continue the host a copy of the on-line version, including its link to Judge Kozinski's website, to this day. *See* footnote 7, *infra.*

19. Judge Schroeder's delay of more than one year caused the loss of the evidence about contents of the .pdf Kozinski put on the internet, but not the link itself, thanks to Mr. Bashman. As the chief circuit judge at the time, Judge Schroeder was charged under the Judicial Discipline Rules then in effect with evaluating a complaint and dismissing it or finding it is moot and concluding the proceeding pursuant to Section 352(b) of Title 28, or appointing a special committee to investigate the charges pursuant to Section 353 thereof. In particular Section 352(a) of Title 28 of the United States Code states that the "chief shall expeditiously review any complaint...."

20. Judge Schroeder made the explicit factual finding of "no posting of complainant's case-related information on any website maintained by the judge." This finding of fact is contrary to the truth. The online version of Judge Kozinski's article on the Recorder's website, "law.com" included a link to the site alex.kozinski.com The link was active when Complainant filed the complaint, and at least a month thereafter. Judge Schroeder's delay resulted in the elimination of that article from the law.com site proper, but not from the related but separately-managed "How Appealing" site.

21. Schroeder and the appellate members of the Judicial Council at the time were aware that Kozinski had shifted his pornography viewing to his server, and was using this pornography for his continued hazing and sexual harassment of his clerks. Judge Schroeder took these actions to give Kozinski time to take his website off-line and scrub the contents. Schroeder was aware from he communications with Kozinski about my complaint that he needed time for most of the evidence to disappear, which she willingly gave him.

22. I filed a petition to review Judge Schroeder's order, which was denied by the Judicial Council with its form order.

23. At some time near the issuance of Judge Schroeder's order in 2006, Judge Kozinski took down the website alex.kozinski.com. Sometime in 2007, Judge Kozinski concluded that it was safe to reactivate the alex.kozinski.com website, which he needed in order to resume watching pornography in his chambers and to force his clerks to watch it. He therefore brought the site back on-line and began distributing links to the portion of the site which includes his articles, including a .pdf scan of the paper version of the "Kozinski Strikes Back" article. (The paper version differs from the on-line version in one important respect—the online version included a hyperlink to case materials posted by Judge Kozinski on alex.kozinski.com/judgethibodeau, which materials have either been moved or removed, while the paper version obviously had no such link).

24. I filed a second judicial misconduct complaint in November of 2007 regarding Judge Kozinski's redistribution of "Kozinski Strikes Back". Judge Kozinski assigned the matter to Judge Schroeder, who, true to form, sat on it.

25. The more I thought about the treatment of Judge Kozinski's alex.kozinski.com site, the more puzzled I became. Why did Judge Schroeder pretend the site did not exist? Why did Judge Kozinski take the site down, then put it back up?

26. On the night before Christmas Eve, after putting my children to sleep with tales of the excitement of the next day, I decided to find out what Judge Kozinski might be distributing via alex.kozinski.com website, so he entered "alex.kozinski.com" into the Google search engine.

27. I had found the reason Judge Kozinski and the Ninth Circuit Judicial Council refused to acknowledge the existence of the

alex.kozinski.com site, I passed the information to John Roemer of the Daily Journal. His editors killed the story, but Terry Carter of the ABA Journal began working on it. When I read the article about Judge Kozinski presiding over the Ira Isaacs obscenity trial, I tipped the Los Angeles Times. The Los Angeles Times reporter Scott Glover independently accessed the site and apparently found files and documents that had been placed in the directory after I had done his downloading and thus saw documents that Complainant never saw. Judge Kozinski recused himself from the Ira Isaacs trial, leading to an ongoing battle over whether double jeopardy applied.

28. When the Los Angelest Times broke the story, Kozinski filed a misconduct complaint against himself. Justice Roberts issues an order transferring that complaint, and any future complaints releated to the same events, to the Third Circuit.

29. I filed a complaint with the Ninth Circuit, but because I had alleged additional facts pointing out what Judge Kozinski did with the

pornography—distributing in his chambers—the Judicial Council violated Justice Roberts' order and stayed my complaints by order of August 10, 2008 signed by Circuit Judges Thompson, Thomas and McKeown. For unknown reasons Judges Graber and Berzon did not participate, but they did not recuse either.

30. As we now know, the eventual opinion concerning Kozinski was a complete whitewash. Even while Kozinski was under investigation he was using his website to distribute pornography, he was utilizing it to terrorize his clerk Heidi Bond. *See* http://www.courtneymilan.com/metoo/kozinski.html. Even though Kozinski's behavior was an open secret, the only witnesses called by the Third Circuit was Kozinski himself. My submission to the investigative committee explaining how to find the access Kozinski made via his chambers computers was ignored, and the Committee never spoke to me.

31. But once Kozinski had been "cleared" the Judicial Council began

its campaign of retaliation. First it assigned investigation of my complaint to Kozinski's best friend on the Court, Stephen Reinhardt. It then then censured me and, through Cathy Catterson, began a campaign of written and verbal pressure to disbar me.

32. The initial entreaties to the bar were rejected, but the Bar's then-new Chief Trial Counsel, Jayne Kim, decided to go forward (she was later forced to resign after she and her mentor at the bar had a falling out.).

33. The orders dismissing all but one of the charges are attached as Exhibits 8 and 9. As set forth therein, the State Bar Court judge wrote that:

> In this count the State Bar alleges that between October 2008 and September 2010, Respondent "filed and maintained formal judicial complaints with the Ninth Circuit Judicial Council against approximately 19 federal judges, when such complaint were frivolous and made for improper reasons . . . . " It alleges that the filing of these complaints constituted acts of moral turpitude.

> In his motion, Respondent argues that the evidence received by this court is insufficient to establish clear and convincing evidence to support this count.
>
> The State Bar did not put in evidence the complaints actually filed by Respondent against the federal judges. In response to this court's inquiry, it was informed by the State Bar that it was unable to do so due to the Ninth Circuit's refusal to provide those complaints to the State Bar. Being unable even to read the complaints filed by Respondent, this court cannot conclude that any of those complaints were filed frivolously or constituted an act of moral turpitude. To the extent that this court is aware of the content of one of those complaints, the record shows that it was apparently justified and resulted in a formal apology by the judge and a self-administered recusal by him from the pending matter involving Respondent.

Exhibit 8 at 4.

34. In a subsequent order dismissing more charges, the State Bar Court judge wrote as follows:

> In 2010, a complaint was made to the State Bar by the Judicial Council of the Ninth Circuit regarding Respondent's purportedly frivolous complaints to it about a number of federal judges. This complaint by the Judicial Council of the Ninth Circuit subsequently formed the basis for Count 6 of the pending NDC. When the complaint was received, the State Bar opened case No. 10-0-09221 (the '10 case) and contacted Respondent about the matter. Then, after learning

that the Judicial Council of the Ninth Circuit would not release to the State Bar the actual complaints filed by Respondent against the federal judges, the State Bar decided to issue a warning letter to Respondent in November 2011, and closed the case.[7] (Ex. 1040.) That decision was explained, both orally and in writing, by the State Bar to Cathy Catterson, a representative of the Judicial Council of the Ninth Circuit, on November 8, 2011. (Ex. 1041). Thereafter, she complained of the State Bar's decision in a letter, dated January 19, 2012,
directed to the then Acting Chief Trial Counsel of the State Bar.

7 The State Bar had previously notified the Judicial Council of the Ninth Circuit in May 2011 that it would be difficult to pursue any complaint that Respondent's complaints against various federal appellate justices were frivolous without having access to the actual underlying
complaints. As stated by the State Bar at that time: "As you may be aware, to prevail in State Bar disciplinary proceedings, our office must prove by clear and convincing evidence that an attorney committed willful misconduct. Although the Judicial Council's order of September 30 2010, will certainly be a useful piece of evidence to establish that Mr. Sanai engaged in misconduct by filing frivolous misconduct complaints, it would be insufficient standing alone to prove by clear and convincing evidence that Mr. Sanai engaged in misconduct warranting discipline, especially since the order does not include any specific findings of fact but rather includes only the conclusion that Mr. Sanai abused the misconduct complaint procedure." (Ex. 1039, p. 2.)

[8]Given the State Bar's inability to provide this court with a copy of the actual complaints filed by Respondent against the federal judges, this court – as accurately predicted by the

> State Bar in May 2011 –eventually dismissed that count at trial due to the State Bar's failure to provide clear and convincing evidence that those complaints were frivolous. The evidence was not sufficient even to enable this court to identify all of the judges against whom complaints had been filed.

35. The last charge will require me to issue subpoenas to Kozinski, Catterson, and the Judicial Council. One of my defense theories focuses on the documented link between Kozinski's retaliatory conduct and *Sanai v. Saltz*, which was first revealed in a post by Kozinski's then-wife, Marcie Tiffany. Another rests on the prosecutorial misconduct of bringing the charge urged by the Judicial Council when the Office of Chief Trial Counsel predicted it would fail without evidence from the Judicial Council. The trial is set for February of 2020. The trial counsel stipulated last month on the record that the charges that were dismissed will not be subject of an appeal. Accordingly, the dismissals are final. Based on the finality, and the need to obtain the Ninth Circuit's records in the misconduct proceedings, I will be filing a lawsuit in the Northern District of California against the Judicial Council, Judge Kozinski, Ms. Catterson and others for injunctive relief, declaratory relief, and as against Kozinski and Catterson, damages. In particular, I will be requesting public release of all records regarding misconduct complaints against Kozinski and the efforts of the Judicial Council to have me disbarred.

36. The meritoriousness of my misconduct complaints was

confirmed a decade after I discovered Kozinski's pornography when a Washington Post national security reporter, having heard rumours about Judge Kozinski, contacted me and others and published a blockbuster pair of articles showing that Kozinski had been openly sexually harassing his clerks and third parties for years, with this pornography-laded server exposed by Sanai 13 years previously a major tool. This exposure had four major consequences.

37. Judge Kozinski's former clerk and daughter in law, Leslie Hakala, was the subject of direct retaliation by Kozinski after he resigned through Cicuit Judge Reinhardt and Ikuta. Ms. Hakala was married to Judge Kozinski's eldest son Yale, and she was a long-time employee of the SEC in Los Angeles. Approximately four years ago she obtained a coveted partnership at K&L Gates; approximately three years ago her marriage fell apart, and she filed for divorce from Yale Kozinski. The divorce was extremely bitter, as Ms. Hakala was the breadwinner. When the Washington Post articles came out last November, her counsel sought to subpoena Judge Kozinski to obtain information about his treatment of Ms. Hakala in the context of the legal battles. The younger Kozinski then acceded to Ms. Hakala's demands and the divorce was settled. After Hakala played the #metoo card and the divorce was finalized, several judges with personal relationship with attorneys at K&L Gates, including Judge

Kozinski's close friend, the late Stephen Reinhardt, and Kozinski's former clerk Sanda, Ikuta, independently told K&L Gates partners that Ms. Hakala's continued presence at the firm would injure its representation of its clients in federal court. Ms. Hakala was then fired.

38. Third, the federal courts assembled a working group that proposed changes to the federal ethics and judicial misconduct proceeding rules. Though these rules were heavily criticized, including by the undersigned counsel and Mr. Mecham, they were passed.

39. Disqualication of the following judges is required because they have been publicly identified as friends of Judge Kozinski or were his clerks: Schroder, O'Scannlain, McKeown, Paez, Fletcher, Bybee, Bea, Ikuta and Watford.

40. Disqualification of the following Circuit Judges is required as they served on the Judicial Council from 1999 to date, and were aware (or a reasonably person would conclude they were aware) of Judge Kozinski's pornography issues, and later, sexual harassment, and either did nothing or actively refused to authorize investigations. Thomas, Wallace, Schroeder, Canby, Kleinfeld, Tashima, Graber, McKeown, Fletcher, Fisher, Gould Paez, Rawlinson, Clifton, Bybee, Callahan, M. D. Smith, N.R.

Smith, Murguia, and Christen.

41. Disqualification of the following judges is required because according to the Court's website they had chambers in Pasadena and had been informed (or a reasonable person would believe they had to have been informed) by their clerks of the pornography distribution that Kozinski engaged in within the Court. Goodwin, Nelson, Fernandez, Tashima, Wardlaw, Fisher, Paez, Ikuta, Nguyen and Watford.

42. Disqualification of the following judges is required because they were directly involved in retaliation against myself or Leslie Hakala and in covering up Kozinski's misconduct after my first complaint as discussed above: Thomas, Schroeder, McKeown, Berzon, Tallman, and Rawlinson.

43. Disqualification of the following judges is required because they were subjects of my valid judicial misconduct complaints which were wrongfully dismissed in order to cover up the full extent of Judge Kozinski's misconduct. Thomas, Schroeder, Fernandez, Graber, McKeown, Fletcher, Fisher, Tallman and Rawlinson.

44. The following specific grounds for disqualification are as follows: (a) As to Circuit Judge McKeown, she was the subject of

direct criticism by myself and Mr. Mecham in the production of the inadequate working group rule revisions; (a) as to Judge Tallman because of his personal relationship with myself and my family; and as to Circuit Judge Nguyen, she was a Los Angeles County Superior Court judge from 2002 to 2009 during the time period in which Bennett represented and advised all Superior Judges, and therefore a reasonable person might doubt her impartiality in respect of any case where Bennett is a defendant.

45. The following chart summarizes the reasons for disqualification:

No.	Circuit Judge	Friend and/or Clerk of Kozinski	On Judicial Council from 1999 to date	Chambers in Pasadena with Kozinski	Participated in Retaliation or Cover-up	Subject of Misconduct Complaint	Other Reasons
1.	Sidney R. Thomas		X		X	X	
2.	Alfred T. Goodwin			X			
3.	J. Clifford Wallace		X				
4.	Mary M. Schroeder	X	X		X	X	
5.	Jerome Farris						
6.	Dorothy W. Nelson			X			
7.	William C. Canby, Jr.		X				

No.	Circuit Judge	Friend and/or Clerk of Kozinski	On Judicial Council from 1999 to date	Chambers in Pasadena with Kozinski	Participated in Retaliation or Cover-up	Subject of Misconduct Complaint	Other Reasons
8.	Diarmuid F. O'Scannlain	X					
9.	Edward Leavy						
10.	Stephen S. Trott						
11.	Ferdinand F. Fernandez			X		X	
12.	Andrew J. Kleinfeld		X				
13.	Michael Daly Hawkins						
14.	A. Wallace Tashima		X	X			
15.	Barry G. Silverman						
16.	Susan P. Graber		X			X	
17.	M. Margaret McKeown	X	X		X	X	X
18.	Kim McLane Wardlaw			X			
19.	William A. Fletcher	X	X			X	
20.	Raymond C. Fisher		X	X		X	
21.	Ronald M. Gould		X		X		

No.	Circuit Judge	Friend and/or Clerk of Kozinski	On Judicial Council from 1999 to date	Chambers in Pasadena with Kozinski	Participated in Retaliation or Cover-up	Subject of Misconduct Complaint	Other Reasons
22.	Richard A. Paez	X	X	X			
23.	Marsha S. Berzon		X		X	X	
24.	Richard C. Tallman				X	X	X
25.	Johnnie B. Rawlinson		X		X	X	
26.	Richard R. Clifton		X				
27.	Jay S. Bybee	X	X				
28.	Consuelo M. Callahan		X				
29.	Carlos T. Bea	X					
30.	Milan D. Smith, Jr.		X				
31.	Sandra S. Ikuta	X		X	X		
32.X	N. Randy Smith		X				
33.X	Mary H. Murguia		X				
34.X	Morgan Christen		X				
35.	Jacqueline H. Nguyen			X			X

No.	Circuit Judge	Friend and/or Clerk of Kozinski	On Judicial Council from 1999 to date	Chambers in Pasadena with Kozinski	Participated in Retaliation or Cover-up	Subject of Misconduct Complaint	Other Reasons
36.	Paul J. Watford	X		X			
37.	Andrew D. Hurwitz						
38.	John B. Owens						
39.	Michelle T. Friedland						
40.	Mark J. Bennett						? (unknown if related to Defendant Bennett)
41.	Ryan D. Nelson						
42.	Eric D. Miller						
43.	Bridget S. Bade						
44.	Daniel Bress						

I declare, under penalty of perjury of the law of the United States that the foregoing statements of fact are true and correct.

Dated as of October 9, 2019 in Beverly Hills, California

/s/ Cyrus Sanai

CERTIFICATE OF COMPLIANCE

I certify that the foregoing motion is double-spaced (except for quotations in excess of 49 words from legal authorities and the record) and utilizes a proportionately spaced 14-point typeface. The motion (excluding the Declaration, Exhibits, Cover, and Certificate of Compliance) comprises a total of 19 pages.

Dated: October 9, 2019

By:/s Cyrus Sanai
Appellant

EXHIBITS

EXHIBIT 1

M52

Office of the Circuit Executive

UNITED STATES COURTS FOR THE NINTH CIRCUIT

95 Seventh StreetGregory B. Walters, Circuit Executive
Post Office Box 193939Phone: (415) 556-6100
San Francisco, CA 94119-3939Fax: (415) 556-6179

---

to: Judicial Council

from: Greg Walters, *Circuit Executive*

date: April 23, 1998

re: Internet Access to Pornographic Material

Judge Kozinski's memo (attached) raises a question about the management of the Internet Project that requires your attention. In a nutshell, the question before you is whether we should continue to block access to pornographic sites on the Internet for the Judges and Staff of the Ninth Circuit.

Background of the Internet Project

At its September 1997 session, the U. S. Judicial Conference approved a judiciary-wide policy regarding access to the Internet from computers connected to the DCN. The policy requires access to the Internet be provided only through national gateway connections approved by the Administrative Office pursuant to procedures adopted by the Committee on Automation and Technology of the USJC. (See IRM bulletin 97-19, attached)

The Office of the Circuit Executive for the Ninth Circuit maintains one of these three national Internet gateways from the judiciary's internal data communications network (DCN). The Administrative Office and the Fifth Circuit maintain the other two gateways. Our office provides Internet services to approximately 10,000 users in the Eight, Ninth and Tenth circuits.

The determination of the location of the gateways was based on considerations of geography as well as personnel expertise and infrastructure at the sites.

The Internet access project was established for three purposes:

1. To provide Internet access to members of the Judiciary,
2. To provide in-bound and out-bound Internet e-mail services,

3. To provide website hosting services for court units and assist in development and implementation of such sites.

The decision to limit the number of gateways to three was made to preserve the integrity of Data Communications Network (DCN). The security of the entire judiciary's network relies on properly maintained firewalls at the gateways. The fewer access points, the better the security. Rather than allowing each court unit in the United States to provide independent access to the Internet, the USJC Committee on Automation and Technology determined that all Internet traffic should flow through one of these three sites thus dramatically reducing the potential for security intrusions. A firewall is usually a computer and software that sits between an internal network (the DCN) and the Internet, monitors all traffic and and only allows authorized traffic to traverse the firewall.

After a thorough review of the available options, the three gateways agreed upon standard hardware and software configurations. The products that were put in place were Firewall-1 and WebSense. Firewall-1 is the most widely used firewall product. It offers high-level security without decreasing the performance of the network. Firewall-1 logs every Internet transaction, both in-bound and out-bound, for security purposes. The logs are highly detailed, including date, time, Internet address of user, site accessed, and protocol used.

WebSense is a software product that prevents users on a network from accessing web sites based on an site-denial list. The site-denial list is created by selecting predefined categories determined by WebSense employees. WebSense differs from many filtering products by categorizing websites based upon an actual visit by an employee. In addition to the filtering capabilities, WebSense also offers extensive site access reports based on firewall logs.

Currently, the 9th Circuit is the only gateway with both Firewall-1 and WebSense installed and operational. The 5th Circuit is waiting for a new server before installation of WebSense. The AO has both installed, but has not implemented WebSense's blocking feature. They are now awaiting the outcome of your deliberations.

The Eight and Tenth Circuit's were contacted and both elected to leave the blocking software intact pending the results of your review.

Appropriate Usage Policies.

The Policy statement approved by the USJC in September called for each court to establish responsible usage policy statements. The language of that policy is included in Information Resources Management Bulletin (IRM 97-19) put out by the Administrative Office. The full Bulletin is attached. In says in part:

Experience in the private sector and in other government agencies has revealed four principal areas of concern associated with uncontrolled access to the Internet for employees: institutional embarrassment, misperception of authority, lost productivity, and capacity demand. When accessing the Internet from a judiciary gateway, users need to keep in mind several points: they should use discretion and avoid accessing Internet sites which may be inappropriate or reflect badly on the judiciary; those not authorized to speak on behalf of their units or the judiciary should avoid the appearance of doing so; users should exercise judgment in the time spent on the Internet to avoid an unnecessary loss of productivity or inappropriate stress on capacity.

The Ninth Circuit also requires that Internet usage policies be established by each court unit executive before access is given to their users. All of the courts within the Ninth Circuit have provided us with formal procedures with the exception of the Court of Appeals. We have been bringing their users online with the approval of the Clerk of Court. We have not required formal written policies by the unit executives of the Eight and Tenth circuits.

We developed and circulated a "model" usage policy for the consideration of the courts. Most of the Court units within the Ninth Circuit adopted this policy or some variant on it. The model policy follows:

Office of the Circuit Executive Model Policy:
"Policy for the Acceptable Use of the
Public Internet Network"

June 30, 1997

Introduction:

The following model policy for acceptable use of the public Internet network is supplied to court units so they may more easily draft a use policy that reflects local business needs. Prior to any court supplying widespread Internet access to employees via the Judiciary's Data Communications Network, it is strongly suggested that they adopt this policy, or a modified version, and make it available to all staff that will be able to access the Internet.

Policy for the Acceptable Use of the Public Internet Network

General Policy

1. Use of the public Internet network accessed via computer gateways owned, or operated on the behalf of the United States District Court for the District of XXX ("the Court") imposes certain responsibilities and obligations on Court employees and officials ("Users") and is subject to Court policies and local, state and federal laws. Acceptable use always is ethical, reflects honesty, and shows restraint in the consumption of shared computing resources. It demonstrates respect for intellectual property, ownership of information, system security mechanisms, and an individual's right to freedom from harassment and unwarranted annoyance.

2. Use of Internet services provided by the Court may be subject to monitoring for security and/or network management reasons. Users of these services are therefore advised of this potential monitoring and agree to this practice. This monitoring may include the logging of which users access what Internet resources and "sites." Users should further be advised that many external Internet sites also log who accesses their resources, and may make this information available to third parties.

3. By participating in the use of Internet systems provided by the Court, users agree to be subject to and abide by this policy for their use. Willful violation of the principles and provisions of this policy may result in disciplinary action.

Specific Provisions

1. Users will not utilize the Internet network for illegal, unlawful, or unethical purposes or to support or assist such purposes. Examples of this would be the transmission of violent, threatening, defrauding, obscene, or unlawful materials.

2. Users will not utilize Internet network equipment for partisan political purposes or commercial gain.

3. Users will not utilize the Internet systems, e-mail or messaging services to harass, intimidate or otherwise annoy another person.

4. Users will not utilize the Internet network to disrupt other users, services or equipment. Disruptions include, but are not limited to, distribution of unsolicited advertising, propagation of computer viruses, and sustained high volume network traffic which substantially hinders others in their use of the network.

5. [Local verbiage Option A]

Users will not utilize the Internet network for private, recreational,

non-public purposes.

[Local verbiage Option B]
Use of the public Internet system will be treated similarly to "local telephone calls," and staff will keep the use of the Internet system for personal or non-public purposes to a minimum. Users should exercise discretion in such use, keeping in mind that such use is monitored and traceable to the court and to the individual user.

6. Users will utilize the Internet network to access only files and data that are their own, that are publicly available, or to which they have authorized access.

7. Users will take precautions when receiving files via the Internet to protect Court computer systems from computer viruses. Files received from the Internet should be scanned for viruses using court-approved virus scanning software, as defined by Court policy.

8. Users will refrain from monopolizing systems, overloading networks with excessive data, or otherwise disrupting the network systems for use by others.

Blocking Software.

The Administrative Office has established a policy for their own employees that prohibits any unofficial use of the Internet. They actively track the Internet activity of all of their employees and have fired at least two employees for accessing pornographic material. An AO employee who is on the Internet for official business and inadvertently accesses a pornographic site must file a form explaining the event. According to the AO, many of the executive branch agencies have adopted this same "tracking" approach.

An alternative to tracking is to "block" access to selected sites. There is a variety of software packages that accomplis this. Some of them search the web using keywords and automatically block any site that includes an objectionable word. The WebSense software that was selected by all three national sites uses a different approach. They have employees who review all new sites and classify them.

WebSense serves a dual purpose. It provides the capacity to block sites based upon category and has an add-on product that simplifies report generation from the firewall logs. The categories that WebSense uses are determined by a visit by a WebSense employee. This method is much more effective than other products that use a keyword, or imbedded rating approach.

We are using WebSense to block three categories of sites: pornographic, adult, and

sexuality/lifestyles. We implemented the blocking for several reasons:

1. There is no reason that a user, during the normal course of business, needs access to these sites.
2. Visits by judicial employees to these sites could result in embarrassment to the judiciary. All visits to websites are logged at the firewall for security purposes, but they are also logged at the site that is visited. Marketing agencies often use these figures to determine site popularity and advertising rates. Since every visit to a site by a user from the judiciary results in a **uscourts.gov** name resolution in their log, this can cause potential embarrassment for the judiciary.

3.Potential for sexual harassment claims due to employees "posting" sexually explicit images on their screen while viewing and/or downloading pictures from these sites. (See attached article)

Judge Kozinski's memo alerted us to an issue of which we were previously unaware: gay, lesbian and bisexual sites are restricted by our current category restrictions. WebSense has grouped all gay and lesbian sites into the sexuality/lifestyles category. The "pornographic" category is only for heterosexual sex according to WebSense. Unfortunately, if we allow the sexuality/lifestyles category, we will not only allow gay and lesbian bookstores, but also gay and lesbian sex, bestiality, sado/masochism, fetishes, and more. We have contacted WebSense about this unusual classification.
In the meantime, we have the ability to allow sites that are inappropriately blocked. When a user encounters a blocked site that he or she would like access to, he or she can write or call and ask that the blocking for that site be removed.

Considerations for The Judicial Council.

There are a variety of alternatives for you to consider. At one extreme, we could allow absolute unfettered access to the Internet for all employees. At the other extreme, we could establish a complete circuit-wide prohibition against personal use of the Internet similar to the policy in place for employees of the Administrative Office. There are many alternatives between those extremes. The software is fairly flexible and we are not overly limited by technical considerations.

What follows are five variants for you to consider.

1. **No Tracking/No Blocking**. Allow complete access to all sites on the Internet. If we remove our blocking software at the gateway level, all 10,000 users in the three circuits would have full access to all Internet sites regardless of content. The potential for misuse and embarrassment to the judiciary is high. It should be kept in mind that all Internet traffic would

still be logged. Keeping a log at the firewall is essential for maintaining the security of the DCN. The OCE will not scan the logs and look for inappropriate usage. Additionally it should be noted that all of the commercial sites maintain a log of visitors for their site that can trace the visit back to the actual machine that was used to access the site. A visit to any site from a computer coming through this firewall will leave an electronic trail that concludes with...."uscourts.gov".

I asked the staff to run a list of the sites that were visited in the month before we put the blocking software in place. As you can see from this partial listing, there is ample opportunity for institutional embarrassment.

2. **Local Blocking.** Allow complete access through the gateway, but require courts to purchase their own "mini-firewall" to control users access. CAC District court has implemented one of these products, BorderManager from Novell, for this purpose. The advantage of this option is that it is highly flexible and each court unit could tailor their own policies. Unfortunately, this is very costly software. WebSense costs between $2,500 and $10,000 per location plus an on-going maintenance amount. Each location is defined as each place with an independent computer network. In this circuit alone we would be required to purchase and maintain around 50 or 60 copies of the software. This would be an expensive and complex undertaking that would diminish the security and integrity of the Data Communications Network. It would cost a minimum of $125,000 to implement this solution in just the Ninth Circuit.

3. **Full Access to Some Users.** The blocking software that we are using would allow us to offer complete access to a few users based on IP address or network segment. In other words, we could provide Judge Kozinski's chambers with complete access and continue to block others. This solution is possible if there are only a handful of sites that are given this level of access. If there were more than a very few of these types of exceptions, it would quickly overwhelm our staff and the other over local systems staff.

4. **District Wide Access.** A viable option is to allow each district and the Court of Appeals to make their own determination as to whether they want to block access to these sites or not. While it is technically possible to allow tailored access to units smaller than the entire district, it would be an administrative nightmare to try and manage such a system. In the Ninth Circuit alone there are 15 districts plus the Court of Appeals. Between the Eight, Ninth and Tenth circuits there are 33 districts and Three Courts of Appeal. If we were to tailor access at the unit level, we would be maintaining sixty unique polices in the Ninth Circuit and up to 125 or so between the three circuits. Exercising this option at anything less than a district wide level is not feasible with current staff due to the extreme administrative workload. The only way to successfully implement this policy would be to receive funding from the AO for a dedicated position.

5. **Current Implementation.** A final alternative would be to continue blocking access to pornographic materials for all users as we currently do. In other words we would leave the

blocking software in tact. If we were to pursue this approach, it would make sense to approach WebSense to see if they could sever the relationship between the gay and lesbian sites and the pornographic sites. This is the safest, cheapest alternative.

STAFF RECOMMENDATION

I recommend that you adopt the following policy governing access to the Internet for all court units within the Ninth:

1. Continue to block access to pornographic sites at the firewall as the default setting.

2. Allow each district (not court unit) and the Court of Appeals to request that the blocking be turned off for the users under their control.

The advantages of this hybrid approach are several:

Each district could elect to have access blocked at the firewall or to offered unlimited access to their users.

Each district could elect to purchase and maintain their own software, but wouldn't be required to.

This system would be fairly easy to maintain at the circuit level since all decisions would have to be made at the district-wide level. All of the court units within a district would have the same policy at the firewall level, either blocking on or blocking off.

M60

OFFICE OF THE CIRCUIT EXECUTIVE

UNITED STATES COURTS FOR THE NINTH CIRCUIT

95 SEVENTH STREET
POST OFFICE BOX 193939
SAN FRANCISCO, CA 94119-3939

GREGORY B. WALTERS, CIRCUIT EXECUTIVE
PHONE: (415) 556-6100
FAX: (415) 556-6179

TO: Hon. Proctor Hug, *Chief Judge*
Greg Walters, *Circuit Executive*

FROM: Matthew Long, *Assistant Circuit Executive for Automation and Technology*

DATE: April 28, 1998

RE: Adult Site Access by Judicial Employees

We have finished processing the firewall logs for the month of February. The actual dates of the logs analyzed are from February 4 to March 3, 1998. This twenty-eight day period gives us a sampling of Internet usage by users from the 8th, 9th, and 10th circuits in the month prior to the installation of WebSense.

We used two methods to try to extract adult site accesses through our firewall. First we used a keyword search on adult-oriented themes to locate domain names that corresponded to sex sites, e.g. sex, porn, adult, etc. Once we compiled a large list of names, we traced the viewing habits of individual users who had visited these sites. This allowed us to augment our database and produce more accurate numbers.

Of the 28,000 different sites accessed in February, approximately one-third did not resolve to a name, thus making it difficult to get exact figures for adult site accesses. For example, a site would be listed in the log as 207.204.211.25 instead of www.sex.com. Many adult sites deliberately do not resolve, either to save money on name registration or to maintain anonymity. I believe our figures to be a good estimate, but could be as much as 10-25% below the actual numbers.

Here are the rounded figures for Internet access through our gateway:

Total web accesses*:	2,500,000
Total sites accessed:	28,000
Total adult site accesses:	**90,000**
Total adult sites accessed:	1,100
Adult site access percentage:	3.6%
Adult site percentage:	3.9%

*Every time a user clicks on a link on a webpage, it counts as a web access hit. For

example, if a user visited www.usatoday.com clicked on a story link and then clicked the back button, our log would show three web accesses and one site accessed (usatoday).

I've attached a partial listing of some of the adult sites accessed through our firewall. The list contains some very graphic names, but should be a good sample of the types of sites that were accessed. We have not verified that all of these are adult sites; therefore, there may be several on the list that are not. The full 28-page listing is available if you need it for the council meeting.

Attach.

Adult Sites Accessed through the Ninth Circuit Gateway

February 4 to March 3, 1998

Partial Listing

CONFIDENTIAL

1adultvideo.com
1porn.com
69oralsex.com
adamsxxx.com
adult7.com
adultad.com
adultcentral.com
adulthosting.com
algol.cybererotica.com
allteens.com
amateurfresh.com
amateurindex.com
amazon-cum.com
asiannudes.com
assland.com
babe.swedish-erotica.com
babes.sci.kun.nl
bestgirl.com
bigchicks.com
bitemypussy.com
blondes.nudepictures.com
butts-n-sluts.com
cam.digitalerotica.com
canadianschoolgirls.com
comfortablynude.com
ctc.sexcenterfolds.com
cubby.shaven-girls.com
cumberland.premiernet.net
cyber.playboy.com
cyberteens.www.conxion.com
electraporn.com
erotic-x.com
eroticnet.babenet.com
famousbabes.com
faraway.cybererotica.com
fetishtime.com
foot-fetish.com
freehardcorelive.com
gay.adultclubs.com
gayteenboys.com
girls2die4.com

girlsinlingerie.com
girltown.com
girltown.tierranet.com
gorgeousgirls.com
hardcore.sexmonkey.com
hardcoresex.com
hot-live-sex.com
hotcunt.hotcunt.com
hotporno.com
hotsexlinks.com
hotteen.com
hotteensex.com
karasxxx.com
kristysteenpalace.com
kristysteens.com
lynx2.sexbooth.com
mail.amateurdirectory.com
mail.cum2oasis.com
mail.freebie-sex.com
naked4u.com
nude-celebs.com
nudeadultpics.com
nudeceleboutpost.com
nudeeroticsex.com
nudehollywood.com
nudes.com
one.123adult.com
orientalpussy.com
pg.pornoground.com
phils-porno-parlor.com
pics.callgirls-xxx.com
porndirectory.com
porndog.mco.net
pornrock.com
pussybabe.com
pussyland.com
pussyteens.com
realhardcore.com
s2.nastyfetish.com
sexdragon.com
sexpictures.com
sexploitation.com
sexscape.com
sexsluts.com
sexwars.com

CONFIDENTIAL

sexworlds.com
showgirl.net
sinfulteens.com
sixchicks.com
sluttyamateurs.com
sucksex.com
supermodels.nudepictures.com
superpics.adulthosting.com
technoteen.com
teenbutts.com
teensexworld.com
teensexx.com
teentwat.teentwat.com
teenvirgins.com
time4sex.com
traxxx1.focus.de
ultrafreexxx.com
ultrahardcore.com
universaladultpass.com
vh1.adultlinks.com
vividsex.com
vlad.adultorigin.com
vlad2.absolutexxx.com
voiceofwomen.com
w3.purehardcore.com
west.sucksex.com
wetfetish.com
ww1.voyeurweb.com
www.2adult.com
www.3sex.com
www.4adultsonly.com
www.aahsex.com
www.adult2.com
www.adultbytes.com
www.adultlink.com
www.adultphotos.com
www.adults-online.com
www.adultsights.com
www.adultswap.com
www.advancingwomen.com
www.all-americangirl.com
www.allerotica.com
www.altsex.org
www.amateur-x-pics.com
www.amateur-x.com

CONFIDENTIAL

www.amateurexhibitionists.com
www.amateurmagazine.com
www.amateursonline.com
www.amateursonly.com
www.amateursweb.com
www.analbabes.com
www.asexycafe.com
www.asian-teens.com
www.asianxxxpics.com
www.atomicpussy.com
www.awsomebabes.com
www.axxxess.com
www.babes4free.com
www.bigsextoys.com
www.bisexualbabes.com
www.celebritybabes.com
www.chatgirls.com
www.clubsex.net
www.cockorama.com
www.cocktailbar.com
www.collegenudes.com
www.cruisingforsex.com
www.cumasyouare.com
www.cumorahcu.com
www.cumpany.com
www.cyberporn.inter.net
www.cyberporndirectory.com
www.dailyxxx.com
www.delicious-pussy.com
www.dormgirls.com
www.dreamgirls.com
www.erotica.co.uk
www.eroticpix.inter.net
www.eroticworld.net
www.euroflixxx.com
www.fastporn.com
www.finegirls.com
www.free-xxx-pictures.com
www.free-xxx-porn.com
www.free-xxxpics.com
www.freegirlsex.com
www.gayhardcore.com
www.girl.co.jp
www.girlies.cz
www.girlsagent.com

CONFIDENTIAL

www.girlswithgirls.com
www.groupsexdogs.com
www.hardcoreclub.com
www.hollywoodnudes.com
www.hollywoodteens.com
www.hot4sex.com
www.hottestwomen.com
www.hotwiredxxx.com
www.hotxxxteens.com
www.imengonude.com
www.internet-xxxmodels.com
www.intersex.inter.net
www.jessicasteen.com
www.lasvegassex.com
www.lensexpress.com
www.leo-xxx.com
www.littleteen.com
www.maturebabes.com
www.naked-celebs.com
www.nastychat.com
www.nastysex.com
www.net-erotica.com
www.net2sex.com
www.onlyxxx.com
www.playgirlmag.com
www.playsex.com
www.porn-king.com
www.pornado.com
www.porndorm.com
www.pornet.com
www.pornexchange.com
www.pornocopia.net
www.pornojapan.com
www.pornotimes.com
www.pornplus.com
www.pornstories.com
www.pornusa.com
www.powerotic.com
www.private.sex.se
www.purehardcore.com
www.pussylink.com
www.pussyvision.com
www.realamateur.com
www.realsex.com
www.ripvoyeur.com.hk

GOVERNMENT EXHIBIT

www.schoolgirlz.com
www.sex-crawler.com
www.sex.se
www.sex4ya.com
www.sexcabin.com
www.sexcat.com
www.sexclubxxx.com
www.sexdv8.com
www.sexe.com
www.sexelsewhere.com
www.sexfiction.com
www.sexfinder.com
www.sexfreebies.com
www.sexgalleries.com
www.sexgalore.com
www.sexhigh.com
www.sexhungryjoes.com
www.sexinabox.com
www.sexinc.com
www.sexlink.net
www.sexodus.com
www.sexplanet.com
www.sexshopper.com
www.sexsounds.com
www.sexsource.com
www.sexswap.com
www.sextv.com
www.sexvote.com
www.sexybloomers.com
www.sexyfriends.com
www.sexyinternet.com
www.sexypics.com
www.sexysin.com
www.sexysites.com
www.showgirl.com
www.smokingpussy.com
www.smutcity.com
www.smutland.com
www.smutpix.inter.net
www.sororitypussy.com
www.spice-girls.co.uk
www.tecumseh.com
www.teen-porn-club.com
www.teenage-tarts.com
www.teenchallenge.com

CONFIDENTIAL

www.teenhideout.com
www.teenie-sex.com
www.teennympho.com
www.teenpanties.inter.net
www.teens-n-colors.com
www.teenstar.com
www.teenstories.com
www.teeny.com
www.thesluts.com
www.totallysex.com
www.uk.playboy.com
www.ukhardcore.com
www.ultimatehardcore.com
www.voyeurplay.inter.net
www.voyeurstories.com
www.voyeurweb.com
www.xtremehardcore.com
www.xxx-18.com
www.xxx4u.net
www.xxxcat.com
www.xxxcounter.com
www.xxxman.com
www.xxxreferral.com
www.xxxstories.com
www.xxxstuff.com
www.xxxvisions.com
www.youngerotica.com
www.zoosex.com
www1.playboy.com
www2.adultsights.com
www2.amateurfresh.com
www2.playboy.com
www4.playboy.com
www7.hollywoodhardcore.com
www8.girlsofrussia.com
wwwserv.weirdsex.com
xxx-pics.net
xxx.com
xxxads.adulthosting.com
xxxempire.com
xxxlinkexchange.com
xxxnewspics.com
xxxo.com
xxxvids.com
xxxxxx.com

CONFIDENTIAL

EXHIBIT 2

October 12, 2007

Judge Ralph K. Winter Jr., Chairman
Judicial Conference Committee on Judicial Conduct and Disability
US Court House, 141 Church Street
New Haven, CT 06510

Dear Judge Winter,

RE: Public Comment on Proposed Rules Governing Judicial Conduct and Disability Proceedings.

TEST CASE TO ASSESS, IN PART, THE ADEQUACY OF THE PROPOSED RULES

The following factual case is offered as a possible test of the adequacy of the proposed new rules. Although the Breyer Committee discussed in general several instances when Circuit Councils did not deal appropriately or adequately with complaints filed against a few Federal Judges, it is not clear if the Committee considered this case. When given the facts which were publicly known, lawyers at the General Services Administration (GSA) and the Administrative Office of the United Stated Courts (AO) and even Chief Justice William H. Rehnquist agreed that at least one felony probably had been committed by a United States Circuit Judge acting in concert with a Circuit Executive. The facts were known by the Circuit Chief Judge, the Circuit Council and indeed by the Judicial Conference of the United States. Yet, no complaint was filed against the Judge by the Circuit Chief Judge or by any member of the Circuit Council or the Judicial Conference. Moreover, although probably outside the purview of your Committee, to my knowledge, no disciplinary action was taken against the Circuit Executive by the Circuit Chief Judge or the Circuit Council, which clearly did have jurisdiction.

It is my strongly held view that this total absence of action is the worst example of failure by those responsible for disciplining Judges that I witnessed during my 21 years as AO Director.

I present this case so that your Committee can determine if disciplinary action was mandated against the offending Judge under the old Rules and Statutes. If not, do the new Rules close what is thus a gaping loophole in the old Rules and mandate disciplinary action, and by whom?

Commendation for Winter and Breyer Committees

First let me commend you and your committee for the draft rules that you have proposed to amend current Judicial Conduct and Disability Rules. My admiration extends also to the report to the Chief Justice by the Judicial Conduct and Disability Act Study Committee entitled "Implementation of the Judicial Conduct and Disability Act of 1980," Chaired by Justice Stephen Breyer with 5 Federal Judges also serving. Taken together, these two reports will do much to maintain and increase public and Congressional confidence in the Federal Judges as your new Rules are applied by the Circuit Councils in considering complaints of misconduct filed against Federal Judges.

As you know, over the years some leaders in Congress and Academe have suggested that in some instances the Judges on Circuit Councils have not been willing to discipline appropriately their colleagues when complaints were filed. Moreover, some Circuit Chief Judges have failed to file complaints against their colleagues even though the facts apparently justified such action.

As you know, I served as Director of the Administrative Office of the United States Courts (AO) for 21 years. Early in my service Representative Robert Kastenmeyer (D. Wisc.) Chaired the House Judiciary Committee. He believed that Circuit Councils may not have been carrying out their duties in some instances when complaints were filed against Federal Judges House hearings were held and although the Judiciary was urged to improve, no legislative action was taken at that time. Then about three years prior to my 2006 retirement, major concerns were expressed by several current Congressional members alleging lack of objectivity by Circuit Councils in handling some complaints particularly by Representative James Sensenbrenner (R. Wisc.) then

Chairman of the House Judiciary Committee. Allegations were made that there was an "old boy network" of Judges who protected and would not act against their colleagues. He was sharply critical of what he perceived to be the failure of certain Circuit Councils to deal appropriately or adequately with complaints against a few Judges. He expressed these views with a high degree of passion both publicly and in two personal appearances before the Judicial Conference of the United States. Of course I had kept Chief Justice William Rehnquist informed of his criticisms well before he presided over the Conference services meeting where Sensenbrenner spoke. Then I met with the Chief Justice after the second Sensenbrenner "lecture" and we agreed that he should visit Sensenbrenner at his House office, a most unusual thing for any Chief Justice to do. But the Chief agreed that this issue was sufficiently important to do so. After talking with Sensenbrenner he told him that he planned to appoint a special committee of Judges to study the issue, to be chaired by Justice Stephen Breyer.

At least two very important results came from that process; first, the Judiciary bought some time because had there been no such actions, Chairman Sensenbrenner made it very clear that he was going to impose an Inspector General on the Judiciary to make sure that the Judges behaved themselves. Second, it has now resulted in the excellent work product from both the Breyer committee and your important Conference committee. If adopted, your proposed Rules will increase the confidence in Judges among Congress, the public, the Bar and the Media.

My comment on the proposed Rules themselves will be confined to posing a factual situation, which in my view should have been considered by the Ninth Circuit Council but never was. In my opinion it is still a dark cloud hanging over the reputation of the Judicial Branch. The current rules could and should have been applied through a formal complaint against the Judge involved either by the Chief Circuit Judge or other Judges. I believe the current rules allow and may require a complaint by the Chief Judge of the Circuit. However such a complaint never was forthcoming from her or from any other Judge.

Factual Case to Test the Proposed New Rules

In 2001, Ninth Circuit Judge Alex Kozinski, in the company of the then Circuit Executive Greg Walters and perhaps one other Ninth Circuit Judge illegally (according to GSA's lawyers and ours) seized and then sabotaged the vital Judiciary Internet Gateway Security System then located in San Francisco. As a result thousands of computer hackers throughout the world were permitted to invade the records of courts, judges and court staff not only in the Ninth Circuit but also in the Eighth and Tenth Circuit, which were similarly served by that Gateway. Moreover, skilled hackers once they broke through the system in San Francisco could penetrate into every Court in the United States. The National Security Agency (NSA) expert who consulted with the Judicial Conference Internet and Technology (IT) Committee said that from a security standpoint this action by Kozinski was "insane."

GSA lawyers who are responsible for computer systems policy in the Federal government said that this action was not only "illegal" but constituted at least one felony. They along with our own internal lawyers cited title 18 USC1361, which states that:

> "whoever willfully injures or commits any depredation against any property of the United States, or of any Department or Agency thereof ... shall be punished by a fine of $1,000 and depending on the circumstances a prison term of 1 to 10 years."

Likewise section 1362 states that:

> "whoever willfully injures or maliciously destroys any ... system, or other means of communications, operated or controlled by the United States ... or willfully or maliciously interferes in any way with the working or use of any such line, or system, or willfully or maliciously obstructs, hinders, or delays the transmission of any communication over any such line, or system or attempts or conspires to do such an act, shall be fined under this title or imprisoned not more than 10 years or both."

For your Committee to determine the application to this case of either the old or your proposed new rules, it is important to know the facts that led up to this extraordinary unsupportable action by Judge Kozinski and Greg Walters. During 2000 and 2001 there was a major increase in the use of Internet Bandwidth by Federal Courts throughout most of the United States. This greatly elevated the cost and gave rise to the strong suspicion that the court computer systems were being abused. This was of great concern to the Judicial Conference Information Technology (IT) Committee, which had been given considerable responsibility by the Judicial Conference to monitor the costs and management of judicial computer systems throughout the country. The Committee, then Chaired by the late District Judge Ed Nelson, directed my staff at the AO to monitor internet bandwidth use throughout the country to determine why there had been such a major increase in bandwidth use. The Committee also directed that the study must be confined solely to general bandwidth information. The staff was expressly forbidden to examine either e-mail or individual computers used by any Judge or court employees anywhere in the country. This was done to assure privacy.

When this initial bandwidth study was completed, the results were presented to the IT Committee which learned that by far the greatest proportion of the bandwidth increase occurred through the illegal downloading of pornography and some other movies and NAPSTER music on court computers in Federal courts on Federal time throughout the United States. In short there was a wholesale violation of the Federal law and waste of taxpayer funds throughout the country, particularly in 39 courts.

Judges and Court Employee Privacy Fully Protected

It is important to note once again that my staff faithfully followed the direction of the IT Committee and confined their study solely to internet bandwidth use. Thus the computers and e-mail of individual court employees, law clerks and Judges were not examined or studied. The IT Committee then issued instructions which in most instances, I was asked to send to the entire court family so that this systematic breaking of

Federal Law in the Courts would be ended, and the Judiciary avoid serious embarrassment. But Judge Kozinski chose to comment publicly to the New York Times, to at least one National news magazine and wrote a lengthy essay for the Wall Street Journal editorial page on his mistaken version of the study. By doing so, he created considerable media attention and public awareness to the Judiciary's severe problem of illegally using court computers.

The facts described above are indisputable since Judge Kozinski publicly admitted his role in illegally seizing the vital Internet security facility disabling it, and thus opening judicial records up to thousands of computer hackers throughout the world endangering the security of the entire Judicial Branch. Not only did he admit his illegal actions but he also boasted about them in the National press. One National magazine published his picture with an article in which he recounted his sabotage of the security system featuring his comment "What is a Judge to do?" Virtually every other Judge in the United States would have said that what a Judge is to do is obey Federal law, not waste Federal money and not to believe apparently that a Federal Judge is above the law just because of his office. Judge Kozinski was so proud of his sabotage action that he actually filmed a reenactment and made copies of the tape, one of which was sent and viewed at a nationwide Judiciary computer staff meeting in Jacksonville, Florida. On the tape he described triumphantly to all the many court computer experts assembled from throughout the country precisely how he seized the computer security facility and disabled it so it would no longer protect Judge's records. Present, however, was the great Chairman of the Judicial Conference IT Committee which had directed that the bandwidth use study be made. Judge Nelson recognized that the Kozinski tape was intended in part to be a direct attack on him and his committee before the professional staff in order to embarrass him and his fellow committee members. He said he could not understand how Judge Kozinski could possibly justify his illegal action to destroy the security system and endanger Judges records and then reenact the crime on film.

For Judge Nelson and for any objective observer it was impossible to connect the destruction by Kozinski of the security system with a Committee request to study bandwidth which in no way violated the privacy of Judges or court staff but did reveal that some employees in

Federal Courts, at least 39 Courts, were downloading pornography and some even viewing them in the court facilities on court time. Judge Nelson believed that the Kozinski action was designed entirely to cover up this outrageous waste of Federal taxpayer money and equipment in too many of the courts.

Kozinski even volunteered publicly that one of his law clerks had downloaded pornography in his court. He did not mention the extent to which he and his other law clerks also downloaded pornographic movies and NAPSTER music.

Chief Justice Rehnquist was appalled by the Kozinski Security Sabotage

When Chief Justice William Rehnquist learned of Kozinski's actions and then learned that he was boasting in public about his deliberate violation of Federal law he said "Tell Alex to watch pornography at home and not download and watch it in the courts."

Chief Justice Rehnquist was so disturbed by Kozinski's actions and his public boasting that he directed the Judicial Conference Executive Committee immediately "to take firm disciplinary action against all those involved" including, of course, Kozinski and Walters. He also believed that the Kozinski/Walters action might have been taken with the tacit or active endorsement of the Chairman of the Circuit Council, Judge Mary Schroeder, and perhaps the entire Ninth Circuit Council. Thus the minutes for the Executive Committee emergency teleconference of May 31, 2001 show that the Chief Justice "concluded something needs to be done that would get the attention of the Ninth Circuit Council." He said that "more needed to be done than a remonstrance and more than a slap on the wrist." He directed the Committee and me to determine if the Ninth Circuit Council Judges and Circuit staff could be cut off completely from the data communications network (DCN) thus depriving them of their computers and other automated facilities. Indeed he specifically asked us, "Can we cut off computers?"

At the time of the Executive Committee meeting, Associate AO Director Pete Lee was in Alaska attending a gathering of Chief Judges from the Ninth Circuit Chaired by Circuit Chief Judge Mary Schroeder. He

reported on the phone for the Executive Committee and me that she was "now talking to them" (the Chief Judges) and said "she is afraid that the record of the extensive downloading of pornography in the courts will be embarrassing to some of the Judges who are up for Supreme Court or other appointments." According to Lee, she also said that she and a Circuit Executive, Walters, were willing to "put the security system back up" and make it operational "if we (the Executive Committee members and the AO) agree not to measure sex explicit movies that are being down loaded in the courts." Significantly, there was no talk at the Alaska meeting according to Lee about fear of reading Judges e-mail which they knew did not occur. Rather the concern was about possible embarrassment to Judges caused by reports of pornography downloading in the Courts.

No Disciplinary Action Taken

Given the gravity of this situation, coupled with the exceptionally strong views of the Chief Justice, I was truly surprised when a narrow majority of the Executive Committee refused to recommend or take any disciplinary action with respect to Kozinski or Walters or the Ninth Circuit Council. All they agreed to do was to have the Chairman, District Judge Charles Haden (N.D. West VA) call Chief Judge Schroeder to work out an agreement to restore that the security system to working condition. Haden then promised to her that the IT committee would no longer require the monitoring of bandwidth use by the courts. In short, Judges Schroeder and Kozinski and Circuit Executive Greg Walters got precisely what they wanted. There would be no discipline of the offenders. Moreover, no longer would there be any monitoring of the extent to which pornographic movies and NAPSTER music were being illegally downloaded by Federal Courts. Later, the Judicial Conference took what can only be described as cosmetic action essentially leaving it up to each individual court to develop a system of its own in the hope that Federal law is not being violated in that court. The Administrative Office was directed by the Conference to obtain an annual report on the quality and adequacy of the plans developed by each court throughout the country to require legal compliance. Based upon the last report which I say which was for 1995-96 some courts have no plan at all while other courts have

inadequate plans. Fortunately, some have good working plans. In short, even the cosmetic action goals are not being met in too many of the courts throughout the country. If this sorry state of affairs is once again treated in the media and considered by Congress, the Judiciary stands to be held up to ridicule and embarrassment throughout the United States.

Result of the Failure to Discipline

The conclusion reached in this case study is that a Judge and/or a court administrator can violate Federal law and commit felonies but will not be disciplined in any way. Likewise, in too many courts, Judges and court staff appear largely to be free to download pornography and NAPSTER music if they choose without detection and with no discipline built into the system of these courts to assure that Federal law is being obeyed.

Chief Justice orders Removal of an Internet Security Gateway from the Ninth Circuit

To say that Chief Justice Rhenquist was angry about the failure of the Conference Executive Committee to carry out his direction to discipline the Ninth Circuit perpetrators coupled with the limited cosmetic action taken by the Judicial Conference along with the failure of the Ninth Circuit to consider complaints would be a gross understatement. The Chief Justice lectured the Executive Committee sternly about their failure to take appropriate action to discipline Judge Kozinski, Greg Walters and the Ninth Circuit Council.

As stated, Chief Justice Rehnquist was highly disturbed about what he perceived to be the complete failure of the Ninth Circuit Council and Chief Judge Schroeder either to take disciplinary action against Judge Kozinski and/or on Circuit Executive Greg Walters. However there was one action that he could take to further express his displeasure and restore some integrity to the system. He ordered me to remove the Internet Gateway security system from San Francisco taking it entirely out of the Ninth Circuit and relocating it in another Circuit. He did this so that neither Judge Kozinski nor Greg Walters nor the Circuit Council could

again sabotage Judicial Branch security equipment and thus endanger the security of the entire Federal Court system. It is now located near Kansas City, Missouri.

Chief Justice Rehnquist further evidenced his continuing acute displeasure caused by the failure of the Ninth Circuit Council or the Executive Committee to take "stern disciplinary action. When Judge Schroeder recommended appointment to the Conference IT Committee of the other Circuit Judge who reputedly accompanied Judge Kozinski, he turned it down flatly. Instead he appointed a District Judge from Idaho whom I recommended.

Judicial Conference Procedures Ignored by Kozinski

Sabotaging the security system was not the only avenue available to Judge Kozinski if he objected to the policy of the Judicial Conference IT Committee seeking to uncover and forestall possible waste, abuse, and violation of Federal law through examining bandwidth use throughout the Judicial Branch. The IT Committee is a creature of the Judicial Conference and responsible to it. Kozinski could have complained to Chief Judge Schroeder who is a member of the Conference by right of office and to the elected District Judge on the Conference from the Ninth Circuit and to ask for a reconsideration of this policy and if necessary ask that it be done on an emergency basis. He also could have lodged a complaint and request for similar action with the Chief Justice who presides over the Judicial Conference and appoints all Conference Committee members including the IT Committee. Likewise he could have gone to Judge Ed Nelson the Chairman of the IT Committee and to the Committee itself seeking such action. The Ninth Circuit has always had a representative Judge who serves on that Committee but there is no record that Kozinski ever complained to that Judge. Thus, instead of going through the accepted Conference channels, which permit expeditious action when necessary, he chose to take the law into his own hands and constitute himself a judicial vigilante. He decided to defy openly both the Conference Committee and the Conference itself presided over by the Chief Justice and preceded to violate Federal Criminal law, which clearly applies to him. Moreover he and Greg Walters violated the

contract made between the Ninth Circuit Executive and the IT Committee in which the Circuit staff agreed to manage the internet security gateway in San Francisco in behalf not only the Ninth Circuit but also the Eighth and Tenth Circuits. Incidentally neither Judge Kozinski nor Judge Schroeder nor Greg Walters consulted with either of the other two Circuits before summarily shutting down the system thus endangering all Judges and court staff in both of those Circuits.

Kozinski "Privacy" Straw Man

Judge Kozinski obviously decided that he could not prevail in the public relations arena if he tried to justify illegally sabotaging the Judiciary's Internet security system in San Francisco solely in order to assure that Judges and court staff could continue to illegally download pornography and NAPSTER music. Therefore, he created a fictitious straw man in an attempt to explain his extraordinary unilateral vigilante action. He falsely claimed both inside the Judiciary and extensively throughout the public media that the bandwidth survey mandated by the IT Committee somehow resulted in Judge's e-mail being read and their individual computers monitored. He did this even though Judge Nelson told him that it wasn't true! No Judge's e-mail was read or monitored in any way nor were their computers monitored. Unfortunately, Kozinski managed to persuade some uninformed media and indeed some of his fellow Judges who did not know the facts that he was the great defender of their privacy. In fact, he was the defender solely of the unfettered ability of all Judges and court employees to illegally download pornography and view it in Federal courts, an objective with which no Federal Judge or Congress would agree.

To my knowledge, the only time individual computers ever were examined to determine if they were being used for illegal purposes was carried out by the Ninth Circuit Council itself in 1998, not by the IT Committee or the AO. The Council discovered that there was a significant amount of abuse in the Ninth Circuit. But there is no record that the Circuit Council disciplined the offenders however.

COMMENT AND QUESTIONS ON THE APPLICATION OF THE PROPOSED NEW RULES TO THE ABOVE FACTUAL SITUATION

1. The conduct described above was not known to members of the Bar or to litigants. It appears therefore from the Committee commentary on Rule 3 that there are only two ways a "complaint" could be filed against Judge Kozinski. One would be by a knowledgeable Federal Judge. The second is that the "complaint" may be "identified" by the Chief Judge. But in the absence of a complaint by another Judge, is the Chief Circuit Judge required to file a complaint? For example, in the above-described situation Chief Judge Schroeder was fully aware of what Judge Kozinski had done but neither she nor any informed Judge filed a complaint. The comment under Rule 3 seems to say that the Chief Judge is not required to file a complaint but "may" file and "often is expected to trigger the process" by "identifying a complaint". Is this a case when a complaint was "expected" to be filed or where one "must" be filed by the Chief Judge?

In the test case, it is theoretically possible that a Ninth Circuit staff member or someone from the AO who were aware of these facts, as indeed many were, could file a complaint against Judge Kozinski. However as a practical matter this likely would not work because of the probable repercussions against such employees. Thus, if the Circuit Chief who, is aware of such misconduct does not elect to identify a complaint, this creates an important loophole in the regulations, which would allow such illegal conduct to go unchallenged. The proposed rules of the Committee ought to consider the possibility of making such action mandatory for the Circuit Chief Judge.

2. If the Circuit Chief Judge is not only aware of possible misconduct or illegal action by another Judge in the Chief's Circuit and may have actually approved or ratified the misconduct or illegality in advance, it is virtually certain that the Chief Judge would not file a complaint. The new Rules as you have proposed them do not appear to deal with this very real possibility. You may wish to

revise the rules to set up an alternate procedure to make sure that a complaint is filed in such circumstances.

3. It does not appear from the existing Rules or the proposed new Rules that there is a statute of limitations that applies to the filing of a complaint of misconduct against a Federal Judge. If that is the case and if the statute has not run, a complaint could still be filed against Judge Kozinski for the illegal action that he took in 2001. Is the Chief Judge required to file a complaint now under the old rules?

4. Under the new Rules, if Rule 5(a) governs and the requirements of Rule 7 and Rule 3(a) too have been met and no complaint has been filed under Rule 6, a Chief Judge "must identify a complaint" and by written orders stating the reasons, begin the review provided in Rule 11. In your Committee's view, is Judge Schroeder obliged to file such a complaint? If so, this probably means that she may be obliged to file one.

5. Rule 29 of your proposed rules provides that the new rules "will become effective 30 days after promulgation by the Judicial Conference of the United States." Thus Judge Schroeder would have to file a complaint, under the new rules but they may not be in effect by November 8, 2007 when she must step down as Chief Judge. If she refuses, who must file a complaint prior to November 8th if anyone?

6. Under current law Judge Alex Kozinski will become the new Circuit Chief Judge on November 8, 2007 succeeding Judge Mary Schroeder. If approved, the new rules will be in effect after Judge Kozinski becomes the Chief Judge. At the time is Chief Judge Kozinski obliged to issue a complaint against himself? I assume the answer is no. I further assume, however, that he would be disqualified under Rule 25. Therefore the new Rules require that the complaint "must be assigned to the Circuit Judge in regular active service who is the most senior in date of commission of those who are not disqualified." If most or all of the members of the current Circuit Council were members of the Council when

Judge Kozinski took his illegal action in 2001, then I assume that the Rules may require each of those individuals to be disqualified particularly if in 2001 they approved Kozinski's illegal action in advance. However Rule 25(G) provides that notwithstanding any other provision of these rules to the contrary, a member of the Judicial Council who is a subject of the complaint may participate in the disposition thereof if the Judicial Council votes that it is necessary and appropriate and in the interest of sound Judicial administration that such subject Judges should be eligible to act. Does this open the door for Judge Kozinski to participate in the Committee handling of his complaint or one filed against him even though he is disqualified as Chief Circuit Judge because he would be the object of the complaint? That section does appear to open the door to him to participate and for any other members of the Council who in 2001 approved his actions in advance, if that occurred.

7. It is clear that the proposed Rules apply only to Federal Judges. They do not therefore cover a Circuit Executive such as Greg Walters who aided and abetted in the committing of a felony according to the facts and the analysis of various lawyers. There is no record that the Circuit Chief Judge or anyone else disciplined him. This clearly is an embarrassment to the Judicial Branch particularly since Walters currently is working on 'detail' for the Administrative Office, which is supervised and directed by the Judicial Conference whose policies and rules he openly defied. This is a notable loophole and your committee may wish to direct an inquiry to the appropriate Judicial Conference Committee, probably Judicial Resources, suggesting that this loophole should be repaired.

In summation: As a result of the illegal action taken by Judge Kozinski, Greg Walters and perhaps one other Ninth Circuit Judge, coupled with the total failure of the Ninth Circuit Council and the Judicial Conference even to consider disciplining for Judge Kozinski under current law and Rules procedures, the Federal Judiciary could be censured by Congress for permitting its laws to be openly flaunted with no response by the Judiciary. Also, it could be justifiably

criticized by the media. This is particularly true and doubly serious because the disabling of the security system obviously took place for one reason and one reason only namely that Judge Kozinski and his allies wanted to make it possible for Federal Judges and court staff to be totally free of detection when or if they download illegal pornography movies and NAPSTER music on Federal Court computers, on Federal Court time, in Federal Court buildings using Federal taxpayer money. Therefore in the interest both of good government and the reputation of the Judicial Branch the new Rules should require Circuit Chiefs and Circuit Councils or suitable alternative Judicial Branch organizations to initiate and consider complaints in this and similar factual situations. Certainly Chief Justice Rehnquist strongly believed that the system must require "stern discipline" in such a situation, discipline that is totally absent thus far and I agree with him fully.

Summary of Central Questions for Your Committee

- Is it mandatory for the Chief Circuit Judge or any other Judge to file a complaint against Judge Kozinski under the old Rules? If not, does your Committee have authority to mandate the filing and consideration of such a complaint?
- Do the proposed Rules require the Ninth Circuit Chief Judge to initiate a complaint against Kozinski that is then considered by the Circuit Council? If not, is it mandatory upon any other Judicial organization such as your Committee to initiate a complaint? If not, your Committee may wish to revise the Proposed Rules to assure that such disciplinary action is taken to restore integrity to the Rules process while at the same time avoiding serious embarrassment to the Judicial Branch for its failure to act.

CC: William R. Burchill Jr., Associate Director and General Council

Mr. William R. Burchill Jr., Associate Director and General Council
Administrative Office of the US Courts
Thurgood Marshall Federal Judiciary Building
Washington DC 20544

Judge Ralph K. Winter Jr., Chairman
Judicial Conference Committee on Judicial Conduct and Disability
US Court House, 141 Church Street
New Haven, CT 06510

EXHIBIT 3

WSJ.com OpinionJournal
from THE WALL STREET JOURNAL Editorial Page

AT LAW

Privacy on Trial

Big Brother is watching you, your honor.

BY ALEX KOZINSKI
Tuesday, September 4, 2001 12:01 a.m.

An open letter to federal judges:

The U.S. Bureau of Prisons maintains the following sign next to all telephones used by inmates:

"The Bureau of Prisons reserves the authority to monitor conversations on the telephone. Your use of institutional telephones constitutes consent to this monitoring. . . ."

I'm planning to put signs like these next to the telephones, computers, fax machines and other equipment used in my chambers because, according to a policy that is up for a vote by the U.S. Judicial Conference, we may soon start treating the 30,000 employees of the judiciary pretty much the way we treat prison inmates.

Exaggeration? Not in the least. According to the proposed policy, all judiciary employees--including judges and their personal staff--must waive all privacy in communications made using "office equipment," broadly defined to include "personal computers . . . library resources, telephones, facsimile machines, photocopiers, [office supplies." There is a vague promise that the policy may be narrowed in the future, but it is the quoted language the Judicial Conference is being asked to approve on Sept. 11.

Not surprisingly, the proposed policy has raised a public furor. This has so worried the policy's proponents that Judge Edwin Nelson, chairman of the Judicial Conference's Automation and Technology Committee, took the unprecedented step of writing to all federal judges to reassure them that the proposed policy is no big deal. I asked that my response to Judge Nelson be distributed to federal judges on the same basis as his memo, but my request was rejected. I must therefore take this avenue for addressing my judicial colleagues on a matter of vital importance to the judiciary and the public at large.

The policy Judge Nelson seeks to defend as benign and innocuous would radically transform how the federal courts operate. At the heart of the policy is a warning--very much like that given to federal prisoners--that every employee must surrender privacy as a condition of using common office equipment. Like prisoners, judicial employees must acknowledge that, by using this equipment, their "consent to monitoring and recording is implied with or without cause." Judicial

opinions, memoranda to colleagues, phone calls to your proctologist, faxes to your bank, e-mails to your law clerks, prescriptions you fill online--you must agree that bureaucrats are entitled to monitor and record them all.

This is not how the federal judiciary conducts its business. For us, confidentiality is inviolable. No one else--not even a higher court--has access to internal case communications, drafts or votes. Like most judges, I had assumed that keeping case deliberations confidential was a bedrock principle of our judicial system. But under the proposed policy, every federal judge will have to agree that court communications can be monitored and recorded, if some court administrator thinks he has a good enough reason for doing so.

Another one of our bedrock principles has been trust in our employees. I take pride in saying that we have the finest work force of any organization in the country; our employees show loyalty and dedication seldom seen in private enterprise, much less in a government agency. It is with their help--and only *because* of their help--that we are able to keep abreast of crushing caseloads that at times threaten to overwhelm us. But loyalty and dedication wilt in the face of mistrust. The proposed policy tells our 30,000 dedicated employees that we trust them so little that we must monitor all their communications just to make sure they are not wasting their work day cruising the Internet.

How did we get to the point of even considering such a draconian policy? Is there evidence that judicial employees massively abuse Internet access? Judge Nelson's memo suggests there is, but if you read the fine print you will see that this is not the case.

Even accepting the dubious worst-case statistics, only about 3% to 7% of Internet traffic is non-work related. However, the proposed policy acknowledges that employees are entitled to use their telephone and computer for personal errands during lunchtime and on breaks. Because lunches and breaks take up considerably more than 3% to 7% of the workday, we're already coming out ahead. Moreover, after employees were alerted last March that downloading of certain files put too much strain on the system, bandwidth use dropped dramatically. Our employees have shown they can be trusted to follow directions.

What, then, prompted this bizarre proposal? The answer has nothing to do with bandwidth or any of the other technical reasons articulated by Judge Nelson. Rather, the policy became necessary because Leonidas Ralph Mecham, director of the Administrative Office of the U.S. Courts, was caught monitoring employee communications, even though the Judicial Conference had never authorized him to do so. Unbeknownst to the vast majority of judges and judicial employees, Mr. Mecham secretly started gathering data on employee Internet use. When the Web sites accessed from a particular computer affronted his sensibilities, Mr. Mecham had his deputy send a letter suggesting that the employee using that computer be sanctioned, and offering help in accomplishing this. Dozens of such letters went out, and one can only guess how many judicial employees lost their jobs or were otherwise sanctioned or humiliated as a consequence.

When judges of our circuit discovered this surreptitious monitoring, we were shocked and dismayed. We were worried that the practice was of dubious morality and probably illegal. We asked Mr. Mecham to discontinue the monitoring. Rather than admitting fault and apologizing, Mr. Mecham dug in his heels. The monitoring continued for most of the country until Mr. Mecham was ordered to stop by the Judicial Conference Executive Committee.

Hell hath no fury like a bureaucrat unturfed. In a fit of magisterial petulance, Mr. Mecham demanded that his authority to monitor employee communications be reinstated without delay. A compliant Automation Committee hastily met in secret session to draft the proposed policy, pointedly rejecting all input from those who might oppose it. In their hurry to vindicate Mr. Mecham's unauthorized snooping, the committee short-circuited the normal collegial process of deliberation and consultation.

Salving Mr. Mecham's bureaucratic ego, and protecting him from the consequences of his misconduct, is hardly a basis for adopting a policy that treats our employees as if they live in a gulag. Important principles are at stake here, principles that deserve discussion, deliberation and informed debate. As Chief Judge James Rosenbaum of Minnesota has stated, "giving employers a near-Orwellian power to spy and snoop into the lives of their employees, is not tenable." If we succumb to bureaucratic pressure and adopt the proposed policy, we will betray ourselves, our employees and all those who look to the federal courts for guidance in adopting policies that are both lawful and enlightened.

I therefore suggest that all federal judges reading these words--indeed all concerned citizens--write or call their Judicial Conference representatives and urge them to vote against the proposed policy. In addition, we must undo the harm we have done to judicial employees who were victims of Mr. Mecham's secret, and probably illegal, snooping. The Judicial Conference must pass a resolution that offers these employees an apology and expungement of their records.

Moreover, we should appoint an independent investigator to determine whether any civil or criminal violations of the Electronic Communications Privacy Act were committed during the months when 30,000 judicial employees were subjected to surreptitious monitoring. If we in the judiciary are not vigilant in acknowledging and correcting mistakes made by those acting on our behalf, we will surely lose the moral authority to pass judgment on the misconduct of others.
Mr. Kozinski is a judge on the Ninth U.S. Circuit Court of Appeals in California. His unmonitored e-mail address is kozinski@usc.edu.

Copyright © 2008 Dow Jones & Company, Inc. All Rights Reserved.

PRINT WINDOW CLOSE WINDOW

EXHIBIT 4

CAL LAW
CALIFORNIA'S LEGAL NEWS SOURCE

Select '**Print**' in your browser menu to print this document.

©2005 ALM Properties, Inc.
Page printed from: Cal Law

Back to Article

Kozinski Strikes Back

Alex Kozinski
The Recorder
09-23-2005

Last week in this space, Cyrus Sanai took up what was headlined as the "Taking the Kozinski Challenge" by purporting to show that the Ninth Circuit routinely ignores circuit and Supreme Court precedent in its published and unpublished opinions. According to Mr. Sanai, Ninth Circuit panels "silently dustbinned" inconvenient opinions, paid "lip service" to Supreme Court case law, vaulted "somersaults" in creating three lines of authority "none of which agree with each other," and adopted a rule that has "the 'absolute simplicity' of Joseph Heller's 'Catch-22.'"

Were this criticism justified, it would be an embarrassing illustration of judicial lawlessness. Fortunately, it isn't.

For reasons of his own, Mr. Sanai chose as the centerpiece of his article an arcane area of federal jurisdiction known as the *Rooker-Feldman* doctrine. This doctrine holds that district courts may not entertain lawsuits challenging the validity of state court judgments. Were it otherwise, district courts would effectively become appellate tribunals for state court decisions — a role reserved to the U.S. Supreme Court.

This much is clear. The closer question is what happens where the state courts conclusively resolve a federal issue in an interlocutory order. May the losing party challenge that order by bringing a federal action, or must it await review by writ of *certiorari* after final judgment? According to Mr. Sanai, we held in *H.C. ex rel. Gordon* v. *Koppel*, 203 F.3d 610 (9th Cir. 2000), that "*Rooker-Feldman* did not apply to ongoing state proceedings."

Not so. *H.C.* arose out of a state court order transferring temporary custody from mother to father. The mother then brought a federal lawsuit seeking to enjoin the state judge from enforcing his order. The district court dismissed on *Rooker-Feldman* grounds and the mother appealed.

Our opinion considered both *Rooker-Feldman* and *Younger* abstention, and affirmed on the basis of *Younger.* As to *Rooker-Feldman*, the opinion did not hold (as Mr. Sanai imagines) that the doctrine never applies to orders entered in the course of ongoing state litigation. *H.C.* merely found that, because temporary custody could change during the course of the litigation, "there is no final state judgment *or order* to which the *Rooker-Feldman* doctrine might relate and *we need not reach the question of the doctrine's applicability to this action*." *Id.* at 613 (emphasis added). *H.C.* expressly left open whether *Rooker-Feldman* applies to an interlocutory order that finally resolves the federal issue: "Nor are we asked to review a final state judgment of an order of an interlocutory nature." *Id.*

Doe & *Associates Law Offices* v. *Napolitano*, 252 F.3d 1026 (9th Cir. 2001), reached this question. At issue in *Napolitano* was a grand jury subpoena seeking client records from a law firm. The firm unsuccessfully petitioned the state court to quash the subpoena, then brought a federal lawsuit seeking to enjoin its enforcement. The district court eventually dismissed on *Rooker-Feldman* grounds.

Napolitano thus confronted the question left open in *H.C.*: Does *Rooker-Feldman* bar a federal lawsuit challenging a state-court order that conclusively resolves an issue, even though the litigation continues as to other issues? *Napolitano* held that such a federal lawsuit is barred by *Rooker-Feldman.* One might disagree, as Mr. Sanai clearly does, but his claim that *Napolitano* "dustbinned" *H.C.* is unsupported.

Mr. Sanai next claims that *Napolitano* was overruled by *Exxon Mobil Corp.* v. *Saudi Basic Industries Corp.,* 125 S. Ct. 1517 (2005), yet we stubbornly refused to acknowledge this in *Mothershed* v. *Justices of the Supreme Court*, 410 F.3d 602 (9th Cir. 2005). But *Exxon Mobil* did not address the issue resolved by *Napolitano* — whether *Rooker-*

Feldman applies to interlocutory but final state court orders. The question in *Exxon Mobil* was whether *Rooker-Feldman* bars federal lawsuits brought before the state courts have adjudicated the federal question.

Mothershed did not rely on *Napolitano* and so had no reason to decide whether *Napolitano* was affected by *Exxon Mobil.* Rather, *Mothershed* found *Exxon Mobil* inapplicable because the state courts in *Mothershed* had conclusively resolved the federal issues before the federal lawsuit was brought. Is this the only plausible reading of *Exxon Mobil?* Perhaps not — though I believe it's a fair reading. Certainly, however, Mr. Sanai's claim that *Mothershed* paid mere "lip service" to *Exxon Mobil* is seriously overstated. All that can fairly be said about *Mothershed* is that it selected one permissible interpretation of a Supreme Court opinion that was not directly on point.

Mr. Sanai's claim that our *Rooker-Feldman* jurisprudence is in hopeless disarray is especially off the mark because this is an area where we have been vigilant in maintaining consistency. This is due in no small part to the fact that our colleague, Judge William Fletcher, is not merely one of the great minds of the federal judiciary, but a federal courts professor and a recognized authority on *Rooker-Feldman.* Judge Fletcher can be a bit of a nudge in prodding us to interpret *Rooker-Feldman* correctly, and so three years before the Supreme Court decided *Exxon Mobil*, our court took *en banc Ahmed* v. *Washington*, 276 F.3d 464 (9th Cir. 2001), where a panel had committed the very error the Supreme Court eventually corrected in *Exxon Mobil.* Though the parties settled, rendering the appeal moot, the *en banc* panel vacated the incorrect panel opinion, keeping our case law out of harm's way when the Supreme Court unanimously reversed other circuits in *Exxon Mobil*.

Despite his colorful language, Mr. Sanai's article raises no legitimate question about whether the Ninth Circuit has been derelict in following circuit or Supreme Court precedent. But the article does raise serious issues of a different sort. Mr. Sanai's article urges us to "grant *en banc* rehearing of the next decision, published or unpublished, which asks the court to resolve the split among *H.C., Napolitano* and *Mothershed*." A petition for *en banc* rehearing raising this very issue crossed my desk just as Mr. Sanai's article appeared in print. The name of the case? *Sanai* v. *Sanai.* A mere coincidence of names? Not hardly. The petition, signed by Mr. Sanai, cites the same cases and makes the same arguments as his article — including the reference to "Catch-22."

Mr. Sanai's byline modestly lists him as "an attorney with Buchalter Nemer in Los Angeles." The firm's Web site identifies him as "a Senior Counsel and English solicitor ... [whose] practice focuses on project finance, corporate finance and business transactions, with a particular expertise in international finance transactions." The careful reader would therefore have no cause to doubt that Mr. Sanai is a disinterested observer of this court's *Rooker-Feldman* jurisprudence. Nothing alerts the reader to the fact that Mr. Sanai has been trying for years to get the federal courts to intervene in his family's state-court dispute, an effort referred to by a highly respected district judge as "an indescribable abuse of the legal process, ... the most abusive and obstructive litigation tactics this court has ever encountered. ..." Nor would the reader — unless he happened to enter Mr. Sanai's name in the Westlaw CTA9-ALL database — realize that, as part of the same imbroglio, he and certain members of his family have hounded a state trial judge off their case (read the PDF); been held in contempt and sanctioned under 28 U.S.C. §1927 and had their *ninth* sortie to our court in the same case designated as "frivolous" and "an improper dilatory tactic" by the district court. A detached observer, Mr. Sanai is not.

By failing to disclose his long-standing, active and abiding interest in the legal issue he discusses in his article, Mr. Sanai has done the reading public a disservice, cloaking his analysis with a varnish of objectivity. Worse, by publishing the article while he had a case raising this precise issue, Mr. Sanai used *The Recorder* to call unfair attention to his petition for rehearing, to the detriment of opposing parties who limited their advocacy to the briefs. And, by gratuitously drawing my name repeatedly into the controversy, he has also managed to disqualify me from participation in his case, skewing the *en banc* voting process.

Whether our court is diligent in applying circuit law and faithful to Supreme Court precedent are issues that deserve public attention. Contrary to Mr. Sanai's bold assertion, I have never claimed that intra-circuit conflicts never arise, and my colleagues and I welcome legitimate efforts to tell us when our circuit law needs mending. It is important, however, to draw a clear line between case advocacy and objective public debate. This Mr. Sanai has neglected to do.

Alex Kozinski *is a judge on the Ninth Circuit U.S. Court of Appeals.*

EXHIBIT 5

JUDICIAL CONFERENCE OF THE UNITED STATES
COMMITTEE ON INFORMATION TECHNOLOGY

HONORABLE EDWIN L. NELSON, CHAIR

HONORABLE DAVID A. BAKER
HONORABLE PAUL J. BARBADORO
HONORABLE ALICE M. BATCHELDER
HONORABLE DAVID H. COAR
HONORABLE LEWIS A. KAPLAN
HONORABLE ROBERT B. KING
HONORABLE J. THOMAS MARTEN
HONORABLE CATHERINE D. PERRY
HONORABLE JAMES ROBERTSON
HONORABLE ROGER G. STRAND
HONORABLE L. T. SENTER, JR.
HONORABLE DIANE W. SIGMUND
HONORABLE THOMAS I. VANASKIE

May 10, 2002

Honorable Howard Coble
Chairman, Subcommittee on Courts,
the Internet, and Intellectual Property
Committee on the Judiciary
United States House of Representatives
B351A Rayburn House Office Building
Washington, DC 20515

Dear Mr. Chairman:

I understand that on May 2, 2002, the Judiciary Subcommittee on Courts, the Internet, and Intellectual Property held a business meeting to consider H.R. 4125, the "Federal Courts Improvement Act." At the meeting Mr. Berman first offered and then withdrew an amendment relating to "monitoring" of electronic communications on the judicial branch's Data Communications Network (the "DCN"). I am told that Mr. Berman may again offer his amendment when H.R. 4125 is considered by the full committee. Those of us who serve on the Judicial Conference Committee on Information Technology (the "IT Committee") believe the proposed amendment would constitute an unwarranted and unneeded intrusion into the internal workings of the Third Branch and would, in fact, cause substantial harm to the judiciary's ongoing automation efforts.

As you are aware, the work of the Judicial Conference of the United States is supported and facilitated by the work of 24 committees, the members being appointed by the Chief Justice of the United States who serves as the presiding officer of the Judicial Conference. The IT Committee, formerly the Committee on Automation and

Technology, which I chair, is comprised of 14 judges–one from each of the regional circuits, one magistrate judge and one bankruptcy judge. The IT Committee is responsible for providing policy recommendations to the Judicial Conference on its subject-matter jurisdiction, planning, and oversight of the judiciary's many automation programs.

I am told Mr. Berman expressed some concern that on two occasions, in 1998 and 2000, Administrative Office (the "AO") personnel may have monitored or blocked Internet communications on the DCN. In 1998, the AO was not involved at all and the action in 2000 was directed by the IT Committee.

During the early spring of 1998, at the direction of the Ninth Circuit Council, the Ninth Circuit technical staff installed and activated at the Ninth Circuit Internet gateway a filtering software system called WebSense, with the goal being to determine access through that gateway to adult-oriented materials by DCN users in the Ninth Circuit. AO personnel were not involved.

Findings by Ninth Circuit staff which resulted from the short-term use of WebSense are revealing. On April 28, 1998, Ninth Circuit technical staff reported to the then chief judge of that circuit that a local review by staff of that court of logs over a 28-day period revealed that users in the three circuits served by that gateway had accessed approximately 1100 "adult" web sites approximately 90,000 times. Two explanatory notes may put those figures in better perspective. While 90,000 "adult" site accesses may seem high, one must remember that every click on a new link, even at one site, will be recorded as a separate access. On the other hand, 3.6% of total accesses may not seem particularly high, but if one remembers that "adult" sites tend to be graphics and media intensive, the actual traffic generated by those accesses was probably higher than 3.6% of the total traffic, up to 40% to 50% of available bandwidth.

That staffer attached to his memorandum to his chief judge a 7 page "partial listing" of some 300 "adult" sites that had been accessed. An examination of the names of sites shown on the list suggests that transfers of files to or from many such sites would likely violate federal law prohibiting the sexual exploitation of children. Some such names–ones that I can repeat here were: allteens.com; cyberteens.com; hotteen.com; hotteensex.com; and hollywoodteens.com.

As a result of the findings of the filtering, the Circuit determined to block access to adult-oriented sites. Placement and removal of WebSense on the Ninth Circuit Gateway were decisions taken by appropriate authorities in the Ninth Circuit.

At its meeting in January 1999, the IT Committee recommended to the full Judicial Conference, that it authorize the AO to install software at each of the national gateways to block access to adult-oriented, pornographic Internet web sites. At its meeting in March 1999, the Judicial Conference declined to accept that recommendation, believing that such blocking was a matter more appropriately addressed by each court. Subsequently, the Ninth Circuit stopped blocking.

At its meeting in December 2000, the IT Committee was informed that demand for bandwidth (capacity) on the DCN for access to the Internet had almost doubled over the preceding 10 months. Several members of the committee had received anecdotal complaints and the AO had received numerous specific complaints about slow access to and responses from the Internet. Concerned that IT resources purchased with tax payer funds be used appropriately, the IT Committee directed committee staff from the AO to determine the cause of the increased demand and to report to the committee at its meeting in June 2001.

Responding to the committee request, in January 2001, AO personnel activated two filters or "signatures" on the already installed and operating intrusion detection software at the three national gateways to identify high volume files passing through those gateways. Experience has taught us that music and movie files tend to be among the largest on the Internet. One twenty-second video/movie clip may be the equivalent of sending two thousand pages of typed text. Signatures activated on the intrusion detection software were intended to detect and log the passage of such large files. The logging consisted of recording several items of data: (1) the date and time; (2) the IP address inside the DCN; (3) the IP address outside the DCN; and (4) the name of the file passing through the gateway. The user inside the DCN could not be identified because the AO has no way to do that. It can only identify the judiciary facility to which any IP address has been assigned. The information captured showed that a substantial portion of Internet traffic was non-business related and that a few judiciary users were engaged in extraordinarily high volume downloading of music and movies. Many of the Internet site and video file names suggested they contained pornography. Others suggested they might contain depictions of children engaged in sexually explicit conduct, prohibited by federal law. Finally, many were music files that were most likely copyrighted.

Let me emphasize again that neither the Director of the AO, nor the employees of the AO, nor the IT Committee members knew then or know today, the identities of any DCN users who were involved with this downloading. Only local IT staff, operating under the direction of local judges, have the ability to determine the identity of any user

of the DCN. Moreover, this so-called "monitoring" captured the content of video and music files only to extent that the web site and file names suggested such content.

Use of the "offending" intrusion detection signatures was discontinued in early June 2001 after the Executive Committee of the Ninth Circuit Judicial Council unilaterally, and without notice to either the Eight or Tenth Circuits, directed its technical staff to disable all aspects of the intrusion detection system at the Ninth Circuit gateway. Reasonable people may disagree about the serious level of risk created by this action but it is clear that the intrusion detection system was, and is, an integral part of the DCN security apparatus and that simply "turning it off" exposed DCN users in the Eighth, Ninth, and Tenth Circuits, and perhaps throughout the entire federal judiciary, to considerable risks to the security of their electronically stored data and electronic communications and, indeed, to their privacy interests.

The intrusion detection software was reactivated in a short time, but only without the music and movie signatures as demanded by the Ninth Circuit Council.

In a special meeting on July 27, 2001, the IT Committee recommended to the Judicial Conference that it adopt on an interim basis the Internet appropriate use policy developed by the Federal Chief Information Officers Council of the General Services Administration. Excluded from that recommendation was a provision of the executive policy which sought to define and limit privacy interests of executive officers and employees. In a mail ballot following its shortened meeting of September 11, 2001, the Conference accepted the IT Committee recommendation.

In the interim, the IT Committee has developed controls that allow the AO to change intrusion detection signatures at the national gateways only in certain specified circumstances. For example, the AO may respond to emergency situations as they arise by adding needed security signatures but such signatures may remain in place for no more than 14 days without the explicit approval of the committee chair or his designee. The need for this emergency response authority was demonstrated in late October and early November 2001 when the DCN was hard hit by the NimdaE email virus.

At least four significant factors counsel against the adoption of this amendment:

- It represents the sort of micro management of judiciary affairs that would seriously threaten the independence of the Third Branch and of the many judges, both Article III and Article I, who serve in that branch.

- It would seriously impair the ability of the courts to administer and manage its wide area network–the foundation on which many of the courts' information technology programs depend. For example, the courts are rapidly developing and implementing modern and robust case management systems that will provide the ability to create and maintain electronic case files. A new and modern technologically advanced financial accounting system that will permit the courts to better manage and account for appropriated funds is being deployed. Both these and other projects require a technologically advanced and secure wide area network.

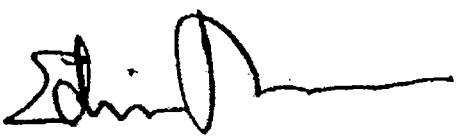
- Under the present state of the law, the federal judiciary is governed by the provisions of the Electronic Communications Privacy Act (the "ECPA"). This amendment would, in my opinion, call into question the status of the judiciary under the ECPA, while leaving intact provisions of law that allow other government and private entities to protect their IT infrastructures and their users. It is unclear to me why the federal courts, with exceptionally higher interests in the security and integrity of the information that is created, transmitted, and stored on court systems than many others, should be afforded less protection than are they.

- There is no articulated need for the proposed amendment. Instead, the Judicial Conference and its Committee on Information Technology are fully engaged in addressing these issues and have demonstrated that they are sensitive to the privacy and security needs of judges and judiciary employees. As judges we are quite capable of considering all sides of virtually any issue, weighing the competing interests, and striking appropriate balances between them. That is what judges do.

Finally, let me debunk a misconception that seemingly gained acceptance among some judges last year. There is not now; there has never been; and there are no plans ever to "monitor" judiciary email. We just last week completed the implementation of the Lotus Notes email system throughout almost virtually all of the entire federal judiciary. Judiciary users now have the capability to encrypt any piece of email to any other judiciary user so it can be read only by the intended recipient. We are investigating the means by which we can provide similar encryption capabilities for email going to or coming from the Internet.

If you or any members of your committee have any additional concerns or questions, I will be pleased to answer them, either by phone, mail, *encrypted* email, or, if you prefer, in person.

Sincerely,



Edwin Nelson
Chairman, Committee on
Information Technology

cc: Members of the Judiciary Subcommittee
on Courts, the Internet, and Intellectual Property
Members of the Judicial Conference Committee
on Information Technology

EXHIBIT 6

M101
This is G o o g l e's cache of http://alex.kozinski.com/articles/articles.by.ak.list.htm as retrieved on Aug 2, 2007 07:09:15 GMT.
G o o g l e's cache is the snapshot that we took of the page as we crawled the web.
The page may have changed since that time. Click here for the current page without highlighting.
This cached page may reference images which are no longer available. Click here for the cached text only.
To link to or bookmark this page, use the following url: http://www.google.com/search?
q=cache:acjiw4A3mswJ:alex.kozinski.com/articles/articles.by.ak.list.htm+alex+kozinski.com&hl=en&ct=clnk&cd=1&gl=us

Google is neither affiliated with the authors of this page nor responsible for its content.

These search terms have been highlighted: **alex kozinski com**

ALEX KOZINSKI
(As of March 30, 2006)

1. A Market Oriented Revision of the Patent System, 21 UCLA L. Rev. 1042 (1974) and 6 Patent L. Rev. 111 (1974). (http://**alex.kozinski.com**/articles/Market-oriented_Revision_of_Patent_System.pdf)

2. That Can of Worms: The Speedy Trial Act, A.B.A. J., July 1976, at 862. (http://**alex.kozinski.com**/articles/That_Can_of_Worms.pdf)

3. Taking it with You Through U.S. Customs, L.A. Lawyer, Oct. 1978, at 43. (http://**alex.kozinski.com**/articles/Taking_it_with_You_Through_US_Customs.pdf)

4. Structure of the United States Legal System, in Practical Guide to Investment in the United States 1 (John I. Forry ed., 1979). (http://**alex.kozinski.com**/articles/Structure_of_the_US_Legal_System%201.pdf)

5. Rules of the Supreme Court of the United States, 94 Harv. L. Rev. 312 (1980) (book review, with W.H. Allen). (http://**alex.kozinski.com**/articles/Rules_of_the_SCOTUS.pdf)

6. Ten Principles for the New Federal Practice, 31 Fed. Bar News & J. 16 (1984). (http://**alex.kozinski.com**/articles/Ten_Principles_for_New_Federal_Practice.pdf)

7. Litigation with the Federal Government, ALI-A.B.A. CLE Rev., Sept. 21, 1984. (http://**alex.kozinski.com**/articles/Litigation_with_Federal_Govt.pdf)

8. Taking the Fifth Seriously, Harv. Salient, Oct. 1987, at 6. (http://**alex.kozinski.com**/articles/Taking_the_Fifth_Seriously.pdf)

9. A Tribute to Chief Justice Warren E. Burger, 100 Harv. L. Rev. 975 (1987). (http://**alex.kozinski.com**/articles/Tribute_to_Chief_Justice_Warren_Burger.pdf)

10. Foreword in Economic Liberties and the Judiciary (James A. Dorn & Henry G. Manne eds., George Mason Press 1987). (http://**alex.kozinski.com**/articles/Economic_Liberties_and_the_Judiciary.pdf)

11. It is a Constitution We Are Expounding, 1987 Utah L. Rev. 977 (debate with J.D. Williams).

(http://**alex.kozinski.com**/articles/It_is'_a_constitution_we_are_expounding.pdf)

12. Torts are No Piece of Cake, Wall St. J., Oct. 6, 1988, at A20 (reviewing Peter W. Huber, Liability: The Legal Revolution and its Consequences (1988)). (http://**alex.kozinski.com**/articles/Torts_are_no_piece_of_cake.pdf)

13. Rescuing Contracts from High Weirdness, Wall St. J., Aug. 3, 1988. (http://**alex.kozinski.com**/articles/Rescuing_Contracts_from_High_Weirdness.pdf)

14. Takings, Reason, May 1988, at 78 (book review). (http://**alex.kozinski.com**/articles/Takings_Reason.pdf)

15. Hunt for Laws' "True" Meaning Subverts Justice, Wall St. J., Jan. 31, 1989, at A14. (http://**alex.kozinski.com**/articles/Hunt_for_Laws_True_Meaning_Subverts_Justice.pdf)

16. Commercial Free Speech in the Marketplace of Ideas, 41 Rutgers L. Rev. 719 (1989) (symposium moderator). (http://**alex.kozinski.com**/articles/Commercial_Free_Speech_Marketplace_Ideas.pdf)

17. Life Is Not A Novel, Wall St. J., July 18, 1989, at A12 (reviewing Nathaniel Branden, Judgment Day: My Years with Ayn Rand (1989)). (http://**alex.kozinski.com**/articles/Life__Is_Not_a_Novel.pdf)

18. What I Ate for Breakfast and Other Mysteries of Judicial Decisionmaking, 43 Cons. Fin. L.Q. Rep. 254 (1989), reprinted in 26 Loy. L.A. L. Rev. 993 (1993). (http://**alex.kozinski.com**/articles/What_I_Ate_for_Breakfast.pdf)

19. The Virtues of an Ordered Mind, Legal Times, Nov. 27, 1989, at 50 (reviewing Ruggero J. Aldisert, Logic for Lawyers: A Guide to Clear Legal Thinking (1989)). (http://**alex.kozinski.com**/articles/Virtues_of_an_Ordered_Mind.pdf)

20. Freedom's Scents: A Romanian Remembers, Wall St. J., Nov. 28, 1989, at A6. (http://**alex.kozinski.com**/articles/Freedoms_Scents_A_Romanian_Remembers.pdf)

21. Romanians Must Now Build a Society, L.A. Daily J., Jan. 18, 1990, at A14. (http://**alex.kozinski.com**/articles/Romanians_Must_Now_Build_Society.pdf)

22. Guide to Nintendo Shopping, Wall St. J., Jan. 31, 1990, at A14. (http://**alex.kozinski.com**/articles/Guide_to_Nintendo_Shopping.pdf)

23. Who's Afraid of Commercial Speech?, 76 Va. L. Rev. 627 (1990) (with Stuart Banner), reprinted as When Speech Isn't Free in Philip Morris Mag., Summer 1991, at 26, in 350 FTC: Watch 8 (Sept. 9, 1991), and in 2 Int'l Health & Dev. 7 (Summer 1991). (http://**alex**.kozinski.com/articles/Who's_Afraid_Commercial_Speech.pdf)

24. Trouble in Santa Teresa, N.Y. Times, May 27, 1990, § 7, at 13 (reviewing Sue Grafton, "G" is for Gumshoe (1990)). (http://**alex.kozinski.com**/articles/Trouble_in_Santa_Teresa.pdf)

25. Of Profligacy, Piracy, and Private Property, 13 Harv. J.L. & Pub. Pol'y. 17 (1990) (debate introduction). (http://**alex.kozinski.com**/articles/Of_Profligacy_Piracy_Private_Property.pdf)

26. Through the Open Door: What Is It Like to Be an Immigrant in America?, Wall St. J., July 3, 1990, at A8. (http://**alex.kozinski.com**/articles/Through_the_Open_Door.pdf)

27. Trouble in Super Marioland, Wall St. J., July 27, 1990, at A9. (http://**alex.kozinski.com**/articles/Trouble_in_Super_Marioland.pdf)

28. Death, Lies & Videotape, Forward, Aug. 24, 1990, at 1, reprinted in A.B.A. J., Jan. 1991, at 71. (http://**alex.kozinski.com**/articles/Death_Lies_&_Videotape.pdf)

29. Dicta: Kozinski Learns About Privacy, L.A. Daily J., March 11, 1991. (http://**alex.kozinski.com**/articles/Dicta_Kozinski_Learns_about_Privac.pdf)

30. Puzznic and Other Video Enigmas, Wall St. J., Mar. 20, 1991, at A18. (http://**alex.kozinski.com**/articles/Puzznic_and_Other_Video_Enigmas.pdf)

31. Tribute to Gideon Kanner, 24 Loy. L.A. L. Rev. 517 (1991). (http://**alex.kozinski.com**/articles/Tribute_to_Gideon_Kanner.pdf)

32. My Pizza with Nino, 12 Cardozo L. Rev. 1583 (1991). (http://**alex.kozinski.com**/articles/My_Pizza_with_Nino.pdf)

33. Confessions of a Bad Apple, 100 Yale L.J. 1707 (1991). (http://**alex.kozinski.com**/articles/Confessions_of_a_bad_apple.pdf)

34. The Dark Lessons of Utopia, 58 U. Chi. L. Rev. 575 (1991), reprinted in The St. Croix Rev., June 1993, at 43, in The Freeman, Feb. 1992, at 58, and in Econ. Educ. Bull., Feb. 1992, at 1. (http://**alex.kozinski.com**/articles/The_Dark_Lessons_of_Utopia.pdf)

35. A Drummer Tries to Remember Jim Morrison, Wall St. J., June 14, 1991, at A8 (reviewing John Densmore, Riders on the Storm (1991)). (http://**alex.kozinski.com**/articles/Drummer_Tries_to_Remember_Jim_Morrison.pdf)

36. Romania's Big Bamboozle, N.Y. Times Book Rev., June 30, 1991, at 16 (reviewing Andrei Codrescu, The Hole in the Flag (1991)). (http://**alex.kozinski.com**/articles/Romanias_Big_Bamboozle.pdf)

37. Thomas Affair: A Valuable Civics Lesson, Wall St. J., Oct. 24, 1991, at A16. (http://**alex.kozinski.com**/articles/Thomas_Affair_Valuable_Civics_Lesson.pdf)

38. The Bulwark Brennan Built, Colum. Journalism Rev., Nov./Dec. 1991, at 8 (reviewing Anthony Lewis, Make No Law: The Sullivan Case and the First Amendment (1991)). (http://**alex.kozinski.com**/articles/The_Bulwark_Brennan_Built.pdf)

39. Books for Christmas, 24 The American Spectator 14 (Dec. 1991). (http://**alex.kozinski.com**/articles/Books_for_Christmas.pdf)

40. Judging Between Archrivals, Wall St. J., Dec. 24, 1991, at A5.

(http://alex.kozinski.com/articles/Judging_Between_Archrivals.pdf)

41. "What's the Alternative?": A Roundtable on the Confirmation Process, A.B.A. J., Jan. 1992, at 41. (http://alex.kozinski.com/articles/What's_the_Alternative.pdf)

42. Scholarship of the Absurd: Bob Bork Meets the Bald Soprano, 90 Mich. L. Rev. 1578 (May 1992) (reviewing Walter Adams and James W. Brock, Antitrust Economics on Trial: A Dialogue on the New Laissez-Faire (1991)). (http://alex.kozinski.com/articles/Scholarship_of_Absurd_Bob_Bork_Meets_Bald_Soprano.pdf)

43. Foreword in Sexual Harassment in Employment Law (Barbara Lindemann & David D. Kadue, BNA 1992), reprinted as Locking Women Workers in a Gilded Cage in Legal Times of Washington, May 25, 1992, at 26. (http://alex.kozinski.com/articles/Foreword_in_Sexual_Harassment.pdf)

44. The Wrong Stuff, 1992 B.Y.U. L. Rev. 325, reprinted as How You Too Can . . . Lose Your Appeal, Montana Lawyer, Oct. 1997, at 5. (http://alex.kozinski.com/articles/The_Wrong_Stuff.pdf)

45. Dances mit Forverts, Forward, July 10, 1992, at 1. (http://alex.kozinski.com/articles/Dances_mit_Forverts.pdf)

46. Administrative Search (Update), Encyclopedia of the American Constitution (Supp. I 1992), at 8. (http://alex.kozinski.com/articles/Administrative_Search_Update.pdf)

47. The Calamira Trial, International Ass'n of Jewish Lawyers & Jurists, (Jerusalem Dec. 29, 1992). (http://alex.kozinski.com/articles/The_Calamira_Trial.pdf)

48. Remarks Concerning Professor Bruff's Proposals, 39 UCLA L. Rev. 1249 (1992). (http://alex.kozinski.com/articles/Remarks_Concerning_Prof_Bruff.pdf)

49. Color and Caution, The New Republic, Feb. 1, 1993, at 72 (reviewing Andrew Kull, The Colorblind Constitution (1992)). (http://alex.kozinski.com/articles/Color_and_Caution.pdf)

50. The Anti-History and Pre-History of Commercial Speech, 71 Tex. L. Rev. 747 (1993) (with Stuart Banner). (http://alex.kozinski.com/articles/Antihistory_and_Prehistory_of_Commercial_Speech.pdf)

51. The View From the Bench, A.B.A. J., May 1993, at 114 (reviewing Ruggero J. Aldisert, Winning on Appeal: Better Briefs and Oral Argument (1992)). (http://alex.kozinski.com/articles/The_View_from_the_Bench.pdf)

52. The Nintendo Story, Wall St. J., May 11, 1993, at A12 (reviewing David Sheff, Game Over: How Nintendo Zapped an American Industry, Captured Your Dollars, and Enslaved Your Children (1993)). (http://alex.kozinski.com/articles/The_Nintendo_Story.pdf)

53. A Penumbra Too Far, 106 Harv. L. Rev. 1639 (1993) (with Eugene Volokh). (http://alex.kozinski.com/articles/A_Penumbra_Too_Far.pdf)

54. Sanhedrin II: The Case of Ivan Demjanjuk, The New Republic, Sept. 13, 1993, at 209.

(http://alex.kozinski.com/articles/Sanhedrin_II.pdf) M105

55. Interbranch Relations: Hearings Before the Joint Comm. on the Organization of Congress, 103d Cong., 1st Sess. 279 (1993) (on the proper use of legislative history). (http://alex.kozinski.com/articles/Interbranch_Relations.pdf)

56. Lawsuit, Shmawsuit, 103 Yale L.J. 463 (1993) (with Eugene Volokh). (http://alex.kozinski.com/articles/Lawsuit_Shmawsuit.pdf)

57. Trademarks Unplugged, 68 N.Y.U. L. Rev. 960 (1993), reprinted in 84 Trademark Rep. 441 (1994). (http://alex.kozinski.com/articles/Trademarks_unplugged.pdf)

58. Conspiracy, What Conspiracy?, Times Literary Supplement, Nov. 26, 1993, at 11 (reviewing Gerald Posner, Case Closed (1993)). (http://alex.kozinski.com/articles/Conspiracy_what_Conspiracy.pdf)

59. Echoes of Tomorrow: The Road to Serfdom Revisited, 23 Sw. U. L. Rev. 429 (1994) (with David Schizer). (http://alex.kozinski.com/articles/Echoes_of_Tomorrow_Serfdom_Revisited.pdf)

60. Cruising the Information Superhighway, Wall St. J., July 18, 1994, at A8 (reviewing Harley Hahn and Rick Stout, The Internet Yellow Pages (1994)). (http://alex.kozinski.com/articles/Cruising_Information_Superhighway.pdf)

61. Introduction to Law, Economics & Civil Justice xiii (Patrick B. McGuigan ed., Free Congress Foundation 1994). (http://alex.kozinski.com/articles/Introduction_to_Law_Econ_CivilJustice.pdf)

62. Mickey & Me, 11 Univ. of Miami Entertainment & Sports L. Rev. 465 (1994). (http://alex.kozinski.com/articles/Mickey_and_Me.pdf)

63. Round Table Discussion: Science, Environment, and the Law, 21 Ecology L.Q. 343 (1994). (http://alex.kozinski.com/articles/Roundtable_Science_Environment_Law.pdf)

64. The Case of Punitive Damages v. Democracy, Wall St. J., Jan. 19, 1995, at A18. (http://alex.kozinski.com/articles/Case_of_Punitive_Damages.pdf)

65. Justice Sutherland, One of Us, Nat'l Rev., Feb. 20, 1995, at 64 (reviewing Hadley Arkes, The Return of George Sutherland: Restoring a Jurisprudence of Natural Rights (1994)). (http://alex.kozinski.com/articles/Justice_Sutherland_One_of_Us.pdf)

66. For an Honest Death Penalty, N.Y. Times, March 8, 1995, at A15 (with Sean Gallagher). (http://alex.kozinski.com/articles/For_an_Honest_Death_Penalty.pdf)

67. Skiers Beware Riders of the Apocalypse, Wall St. J., March 15, 1995, at A12. (http://alex.kozinski.com/articles/Skiers_Beware_Riders_Apocalypse.pdf)

68. Introduction to Volume Nineteen, 19 Harv. J.L. & Pub. Pol'y 1 (1995). (http://alex.kozinski.com/articles/Introduction_to_Volume19.pdf)

69. Don't Drop the Torah!, in Proceedings of the Sixth Annual Symposium of the Constitutional Law Resource Center, 1995, at 85, reprinted as When Just Isn't Right in Farbrengen, Tishrei 5760/1999,

at 15, and reprinted in part under original title in Calif. Lawyer, Feb. 2000, at 21-22.
(http://**alex.kozinski.com**/articles/Dont_Drop_the_Torah_Symposium.pdf)
(http://**alex.kozinski.com**/articles/When_Just_Isnt_Right.pdf)
(http://**alex.kozinski.com**/articles/Don't_Drop_the_Torah_CalLawyer.pdf)

70. Death: The Ultimate Run-On Sentence, 46 Case W. Res. L. Rev. 1 (1995) (with Sean Gallagher). (http://**alex.kozinski.com**/articles/Death_Ultimate_Run-on_Sentence.pdf)

71. Plug 'n' Pray, Forbes, July 29, 1996, at 84. (http://**alex.kozinski.com**/articles/Plug_n_Pray.pdf)

72. Diary, Slate, http://slate.com/diary/96-07-19/diary.asp (Jul. 19-Aug. 1, 1996) Jul. 24-Jul. 26, 1996 reprinted in The Slate Diaries (Jodi Kantor, Cyrus Krohn & Judith Shulevitz eds., 2000). (http://**alex.kozinski.com**/articles/Diary_Slate.pdf)

73. So You Want to Become a Federal Judge by 35?, Nat'l L.J., Aug. 19, 1996, at C6. (http://**alex.kozinski.com**/articles/So_You_Want_to_become_Federal_Judge.pdf)

74. Defying Death for the Heck of It, Wall St. J., Aug. 30, 1996, at A7 (reviewing Michael Bane, Over the Edge: A Regular Guy's Odyssey in Extreme Sports (1996)). (http://**alex.kozinski.com**/articles/Defying_Death_Heck_of_It.pdf)

75. Spook of Earl: The Spirit and Specter of the Warren Court, in The Warren Court: A Retrospective 377 (Bernard Schwartz ed., 1996). (http://**alex.kozinski.com**/articles/Spook_of_Earl.pdf)

76. Foreword in Reel Justice, (Paul Bergman & Michael Asimow, Andrews and McMeel 1996). (http://**alex.kozinski.com**/articles/Foreword_in_Reel_Justice.pdf)

77. In Praise of Moot Court--Not!, 97 Colum. L. Rev. 178 (1997) and American Lawyer, Jan./Feb. 1997, at 91. (http://**alex.kozinski.com**/articles/In_Praise_of_Moot_Court_NOT.pdf)

78. Tinkering With Death, The New Yorker, Feb. 10, 1997, at 48. (http://**alex.kozinski.com**/articles/Tinkering_with_Death.pdf)

79. Teetering on the High Wire, 68 U. Colo. L. Rev. 1217 (1997). (http://**alex.kozinski.com**/articles/Teetering_on_the_High_Wire.pdf)

80. Keynote Colloquy: Finding Justice in the Internet Dimension, 20 Seattle U. L. Rev. 619 (1997). (http://**alex.kozinski.com**/articles/Finding_Justice_in_the_Internet_Dimension.pdf)

81. The Great Dissenter, N.Y. Times Book Rev., July 6, 1997, (reviewing Reason and Passion: Justice Brennan's Enduring Influence (E. Joshua Rosenkranz & Bernard Schwartz eds., 1997)). (http://**alex.kozinski.com**/articles/The_Great_Dissenter.pdf)

82. Post-Mortem Talks with Jury Enlighten Judge, Nat'l L.J., Sept. 8, 1997, at A21. (http://**alex.kozinski.com**/articles/Post_Mortem_Talks_with_Jury_Enlighten.pdf)

83. Tread Carefully When Approaching the Bench, Nat'l L.J., Oct. 27, 1997, at A19. (http://**alex.kozinski.com**/articles/Tread_Carefully_When_Approaching_Bench.pdf)

84. Bending the Law, N.Y. Times Book Rev., Nov. 2, 1997, at 46 (reviewing Daniel A. Farber and Suzanna Sherry, Beyond All Reason (1997)).
(http://**alex.kozinski.com**/articles/Bending_the_Law.pdf)

85. The Modern View of Capital Punishment, 34 Amer. Crim. L. Rev. 1353 (1997) (debate with Professor Stephen Bright), reprinted in The Angolite, July/Aug. 1998, at 26.
(http://**alex.kozinski.com**/articles/Modern_View_Capital_Punishment.pdf)

86. Original Mean[der]ings, 49 Stan. L. Rev. 1583 (1997) (reviewing Jack N. Rakove, Original Meanings: Politics and Ideas in the Making of the Constitution (1996)) (with Harry Susman).
(http://**alex.kozinski.com**/articles/Original_Meanderings.pdf)

87. Brave New World, 30 U.C. Davis L. Rev. 997 (1997).
(http://**alex.kozinski.com**/articles/Brave_New_World.pdf)

88. The Annotated **Alex**, Calif. Lawyer, Jan. 1998, at 35.
(http://**alex.kozinski.com**/articles/The_Annotated_Alex.pdf)

89. How I Stopped Worrying and Learned to Love the Press, 3 Comm. L & Pol'y 163 (1998) (Symposium on the 50th Anniversary of the Hutchins Commission Report).
(http://**alex.kozinski.com**/articles/Stopped_Worrying_Learned_Love_Press.pdf)

90. The Many Faces of Judicial Independence, 14 Ga. St. U. L. Rev. 861 (1998).
(http://**alex.kozinski.com**/articles/Many_Faces_of_Judicial_Independence.pdf)

91. A Dissenting View From the Bench, in Science, Technology, and the Law 51 (New York Academy of Sciences 1998). (http://**alex.kozinski.com**/articles/A_Dissenting_View_from_Bench.pdf)

92. The Breakfast Table, Slate (with Nadine Strossen), available at http://www.slate.com/Code/Breakfast/Breakfast.asp?show=09/xx/98, where xx = 21 through 25 inclusive. (http://**alex.kozinski.com**/articles/Breakfast_Table_Strossen_and_Kozinski.pdf)

93. Clerkship Politics, 2 Green Bag 2d 57 (1998) (with Fred Bernstein).
(http://**alex.kozinski.com**/articles/Clerkship_Politics.pdf)

94. Constitutional Federalism Reborn, 22 Harv. J.L. & Pub. Pol'y 93 (1998).
(http://**alex.kozinski.com**/articles/Constitutional_Federalism_Reborn.pdf)

95. Should Reading Legislative History Be an Impeachable Offense?, 31 Suffolk U. L. Rev. 807 (1998).
(http://**alex.kozinski.com**/articles/Should_Reading_Legislative_History_Impeachable_Offense.pdf)

96. Conduct Unbecoming, 108 Yale L.J. 835 (1999) (reviewing Edward Lazarus, Closed Chambers (1998)). (http://**alex.kozinski.com**/articles/Conduct_Unbecoming.pdf)

97. An Unfair Attack on a Decent Judgment, Nat'l Post, March 8, 1999, at A18.
(http://**alex.kozinski.com**/articles/Unfair_Attack_on_Decent_Judgment.pdf)

98. Time and Place (letter to the Editor), Nat'l Post, March 15, 1999, at A19.

(http://alex.kozinski.com/articles/Time_and_Place.pdf) M108

99. The Case of the Speluncean Explorers: A Fiftieth Anniversary Symposium, 112 Harv. L. Rev. 1834, 1876 (1999). (http://alex.kozinski.com/articles/Case_of_Speluncean_Explorers.pdf)

100. Keeping Secrets: Religious Duty vs. Professional Obligation, 38 Washburn L.J. 747 (1999) (with Leslie A. Hakala). (http://alex.kozinski.com/articles/Keeping_Secrets_Religious_Duty_v_Professional_Obligation.pdf)

101. What's So Fair About Fair Use?, The 1999 Donald C. Brace Memorial Lecture, 46 J. Copyright Soc'y 513 (1999) (with Christopher Newman). (http://alex.kozinski.com/articles/Whats_So_Fair_About_Fair_Use.pdf)

102. Carthage Must Be Destroyed, 12 Fed. Sentencing Rep. 67 (1999). (http://alex.kozinski.com/articles/Carthage_must_be_Destroyed.pdf)

103. The Toyota Principle, 56 Wash. & Lee L. Rev. 923 (Summer 1999). (http://alex.kozinski.com/articles/The_Toyota_Principle.pdf)

104. When the Written Word and Reality Diverge, Forward, February 14, 2000, at 17. (http://alex.kozinski.com/articles/When_Written_Word_and_Reality_Diverge.pdf)

105. Please Don't Cite This!, Calif. Lawyer, June 2000, at 43 (with Stephen Reinhardt), reprinted in 18 Appellate Practice Journal 6 (Summer 2000). (http://alex.kozinski.com/articles/Please_Don't_Cite_This.pdf)

106. Who Gives A Hoot About Legal Scholarship?, 37 Houston L. Rev. 295 (2000). (http://alex.kozinski.com/articles/Who_Gives_A_Hoot_About_Legal_Scholarship.pdf)

107. Pull Down The Blinds, N.Y. Times Book Rev., July 2, 2000, at 10 (reviewing Jeffrey Rosen, The Unwanted Gaze (2000)). (http://alex.kozinski.com/articles/Pull_Down_the_Blinds.pdf)

108. They Call It Paper Love, E-Filing Rep., June 2001, at 7. (http://alex.kozinski.com/articles/They_Call_It_Paper_Love.pdf)

109. How I Narrowly Escaped Insanity, 48 UCLA L. Rev. 1293 (2001). (http://alex.kozinski.com/articles/How_I_Narrowly_Escaped_Insanity.pdf)

110. Expert Testimony After Daubert, J. Acct., July 2001, at 59. (http://alex.kozinski.com/articles/Expert_Testimony_After_Daubert.pdf)

111. Privacy on Trial, Wall St. J., Sept. 4, 2001, at A22. (http://alex.kozinski.com/articles/Privacy_on_Trial.pdf)

112. Fooled by Randomness, Wilson Q., Spring 2002, at 117 (book review). (http://alex.kozinski.com/articles/Fooled_By_Randomness.pdf)

113. Gore Wars, 100 Mich. L. Rev. 1742 (2002) (reviewing Bjørn Lomborg, The Skeptical

Environmentalist: Measuring the Real State of the World (2001)).
(http://**alex.kozinski.com**/articles/Gore_Wars.pdf) M109

114. Congressional Testimony, Oversight Hearing on Unpublished Judicial Opinions, Before the House Subcomm. on Courts, the Internet, and Intellectual Property of the House Comm. on the Judiciary, June 27, 2002. (http://**alex.kozinski.com**/articles/Oversight_Hearing_Unpublished_full.pdf)

115. Recapturing Madison's Constitution: Federalism Without the Blank Check in James Madison and the Future of Limited Government 13 (John Samples ed., 2002) (with Steven A. Engel). (http://**alex.kozinski.com**/articles/Recapturing_Madisons_Constitution.pdf)

116. Pulling the Plug: My Stand Against Electronic Invasions of Workplace Privacy, 2002 U. Ill. J.L. Tech. & Pol'y 407. (http://**alex.kozinski.com**/articles/Pulling_the_Plug.pdf)

117. Foreword in Academic Legal Writing: Law Review Articles, Student Notes and Seminar Papers (Eugene Volokh, Foundation Press 2003). (http://**alex.kozinski.com**/articles/Foreword_in_Academic_Legal_Writing.pdf)

118. The Judgment: X-Treme Advocacy Contest Winner, California Lawyer, September 2003, at 31. (http://**alex.kozinski.com**/articles/Xtreme_Advocacy_Contest_Winner.pdf)

119. Honoring the Court's Past, 71 Geo. Wash. L. Rev. 529 (2003). (http://**alex.kozinski.com**/articles/Honoring_the_Courts_Past.pdf)

120. Foreword in A Criminal Waste of Time (William W. Bedsworth, American Lawyer Media 2003). (http://**alex.kozinski.com**/articles/Criminal_Waste_of_Time.pdf)

121. In Opposition to Proposed Federal Rule of Appellate Procedure 32.1, 51(5) The Federal Lawyer 36 (June 2004). (http://**alex.kozinski.com**/articles/In_Opposition_To_Proposed_Rule.pdf)

122. The Real Issues of Judicial Ethics, 32 Hofstra L. Rev. 1095 (2004), reprinted as The Appearance of Propriety, Legal Affairs, Jan./Feb. 2005.
(http://**alex.kozinski.com**/articles/Real_Issues_of_JudicialEthics.pdf)
(http://**alex.kozinski.com**/articles/The_Appearance_of_Propriety.pdf)

123. Don't Split the Ninth Circuit!, Wall St. J., November 10, 2004, at A16 (with Sidney R. Thomas). (http://**alex.kozinski.com**/articles/Dont_Split_the_Ninth_Circuit.pdf)

124. The Appeal, 103 Mich. L. Rev. 1391 (2005) (with Alexander Volokh). (http://**alex.kozinski.com**/articles/The_Appeal.pdf)

125. Kozinski Strikes Back, San Francisco Recorder, Sept. 23, 2005 (http://**alex.kozinski.com**/articles/Kozinski_Strikes_Back.pdf)

126. Reply to Buchanan, Cato Unbound, December 9, 2005, available at http://www.cato-unbound.org/2005/12/09/**alex**-kozinski/reply-to-buchanan-2/
(http://**alex.kozinski.com**/articles/Reply_to_Buchanan.pdf)
Call Me a Panglossian, Cato Unbound, December 18, 2005, available at http://www.cato-unbound.org/2005/12/18/**alex**-kozinski/call-me-a-panglossian/

(http://alex.kozinski.com/articles/Call_Me_a_Panglossian.pdf)
Responding to:
James M. Buchanan, Three Amendments: Responsibility, Generality and Natural Liberty, Cato Unbound, December 5, 2005, available at
http://www.cato-unbound.org/2005/12/05/james-m-buchanan/three-amendments/
(http://alex.kozinski.com/articles/Three_Amendments.pdf); and
James M. Buchanan, Response to Comments, Cato Unbound, December 14, 2005, available at
http://www.cato-unbound.org/2005/12/14/james-m-buchanan/response/
(http://alex.kozinski.com/articles/Response_to_Comments.pdf)

127. A Court United: A Statement of a Number of Ninth Circuit Judges, Engage, April 2006, at 63 (with thirty-two other judges)
(http://alex.kozinski.com/articles/A_Court_United.pdf)

(March 30, 2006)

EXHIBIT 7

Index of /stuff

Name	Last modified	Size	Description
Parent Directory	09-Dec-2007 23:05	-	
$20 .doc	06-Jun-2002 14:40	68k	
(MONTY~1.MP3	06-Jun-2002 13:00	108k	
(MontyPython)Radio.mp3	06-Jun-2002 13:00	108k	
100movies.wmv	20-May-2007 16:40	19.0M	
10SixteenTons.mp3	15-Nov-2005 21:16	2.6M	
3rdWorldBombSquad.wmv	23-Jul-2005 02:54	1.7M	
5jews.gif	30-Apr-2005 16:40	41k	
AIRPORT.doc	13-May-2002 23:46	526k	
ATM_THEFTS.pps	17-Dec-2006 09:32	558k	
ATT-History.wmv	15-Mar-2007 18:49	2.6M	
Ain tGoin Down1.mp3	31-Jul-2007 18:19	2.6M	
Apr 6 RushLimbaugh.wmv	25-Apr-2006 01:57	1.3M	
Arkie Quarter.jpg	13-May-2002 23:46	45k	
ArnoldBobblehead.bmp	19-Jun-2005 14:44	41k	
ArrestedTexasStyle.wmv	07-Nov-2005 00:18	543k	
BADDAY S.MPG	06-Jun-2002 13:03	408k	
BBCCopsUndies.wmv	30-Sep-2005 07:04	3.5M	
BEERTEND.EXE	06-Jun-2002 13:03	252k	
BLENDER.EXE	06-Jun-2002 13:04	655k	
BUSTED.WAV	06-Jun-2002 13:04	1.3M	
BadDayAtTheRodeo 1.WMV	23-May-2005 00:04	1.7M	
BanningJo.wmv	27-Feb-2006 16:14	4.4M	
BestWomanDriver.wmv	08-Mar-2007 23:06	2.4M	
Bethlehem Steel Resp..>	17-Dec-2003 00:47	61k	
Bob.MP3	15-Mar-2007 18:38	3.4M	
BritishAmbassadorLet..>	21-Nov-2007 19:18	91k	
Brokeback2.jpg	15-Apr-2006 02:22	67k	
Bush Blair11.mpeg	27-Feb-2003 21:21	3.8M	
CAUGHT.WAV	01-Dec-2003 17:46	1.3M	

CHOCOLAT.pps	13-May-2002 23:18	486k
CHOCOL~1.EXE	06-Jun-2002 13:04	798k
COKEGIFT.EXE	06-Jun-2002 13:04	263k
COMPUTERENHANCEMENTS..>	13-May-2002 23:46	211k
COMPUTERENHANCEMENTS..>	06-Jun-2002 13:05	5.1M
Canadian currency/	06-Apr-2006 21:28	-
CaughtOnFilm 21.wmv	25-Apr-2006 01:57	1.1M
CaveOfWeed.pdf	15-Apr-2007 02:21	673k
Christmas Applicatio..>	29-Dec-2002 22:22	45k
Colo-rectalSurgeon.wav	17-Jun-2003 11:23	271k
CowD.jpg	15-Jan-2004 21:28	80k
D-TOYS~2.EXE	06-Jun-2002 13:05	952k
DISCO.EXE	06-Jun-2002 13:05	192k
DUI-TEST-SCOTTISH.wmv	23-Jan-2005 18:51	901k
DaddyCutTheBigOne.wav	04-Jan-2006 21:27	282k
Dilbert.powerpoint.bmp	03-Sep-2006 00:11	855k
Disappointment.wmv	08-Jun-2007 23:51	1.5M
Don't.Eat.Worms.mp3	10-Jan-2007 21:06	2.6M
Don'tTouchMe.mp3	13-May-2002 23:46	3.2M
DoninoPoolFinal.wmv	05-Nov-2006 22:37	1.8M
Douchenzondernattevo..>	19-Feb-2006 13:04	2.4M
ESHEEP.EXE	06-Jun-2002 13:06	310k
Elektronik Supersoni..>	01-Jun-2004 18:42	1.3M
FART.EXE	06-Jun-2002 13:06	604k
Far side.jpg	13-May-2002 23:46	131k
Father.mp3	17-Dec-2002 17:21	729k
Fire.html.htm	12-Jan-2004 01:18	1k
Fire.html_files/	06-Jun-2005 00:19	-
Flowchartofgettingso..>	25-May-2004 21:52	90k
Fridays.wmv	29-Oct-2006 22:05	3.3M
Fucking/	07-Nov-2006 02:28	-
GarageDoorOpener.wmv	28-Oct-2005 22:21	2.1M
Gas Prices.pps	28-Oct-2005 22:05	1.1M
GermanPope.jpg	12-May-2005 20:35	67k

GirlsEvil.jpg	13-May-2002 23:46	24k
Good Morning America..>	06-Jun-2002 13:08	2.0M
GoodMorningAmerica.avi	24-Oct-2002 17:54	2.0M
GoodMorningAmerica.mov	13-May-2002 23:47	2.0M
GoodMorningAmerica.mpg	06-Jun-2002 13:08	2.0M
GreatestMovieLine.wmv	19-Aug-2005 08:28	1.1M
HALLOWEE.JPG	12-Oct-2002 10:56	42k
HAMPSTER.WAV	06-Jun-2002 13:08	105k
HITLER.WAV	06-Jun-2002 13:08	2.2M
HOLZFELR.MP3	06-Jun-2002 13:09	298k
Haircutformeetings.jpg	12-Dec-2005 00:07	25k
Halliburton.mp3	05-Nov-2004 21:27	224k
Halloween Costume.jpg	01-Dec-2002 23:35	27k
Hand Paint/	25-May-2004 21:44	-
Handrolled.mpg	19-Dec-2004 03:08	2.3M
Hats 1 .doc	06-Jun-2002 13:08	22k
HavaNagila.mpg	04-Dec-2002 22:06	1.8M
HawaiiWeather.wvx	16-Dec-2005 01:45	1k
Health.doc	03-May-2005 11:36	22k
HomerLookAlike.jpg	15-Jan-2004 18:33	28k
HorseRace.mp3	04-Oct-2005 21:21	1.1M
How.not.to.kick.mpg	13-May-2002 23:47	2.0M
Howtoputonabra.wmv	10-Nov-2006 14:50	2.1M
I knew there was a b..>	15-Dec-2004 11:56	33k
I veBeentoMooseJaw.wma	30-Dec-2004 21:59	681k
JOHNNY~1.MP3	06-Jun-2002 13:10	3.4M
JUMP.AVI	06-Jun-2002 13:10	562k
JayLeno 1.wmv	27-Feb-2003 21:21	1.7M
JohnnyCash-ABoyNamed..>	06-Jun-2002 13:09	3.4M
Judge So.mp3	01-Apr-2003 15:35	2.6M
Krylaholiday.pps	13-May-2002 23:47	515k
Larry Craig/	11-Sep-2007 17:22	-
MONTYP~1.MP3	06-Jun-2002 13:12	3.1M
MasterCard.jpg	13-May-2002 23:47	49k

MedicalAlert11.doc	25-Jun-2003 01:19	23k
Memo.roma.pdf	03-Jan-2006 13:42	36k
MensRules.pps	19-Nov-2005 22:47	134k
MercuryMotor.pps	28-Feb-2006 20:11	756k
MonkeyJoke.wmv	06-Jan-2004 01:25	1.5M
Monthly Man.wmv	05-Jul-2006 18:49	2.9M
Monty.Python-Lumberj..>	06-Jun-2002 13:11	3.1M
MovieQuiz21.xls	17-Nov-2002 23:50	298k
Muscle Tricks.mpg	10-Apr-2006 19:02	2.7M
NOTMYJOB.GIF	06-Jun-2002 13:12	125k
NYC.exe	13-May-2002 23:47	402k
Netscape Wallpaper.bmp	06-Jun-2002 13:12	157k
Notgood.pps	08-Mar-2006 21:24	2.0M
Notice of Appeal -- ..>	03-Aug-2006 21:29	57k
Notmyjob.jpg	15-Oct-2002 10:54	54k
PARACHUT.AVI	13-May-2002 23:47	4.2M
PLAYBALL.AVI	06-Jun-2002 13:13	3.0M
ParkingExpert1.wmv	28-Jul-2005 00:03	457k
ParkingExpert2.mpg	28-Jul-2005 00:03	634k
ParkingExpert4.mpg	28-Jul-2005 00:03	548k
Playboy's playmates ..>	25-May-2004 21:44	245k
PoolLifeGuard.wmv	09-Jan-2005 04:19	1.1M
Queen and Scots sold..>	30-Dec-2004 21:58	49k
Radiocallgonewrong 1..>	21-May-2003 14:20	633k
Retainer.Letter.pdf	08-Nov-2006 07:53	47k
S&W342.jpg	15-Jan-2004 18:34	10k
SARS Mask Shortage.jpg	16-Jun-2003 02:20	59k
SNAKE.JPG	13-May-2002 23:47	17k
SNL-DeNiro.wmv	29-Jun-2004 17:10	2.3M
SNL-SuspectedbertDeN..>	12-Jul-2004 18:54	2.3M
SNOWMAN.EXE	06-Jun-2002 13:13	1.4M
STUXMASP.EXE	06-Jun-2002 13:13	231k
SWClinton.exe	13-May-2002 23:47	777k
SamGross/	18-May-2005 17:18	-

Seat29EC3.pdf	10-Jul-2005 19:14	111k
She's Mine.mp3	13-May-2002 23:47	3.6M
Sheep guy.jpg	01-Dec-2002 23:35	38k
SofitelLoo2.jpg	29-Oct-2005 13:35	924k
Solution to the Mid-..>	13-May-2002 23:19	606k
St.Marteen1.pps	19-Jun-2005 14:39	1.3M
Stress Reliever.exe	13-May-2002 23:47	1.2M
THEORY.GIF	13-May-2002 23:47	22k
TOOTHBRU.JPG	13-May-2002 23:47	14k
Thats My Boy.mpg	21-Jun-2003 01:02	1.4M
TheBillingSong.mp3	25-Dec-2005 17:08	700k
TheMansong.pps	17-Apr-2007 00:29	535k
The real meaning of ..>	01-Apr-2006 00:11	112k
TheformulaofSex.pps	15-Mar-2007 18:37	72k
Thumbs.db	06-Jun-2002 13:14	84k
Toilet.wmv	14-May-2003 19:00	1.8M
Tom Lehrer - (Hannuk..>	13-May-2002 23:47	1.7M
Tom Lehrer - (Hannuk..>	06-Jun-2002 13:14	1.7M
TurkishGillette.wmv	17-May-2007 20:15	2.3M
VibratorRecall.mp3	27-Jul-2005 00:09	726k
WHICHBAB.JPG	13-May-2002 23:47	60k
WHIPTH~1.EXE	06-Jun-2002 13:15	698k
Whatdoyousee_1.pps	04-Jan-2006 22:11	140k
Where the sun don t ..>	10-Jan-2007 19:06	4.1M
Why Women Live Longer/	04-Feb-2005 00:46	-
XMAS.EXE	06-Jun-2002 13:16	688k
XmasKangaroo.wmv	09-Jan-2006 19:14	5.3M
Youthinkyou reunluck..>	19-Jun-2005 14:43	32k
ZSSSLOTS.EXE	06-Jun-2002 13:16	181k
a.day.without.jews.wmv	18-May-2006 23:56	6.4M
aimhighhh[1].mpeg	13-May-2002 23:46	1.5M
aliensong.mpg	13-May-2002 23:46	3.1M
angel2.wmv	01-Sep-2006 01:08	4.8M
aussie.oops.mpg	29-Mar-2006 23:52	3.0M

bambi.flv	01-Mar-2007 01:14	3.6M
beerbythepoolbounce...>	06-Apr-2006 21:32	3.7M
bending.jpg	13-May-2002 23:46	39k
big_jump.mpeg	20-May-2004 22:36	676k
boris1p.exe	13-May-2002 23:46	287k
bouncy bouncy.wmv	24-Nov-2003 22:29	1.3M
brazilian-hair-cut.pps	09-Jan-2005 04:26	482k
bungeepoo.jpg	13-May-2002 23:46	20k
bush-for-president.jpg	06-Jun-2002 13:04	80k
cameltoe.htm	18-Dec-2003 22:59	18k
cameltoe/	22-Apr-2006 02:53	-
captain .wmv	15-Jan-2004 01:19	2.5M
charade.jpg	11-Aug-2005 22:32	90k
cheeseshop.mp3	28-Jul-2002 23:52	3.7M
chinesemassproductio..>	15-Mar-2007 16:04	2.6M
chocolatebunny.exe	13-May-2002 23:46	798k
collegehumor.248334.mov	25-Sep-2005 12:24	15.3M
commercials/	17-Nov-2007 23:03	-
computerdate.jpg	19-Dec-2004 21:58	57k
consent.htm	27-Oct-2006 19:12	6k
consent_files/	07-Nov-2006 02:36	-
crazy.fish.wmv	23-Jan-2006 17:16	2.7M
dancingbush.exe	13-May-2002 23:46	725k
datingqame.rm	22-Aug-2006 18:17	1.7M
dd.bmp	16-Jun-2003 02:20	1.0M
deaf.ultimate.karako..>	24-Nov-2007 15:06	8.2M
deafkaraoke.wmv	30-Sep-2005 07:05	3.2M
didn't start the fire/	11-Sep-2007 17:22	-
divorce.doc1.pdf	31-Mar-2006 00:30	310k
dl.mpg	06-Jun-2002 13:06	2.6M
donkey.mpg	06-Jun-2002 13:06	2.6M
dumbestdogyoullevers..>	22-Jan-2006 08:56	1k
edwards.pretty.wmv	31-Jul-2007 18:17	4.1M
eggroll.wmv	27-Apr-2006 19:29	1.1M

fastshooter.wmv	09-Mar-2005 20:55	740k
father.rm	13-May-2002 23:46	382k
flying_grandma.wmv	01-Jun-2004 18:42	1.2M
freakinbrothers.wmv	10-Jul-2003 16:21	2.0M
funny-cats-2.wmv	06-Apr-2006 21:31	2.3M
galaxy.swf	11-Nov-2006 01:26	1.0M
garyhart.mp3	04-Apr-2005 17:02	4.3M
georgewwhathe.wmv	21-Jan-2006 19:18	1.8M
gerbil.exe	13-May-2002 23:46	709k
gerbilgeno.exe	13-May-2002 23:46	1.7M
hangonstevens.mp3	05-Jul-2006 18:43	7.7M
harmonic.motion.eml	09-Jan-2004 00:12	106k
harrasment_1.wmv	05-Jul-2006 18:45	3.8M
headache-cure-56.wmv	25-May-2004 21:44	657k
helmutportrait.jpg	16-Oct-2003 17:05	21k
honda.commercial.html	06-Sep-2005 22:21	2k
how.offensive.gif	08-Feb-2006 18:01	58k
howmanypeople.gif	12-Nov-2003 00:07	69k
image0011.gif	03-Sep-2007 02:50	69k
isitmanisitwoman.pps	27-Apr-2006 23:20	1.4M
jackwebb.wav	24-Jan-2005 23:09	926k
jaguar.dent.gif	04-Oct-2005 20:22	80k
japanese.wmv	13-Jun-2004 22:49	1.6M
jaylobj.wmv	17-Nov-2002 23:28	1007k
jesus.mov	04-Jan-2006 22:27	3.5M
jesus.wmv	05-Jul-2006 18:47	2.4M
jewsdontcamp.mp3	21-Jan-2006 18:58	2.3M
joancrawford.jpg	14-Jan-2004 19:32	7k
joefish.exe	13-May-2002 23:47	1.1M
john.mccain.sings.wmv	05-Jul-2006 18:48	4.4M
jump.avi	13-May-2002 23:19	562k
kerrywins!.jpg	12-Dec-2005 00:08	35k
kooljuggle.gif	12-Dec-2003 23:21	574k
languages.jpg	17-Jun-2003 13:55	196k

lawyer&dog.gif	01-Jun-2004 07:54	8k
lehrer.rtf	06-Jun-2002 13:10	16k
levant_ezra060213.rm	19-Feb-2006 14:41	1k
lights.wmv	28-Nov-2005 22:45	4.8M
mars.jpg	17-Jan-2004 12:44	120k
megaflics(1).jpg	06-Jun-2002 13:10	108k
menciaMountain.wmv	15-Apr-2006 01:29	3.5M
mens_room.asf	17-May-2003 00:00	810k
mexicanviagra.gif	17-Nov-2002 23:28	65k
monica.jpg	21-May-2003 14:27	15k
moscow.DOC	13-Mar-2005 20:09	95k
mousedart.exe	13-May-2002 23:47	1.1M
music/	18-May-2005 17:18	-
news_report_from_Ira..>	18-May-2005 17:22	1.3M
nomorebush.jpg	09-Jan-2004 19:18	39k
not_bond.wmv	23-Dec-2005 18:50	4.3M
notre.dame.avi	12-Oct-2006 10:58	4.6M
nutcracker.mpg	11-Oct-2004 01:53	3.0M
opinionpoll.pps	11-Mar-2006 00:32	92k
optical.exe	13-May-2002 23:47	22k
optical.pps	13-Mar-2006 23:30	859k
optical/	27-Feb-2006 22:55	-
orgasm.wav	06-Jun-2002 13:12	800k
osama.gif	19-Feb-2006 12:47	106k
passcontrol.wmv	27-Jul-2005 01:44	1.2M
pepper_&_salt_you_wo..>	13-May-2002 23:47	33k
pingpong.wmv	14-Jul-2003 14:32	3.4M
piss_diver.wmv	11-Feb-2006 01:47	390k
pork.jpg	03-Apr-2006 01:27	47k
porrspel.exe	13-May-2002 23:47	223k
profreading.wmv	17-Nov-2007 22:59	6.7M
riddle.jpg	21-May-2005 23:20	17k
ringmybell3555.wmv	08-Aug-2005 16:14	1.5M
santa_1.wmv	23-Dec-2005 18:49	1.1M

santafart.mp3	08-May-2003 16:04	2.1M
sextetris.exe	13-Oct-2002 13:29	1.7M
sfo.mp4	07-Nov-2005 18:23	250k
shark.mpeg	01-Aug-2004 17:57	1.6M
siquemiteta.swf	15-Jan-2004 01:14	41k
singingrabbi.wmv	21-May-2005 09:41	3.2M
slingshot.wmv	11-Feb-2007 21:26	1.2M
so where did you guy..>	22-Dec-2006 14:26	1.4M
sonicboom.jpg	13-May-2002 23:47	49k
stainglass.jpg	12-Oct-2002 10:56	136k
sundaydriver.mpe	16-Jun-2003 02:20	6.9M
testicle.interview.wmv	22-Dec-2006 13:46	2.8M
texas.shootout/	17-Feb-2007 21:35	-
theartoffoolingmen.pps	11-Oct-2004 01:57	139k
torreador_f.gif	13-May-2002 23:47	61k
toystory.jpg	13-May-2002 23:47	40k
truck-art/	04-Jan-2006 23:39	-
union.wmv	18-Jan-2003 19:46	4.4M
upside.down.wmv	19-Feb-2006 12:25	788k
videodelmese_Yoga.wmv	28-Jul-2005 00:01	2.0M
vince cdnnot[1].mp3	06-Jun-2002 13:14	588k
vwgolf85.jpg	13-May-2002 23:47	153k
w_zales_ad1.wmv	05-Jul-2006 18:49	846k
wall-mart-greeter.gif	27-Jun-2004 20:28	485k
wedding.jpg	06-Jun-2002 13:14	611k
weird_al/	31-Jul-2007 18:56	-
whatsahol.wmv	11-Jul-2005 23:38	1.4M
whiptheworker.exe	13-May-2002 23:47	698k
whymomscan_tdoyoga.wmv	07-Jun-2007 23:02	2.0M
wife joke breaking n..>	16-Dec-2005 01:59	73k
women's%20bathroom.jpg	04-May-2006 00:11	36k
workcycl.avi	06-Jun-2002 13:16	299k
worlds_shortest_vaca..>	13-May-2002 23:47	338k
wtc-photo2.gif	13-May-2002 23:47	2.1M





yale.foreign.culture..>	12-Dec-2005 00:32	78.9M
yaser.wmv	30-Nov-2004 15:42	1.4M
yoga/	04-Jan-2006 23:40	-
yourepitiful.mp3	10-Nov-2006 15:02	4.5M
zzzz.gif	06-Jun-2002 13:16	30k

Apache/1.3.37 Server at alex.kozinski.com Port 80

EXHIBIT 8

STATE BAR COURT OF CALIFORNIA HEARING DEPARTMENT 845 S. Figueroa Street, 3rd Floor Los Angeles, CA 90017-2515	FOR CLERK'S USE ONLY: FILED FEB -6 2015 STATE BAR COURT CLERK'S OFFICE LOS ANGELES
In the Matter of: **CYRUS M. SANAI,** **Member No. 150387,** A Member of the State Bar	Case Nos: 10-O-09221, 12-O-10457-DFM **ORDERS RE RESPONDENT'S MOTIONS TO DISMISS**

On October 17, 2014, in anticipation of the conclusion of the State Bar's case-in-chief during the trial of this matter, Respondent filed motions to dismiss all nine of the counts currently pending against him. (Rules Proc. State Bar, rules 5.110 and 5.124(E).)

On October 24, 2014, the State Bar filed an "omnibus" opposition to the motions.

Rule 5.110 provides:

> (A) Motion on Failure to Meet Burden of Proof. During a trial, after the party with the burden of proof has rested and before the proceeding is submitted to the Court, the opposing party may make a motion for a determination that the party with the burden of proof has failed to meet its burden, or the Court may make the motion itself and give the parties an opportunity to argue the issue. If the allegations are severable, the Court may dismiss some but not all of them. The Court must consider and weigh all the evidence introduced and determine credibility.
>
> (B) Denial of Motion. If the motion is denied, the moving party may offer evidence to the same extent as if the motion had not been made.
>
> (C) Grant of Motion. If the motion is granted, the Court's decision must include findings of fact and conclusions of law.

Rule 5.124(E) provides:

> (E) Motion to Dismiss for Failure to State a Disciplinable Offense. A motion to dismiss for failure of the initial pleading to state a disciplinable offense may be made at any time before the Court finds culpability.

Having considered the arguments of counsel, the voluminous evidentiary record, and the allegations of the Notice of Disciplinary Charges in this matter, the court concludes as follows:

There is no contention made by Respondent in his motion that the State Bar's evidence does not show that he failed to timely report the sanctions that were ordered at that time. Instead, Respondent argues that this count must be dismissed because "It is OCTC's burden of proof to show that the disciplinary proceedings were initiated in a timely fashion."

For all of the same reasons discussed with regard to Count 2, above, this motion to dismiss Count 3 is DENIED.

Count 6:

In this count the State Bar alleges that between October 2008 and September 2010, Respondent "filed and maintained formal judicial complaints with the Ninth Circuit Judicial Council against approximately 19 federal judges, when such complaint were frivolous and made for improper reasons . . . ." It alleges that the filing of these complaints constituted acts of moral turpitude.

In his motion, Respondent argues that the evidence received by this court is insufficient to establish clear and convincing evidence to support this count.

The State Bar did not put in evidence the complaints actually filed by Respondent against the federal judges. In response to this court's inquiry, it was informed by the State Bar that it was unable to do so due to the Ninth Circuit's refusal to provide those complaints to the State Bar.

Being unable even to read the complaints filed by Respondent, this court cannot conclude that any of those complaints were filed frivolously or constituted an act of moral turpitude. To the extent that this court is aware of the content of one of those complaints, the record shows that it was apparently justified and resulted in a formal apology by the judge and a self-administered recusal by him from the pending matter involving Respondent.

This count is DISMISSED WITH PREJUDICE.

Count 7:

In this count, the State Bar alleges that Respondent failed to timely report a sanctions order of the U.S. District Court issued, on or about September 6, 2007.

There is no contention made by Respondent in his motion that the State Bar's evidence does not show that he failed to timely report the sanctions that were ordered at that time. Instead, Respondent argues that this count must be dismissed because "It is OCTC's burden of proof to show that the disciplinary proceedings were initiated in a timely fashion." For all of the same reasons discussed with regard to Count 2, above, that contention is rejected.

Respondent also argues that he had no duty to report the court's order because it was not an award of "sanctions" for which reporting is required by Business and Professions Code section 6068, subdivision (o)(3). This court disagrees.

The scope of the reporting obligation under section 6068, subdivision (o)(3), is not limited to orders issued under authority of statutes or rules having the precise word "sanction" contained

therein. Instead, the duty includes order issued pursuant to statutes and rules (and possibly other sources of authority) which are used for the purpose of punishing bad faith conduct.

This interpretation of the scope of section 6068, subdivision (o)(3), is consistent with the treatment by the California courts of orders issued under other statutes (see, e.g., *Young v. Rosenthal* (1989) 212 Cal. App. 3d 96, 130-138 [order issued under Code of Civil Procedure section 907[2] characterized and treated as "sanction"]), and it is supported by prior decisions of this court. (See *In the Matter of Respondent Y* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 862, 866 [interpreting section 6068, subdivision (o)(3), to require report to be made within 30 days after order issued, even though order is not final and is being appealed].[3]

The order issued by the trial judge here was issued pursuant to 15 U.S.C. 1681n, which provides in pertinent part: "Upon a finding by the Court that an unsuccessful pleading, motion, or other paper filed in connection with an action under this section was filed in bad faith or for the purpose of harassment, the Court shall award to the prevailing party attorney's fees reasonable in relation to the work expended in responding to the pleading, motion or other paper." In that court's decision, the court noted that the statute reflected "the legitimate substantive federal statutory policy of punishing bad faith conduct made in connection with actions under Section 1681." (Ex. 48, p. 3.) The court then awarded attorneys pursuant to that statute based on its finding that Respondent's prosecution of the action had been "malicious" and "in bad faith and with the purpose of harassment." (*Id.* at pp. 3-4.)

Respondent's motion to dismiss Count 7 is DENIED.

Count 8:

In this count the State Bar alleges that Respondent encouraged the continuance of an action from a corrupt motive of passion or interest by filing an Abstract of Judgment in the amount of $143,469.95, with the Los Angeles County Recorder's Office, when he knew he had no basis to do so and did so with a corrupt motive of passion or interest and to inflict harm on the defendants in that proceeding, in willful violation of Business and Professions Code section 6068, subdivision (g).

The evidence received by this court is sufficient to sustain a finding that Respondent's actions in filing the Abstract of Judgment constituted a willful violation of section 6068, subdivision (g). This conduct by Respondent was an unjustified continuation of his previously efforts to obtain $137,000 in attorney's fees. Those actions began with his filing of a memorandum of costs on April 17, 2006, discussed more fully below, prior to any judgment having been entered by the court and without having sought any court order awarding him attorney's fees. After the court entered and then vacated its order of May 11, 2006, disapproving

---

[2] Similar to 15 U.S.C. 1681n, section 907 of the Code of Civil Procedure provides, "When it appears to the reviewing court that the appeal was frivolous or taken solely for delay, it may add to the costs on appeal such damages as may be just."

[3] "We hold that the purpose of section 6068, subdivision (o)(3) is to inform the State Bar promptly of events which could warrant disciplinary investigation. Depending on the facts, any such investigation might not even focus primarily on the sanction itself, but on the conduct preceding or surrounding a sanctions order."

and striking that memorandum of costs, the defendants filed a written motion to have the memorandum of costs stricken, resulting in the court entering an order on July 31, 2006, striking the memorandum of costs. In that order, the court was explicit in stating that Respondent was not entitled to any award of attorney's fees because he had not first sought them through a noticed motion. (Ex. 22.)

Despite that court's written order on July 31, 2006, Respondent proceeded on October 18, 2006 to secure from the court clerk an abstract of judgment and then file that abstract of judgment with the Recorder's Office on October 20, 2006, purporting to show that he held a judgment against The Irvine Company and the other defendants in the amount of $143,469.95 (which was based almost entirely on his previously-disapproved claimed entitlement to $137,000 of attorney's fees). (Ex. 23.) This recorded instrument then created for months an obstacle to those defendants closing various business transactions while the purported "judgment" remained outstanding and unsatisfied.

To remove this impediment to their businesses, the defendants were required by Respondent to file a motion to have the recorded abstract invalidated. The resolution on that motion was delayed by Respondent's unsuccessful challenges to the judge and was not heard until March 2007, at which time the court granted relief from the recorded abstract.

Respondent alleges that the count should be dismissed because the evidence does not provide clear and convincing evidence of the continuation by him of "an action or proceeding from any corrupt motive of passion or interest." More specifically, he argues that a violation of section 6068, subdivision (g), requires "the filing and continuance of a meritless 'action', that is to say 'lawsuit,' and not the filing a specific document therein which is divorced from the merits of the action." (Motion, p. 4.)

This contention lacks merit. Section 6068, subdivision (g), enjoins the "commencement or the continuance of an action or proceeding from any corrupt motive of passion or interest." The use of the disjunctive "or" in that prohibition makes clear that the commencement of an improper action is not a prerequisite to this court finding a violation of the statute based on subsequent conduct, resulting from corrupt motive of passion or interest, seeking to continue the action.

Respondent's motion to dismiss Count 8 is DENIED.

Count 9:

In this count the State Bar alleges, "On or about April 17, 2006, Respondent filed a Memorandum of Costs in *Sanai v. Saltz*, et al., Los Angeles County Superior Court case no. BC235671, listing names of individuals upon an accompanying service list whom Respondent claimed were agents of process for corporate defendants who had been served when he knew, or was grossly negligent in not knowing, that such individuals in fact had not been served on behalf of the corporate defendants, and thereby Respondent committed an act or acts involving moral turpitude, dishonesty or corruption in willful violation of Business and Professions Code, section 6106." [sic]

Respondent contends in is motion that the State Bar has failed to present clear and convincing evidence supporting this count. This court agrees.

There is no evidence that, when the Memorandum of Costs was filed on April 17, 2006, it included a service list "listing names of individuals upon an accompanying service list whom Respondent claimed were agents of process for corporate defendants who had been served." Instead, the evidence is uncontradicted that the proof of service filed by Respondent with the Memorandum of Costs on April 17, 2006, stated that the memorandum had been addressed and mailed only to the corporate defendants' offices, with no designation of any individual at those offices to which the mail was to be delivered.[4]

The evidence offered by the State Bar in support of the above allegation relates to a contention by Respondent's opposing counsel in 2006 that Respondent, after the Memorandum of Costs had been filed, had made a notation on the previously-filed service list regarding the identity of the designated agents of those corporate defendants for service of process. However, it is undisputed that this notation was made by Respondent with the knowledge and consent of the court's clerk, in her presence, and at her request. This clerk was aware that Respondent, a party to the action, was not (and could not be) the person who had signed the proof of service under penalty of perjury, and there is no evidence that Respondent was claiming to modify the proof of service or that the clerk believed that Respondent's subsequent notation in any way modified the original proof of service.

The disputed issue at that time was whether the clerk had merely requested that Respondent write down the identity of the designated agents for service of process or whether she had asked Respondent to write down the names of the individuals who had actually been served. At an ex parte hearing on May 11, 2006, this clerk was called to testify regarding that issue. Prior to her being summoned to testify in 2006, comments by both the presiding judge and opposing counsel made clear that each had discussed with her the substance of her anticipated testimony. (Ex. 29, pp. 5-6; cf. p. 11, line 26.)[5] During her testimony, her answers were equivocal, including acknowledging on cross-examination that her memory of the event (which had happened less than three days before) was poor and that she did not remember exactly the reason she had given Respondent for asking him to write down the names of the designated agents for service of process. (Ex. 29, pp. 25-26, 44.)

This same clerk was called as a witness by the State Bar during the trial of this matter. Although she had been provided with a copy of her prior testimony, and had affirmed its content as correct for the State Bar in January 2014, when she was called as a witness in this proceeding in August 2014, she testified that she could not identify Respondent, has no recollection of the disputed memorandum of costs, and has absolutely no recollection of discussing the matter with

---

[4] This failure to address the letter to individuals authorized to accept service of process on behalf of the corporation greatly reduces the likelihood that the effort at service will be successful, but is not necessarily fatal. (See *Dill v. Berquist Construction Co.* (1994) 24 Cal. App. 4th 1426, 1437 [service is effective, even if the mailing is not addressed to an authorized agent, if it is actually received by such an agent].)

[5] Respondent contends that the clerk's testimony at that time was improperly influenced by the presiding judge for improper reasons, and he seeks in this proceeding to subpoena and question that judge as an adverse witness in this proceeding regarding his contact with the clerk prior to her testimony.

Respondent.[6] This purported lack of any memory by the witness was not credible, had the effect of eliminating any meaningful cross-examination by Respondent, and makes her prior testimony during the May 11, 2006 ex parte hearing even less convincing.

Also weakening the weight to be given the record of the May 11, 2006 hearing is the fact that it took place without Respondent having been given proper prior notice. Opposing counsel had given Respondent only telephonic notice of his intent to make an ex parte application for an order shortening time for a contemplated written motion seeking to strike the memorandum of costs. Opposing counsel had previously indicated to Respondent that this attack would be based on the absence of a judgment entered by the court prior to the filing of the memorandum of costs. Then, on May 11, 2006, when the court heard the ex parte matter, opposing counsel indicated that he had previously given notice, via a telephone message left on Respondent's phone, of his intent to seek on May 11 the actual order striking the memorandum of costs. Although Respondent objected at the hearing to this lack of notice, the court went forward to issue an order striking the memorandum of cost, based in part on the clerk's testimony. The court was then required to vacate that order on the following day, when Respondent was able to return to court and make a formal record of a copy of the recorded phone message, which was explicit in stating that the only stated purpose of the May 11 ex parte appearance was to seek an order shortening time.

Finally, the contention that Respondent was attempting to mislead the court or opposing counsel into believing that the designated agents for service of process had been served with the memorandum of costs is belied by Respondent's having filed and served a declaration, dated May 10, 2006, in which he provided the court and opposing counsel with a copy of the original proof of service; documentation that the memorandum of costs was served only by sending it by certified mail, addressed only to the corporation and not to any specific individual; and documentation that the individuals signing for the certified mail at the two corporate offices were both individuals other than the designated agents for service of process.

The evidence failing to present clear and convincing proof of the act of moral turpitude alleged in Count 9, that count is DISMISSED WITH PREJUDICE.

IT IS SO ORDERED.

Dated: February 6, 2015

DONALD F. MILES
Judge of the State Bar Court

[6] The clerk also denied any memory of her contact with the trial court prior to her testifying in 2006, despite her review of the court's statement in the transcript that he had talked with her.

M129

CERTIFICATE OF SERVICE

[Rules Proc. of State Bar; Rule 5.27(B); Code Civ. Proc., § 1013a(4)]

I am a Case Administrator of the State Bar Court of California. I am over the age of eighteen and not a party to the within proceeding. Pursuant to standard court practice, in the City and County of Los Angeles, on February 6, 2015, I deposited a true copy of the following document(s):

ORDERS RE RESPONDENT'S MOTIONS TO DISMISS

in a sealed envelope for collection and mailing on that date as follows:

☒ by first-class mail, with postage thereon fully prepaid, through the United States Postal Service at Los Angeles, California, addressed as follows:

CYRUS M. SANAI
SANAIS
433 N CAMDEN DR STE 600
BEVERLY HILLS, CA 90210

☒ by interoffice mail through a facility regularly maintained by the State Bar of California addressed as follows:

BROOKE SCHAFER, Enforcement, Los Angeles
KEVIN BUCHER, Enforcement, Los Angeles

I hereby certify that the foregoing is true and correct. Executed in Los Angeles, California, on February 6, 2015.

Tammy Cleaver
Case Administrator
State Bar Court

EXHIBIT 9

FILED
MAR 20 2015
STATE BAR COURT
CLERK'S OFFICE
LOS ANGELES

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT – LOS ANGELES

In the Matter of **CYRUS MARK SANAI,** **Member No. 150387,** A Member of the State Bar.	Case Nos.: **10-O-09221; 12-O-10457-DFM** **ORDER GRANTING MOTIONS TO RECONSIDER DENIAL OF RESPONDENT'S MOTION TO DISMISS AND STATE BAR'S MOTION TO QUASH; DISMISSING COUNTS 1-5 AND 7; GRANTING MOTION TO QUASH SUBPOENAS RE NINTH CIRCUIT EMPLOYEES; AND ABATING RESOLUTION OF COUNT 8 AND RELATED MOTIONS TO QUASH PENDING RESOLUTION OF UNDERLYING CIVIL ACTION**

The Notice of Disciplinary Charges (NDC) in these cases was filed by the Office of the Chief Trial Counsel (State Bar) on January 7, 2014. Counts 1-5 arise out of Respondent's involvement as a party in litigation filed in the State of Washington; Count 6, which has now been dismissed by this court, related to complaints filed by Respondent with the Judicial Council of the Ninth Circuit against various judges of the Ninth Circuit; and Counts 7-9 arise out of Respondent's involvement as a party in litigation still pending in the Los Angeles County Superior Court.[1] In those counts, Respondent is charged with misconduct occurring in April and May 2005 (Count 1), July 2005 (Count 2), March 2005 (Count 3), October 2004 (Count 4),

[1] Count 9 has also now been dismissed by this court.

November 2005 (Count 5), October 2008 through September 2010 (Count 6), September 2007 (Count 7), October 2006 (Count 8), and April 2006 (Count 9).

At the conclusion of the State Bar's case-in-chief against Respondent, Respondent moved to dismiss all of the nine counts pending against him, contending, inter alia, that the counts are barred by the five-year rule of limitations set forth in rule 5.21(A) of the Rules of Procedure of the State Bar of California, which provides: "If a disciplinary proceeding is based solely on a complainant's allegations of a violation of the State Bar Act or Rules of Professional Conduct, the proceeding must begin within five years from the date of the violation." In turn, the State Bar defended its decision to file the charges in 2014, well more than five years after the alleged misconduct, by invoking the provisions of rule 5.21(G), which provides: "The five-year limit does not apply to disciplinary proceedings that were investigated and initiated by the State Bar based on information received from an independent source other than a complainant."

In response to Respondent's motion to dismiss, this court dismissed Counts 6 and 9 based on the absence of clear and convincing evidence of the misconduct alleged in those counts.[2] The court, however, denied Respondent's motion to dismiss the remaining counts based on the five-year rule of limitations of rule 5.21(A). The court's decision to defer resolution of that issue was based on *In the Matter of Wolff* (Review Dept. 2006) 5 Cal. State Bar Ct. Rptr. 1, which holds that the respondent has the burden of proving application of the rule of limitations. Since that burden would suggest that the State Bar had no obligation during its case-in-chief to present evidence regarding defenses to the apparent application and/or running of the rule of limitations, but instead presumably could wait to present such evidence until after Respondent had presented his evidence, this court concluded that resolution of the rule of limitations issue should be deferred until after the State Bar had the opportunity and burden of presenting any evidence that

[2] No request has been made by the State Bar to reconsider those dismissals.

the proceedings were "were investigated and initiated by the State Bar based on information received from an independent source other than a complainant" or that there had been some tolling of the running of the rule of limitations. Respondent has now filed a motion for reconsideration of this court's denial of that request for dismissal.

Related to the resolution of this rule of limitations issue is whether the State Bar may prevent discovery and/or disclosure of evidence regarding the nature and source of the information the State Bar received and relied on in filing the various counts against Respondent. Respondent has sought, during both pretrial discovery and trial, to require the State Bar to produce a substantial number of documents in its files regarding the history of the State Bar's receipt and handling of complaints and information regarding the events giving rise to the remaining counts, and he has subpoenaed as witnesses at trial the two State Bar employees, attorneys Joseph Carlucci and Brooke Schaeffer, who have been identified as the individuals most knowledgeable about the reasons for the State Bar's investigation and initiation of the pending charges. In response to those efforts by Respondent, the State Bar has refused to produce the requested documents and witnesses, and it has filed a motion to quash the trial subpoenas.

On October 16, 2014, this court issued an order denying the State Bar's motion to quash *Respondent's* subpoenas requiring the production of State Bar documents and the appearance as *witnesses of* attorney Schaeffer.[3] In that order this court concluded:

> *In its motions to* quash, the State Bar argues that the requested documents are confidential and protected attorney work product. It is well-established that the party asserting such a privilege has the burden of establishing that privilege. (*Fellows v. Superior Court* (1980) 108 Cal.App.3d 55, 67; Brown and Weil, *Civil Procedure*

[3] In that order the court indicated that it was reserving the issue of whether to quash the subpoena requiring the attendance of Joseph Carlucci as a witness at trial until after the testimony of a designated State Bar witness regarding the procedural history of the matters was heard. That testimony was received on October 21, 2014.

Before Trial, ¶ 8:192.) In addition, rule 5.65(I) provides that "When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or otherwise protected, the party must make the claim expressly and must describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileges, will enable the other party to assess the applicability of the privilege or protection."[4] The State Bar has done neither. The motions and their supporting declarations do not contain express claims of privilege or other protection; nor do they describe the nature of the documents, communications or things not produced or disclosed "in a manner that, without revealing information itself privileged or protected, will enable the other party to assess the applicability of the privilege or protection." (Rule 5.65(I)(2).) The motions do not attempt to provide a privilege log that complies with rule 5.65(I)(2). The supporting declarations are vague and general[5] and based on "information and belief" about the contents of the files and the genesis of the investigations. In sum, there is no factual basis for this court to make a preliminary finding that any of the documents are protected by the attorney work product rule.

The State Bar also asserts that all of its files are confidential pursuant to rule 2301, which states that, except as otherwise provided by law or the Rules of Procedure, its files and records are confidential. This broad rule is applicable to the State Bar's files prior to its filing of charges against a member. However, where charges have been filed, due process and the provisions of the Rules of Procedure, including rule 5.65(I), make clear that the member is entitled to have access to documents that are exculpatory. This is especially true where the State Bar has called one of its own employees to testify regarding its lack of prior knowledge of certain facts from the member.

The list of documents attached to each subpoena sets forth items that may shed light on the genesis of the initial and any subsequent complaints against Respondent; their nature, scope and resolution, if any; and the timing of those events. These documents may be relevant in assessing whether any of the pending charges are time-barred. There is no other way for Respondent to obtain this information and defend on this basis.

---

[4] Rule 5.65(I) also provides in pertinent part that "Statements of any witness interviewed by the deputy trial counsel, ... are not protected as work product." [Footnote in original order]

[5] For example, "Also, many communications between members of State Bar staff have been withheld as privileged. To the best of my information and belief, none of these contain otherwise discoverable witness interviews." (Bucher declarations, page 6, paragraph 9.) [Footnote in original order]

While that order required the State Bar to produce documents on October 20, 2014, the State Bar filed a motion for reconsideration of the above order, and compliance was subsequently stayed by this court pending its receipt of the scheduled State Bar testimony, resolution of Respondent's motions to dismiss, and resolution of the State Bar's motion for reconsideration.

On October 27, 2014, Respondent filed an opposition to the motion for reconsideration. On October 28, 2014, the State Bar filed a reply to the opposition. On October 29, 2014, Respondent filed a request to strike the State Bar's reply or, in the alternative, a sur-reply to the reply.[6]

On October 21, 2014, the State Bar called a State Bar investigator to testify regarding the history of the complaints and investigations leading up to the filing of the NDC in 2014. However, this investigator was not assigned to work on these matters until 2011. His only knowledge of the history of the State Bar's first awareness of the matters giving rise to the alleged misconduct being pursued in the pending NDC is based on his review of the State Bar's files, including documents that are the subject of the pending subpoenas. Although he was requested during the morning of his testimony to bring the files he had reviewed to court during his continued testimony that afternoon, he did not do so.

Documents previously provided by the State Bar to Respondent, coupled with the investigator's testimony at trial, make clear that the State Bar was made aware in August 2005 of complaints regarding Respondent's alleged misconduct in the Washington litigation, when Respondent's opposing counsel in that Washington litigation, William Gibb, forwarded information regarding that alleged misconduct to Frederick Bennett (Bennett), court counsel for the Los Angeles County Superior Court, for the stated purpose of having Bennett report that

[6] The court exercises its discretion to receive both the reply and the sur-reply. The request to strike the reply is denied.

information to the State Bar. Bennett then forwarded that information to the State Bar. In the course of Bennett's complaining to the State Bar, he indicated that he was then acting as "counsel of record for Judge Grimes" - to whom Respondent had apparently written a letter after Judge Grimes had been removed by the appellate court from presiding further over the matter in which Respondent was a party. Bennett complained to the State Bar that Respondent's letter to his client violated various rules of professional conduct. (See Exs. 60, 1045.) Respondent now argues in this proceeding that Bennett's real motivation for his complaints to the State Bar was retaliation for Respondent testifying in opposition to the elevation of Judge Grimes to the appellate bench.

The information provided to the State Bar by Bennett was initially handled in case No. 05-O-3430 (the *'05* case). Thereafter, an additional complaint regarding Respondent's activities in the Washington litigation was received by the State Bar in April 2006 from an employee of the Washington State Bar. This individual provided the State Bar with copies of the sanction orders underlying counts 2, 4, and 5 of the pending NDC as well as information underlying counts 1 and 3. (Ex. 64.) The State Bar then opened case No. 06-O-12214 (the *'06* case) and contacted Respondent in October 2006 regarding the sanction orders and his other actions in the Washington proceeding. (Ex. 65.) At that time, Respondent confirmed the prior issuance of the orders underlying counts 2-5. At some time thereafter, both the *'05* and *'06* cases were closed. The State Bar's witness during the trial of the instant matter was not able to identify who made the decision to close the cases or precisely when they were closed.

At some point in 2008, a new case, case No. 08-O-13372 (the *'08* case), was opened. The State Bar witness testified that this new case was based on the *'05* case and was opened within a few months after the *'05* case was closed at the recommendation of the attorney who had closed the *'05* case. The witness, however, did not identify who that attorney was. What

prompted the matter to be re-opened, albeit under a different case number, was not explained. Respondent was then contacted in 2009 about the conduct underlying counts 7 and 9, and the *'08* case was then closed. The State Bar's witness stated that a number of attorneys worked on the *'08* investigation, but he could not identify the specific individual who had closed the file.

In 2010, a complaint was made to the State Bar by the Judicial Council of the Ninth Circuit regarding Respondent's purportedly frivolous complaints to it about a number of federal judges. This complaint by the Judicial Council of the Ninth Circuit subsequently formed the basis for Count 6 of the pending NDC. When the complaint was received, the State Bar opened case No. 10-O-09221 (the *'10* case) and contacted Respondent about the matter. Then, after learning that the Judicial Council of the Ninth Circuit would not release to the State Bar the actual complaints filed by Respondent against the federal judges, the State Bar decided to issue a warning letter to Respondent in November 2011, and closed the case.[7] (Ex. 1040.) That decision was explained, both orally and in writing, by the State Bar to Cathy Catterson, a representative of the Judicial Council of the Ninth Circuit, on November 8, 2011. (Ex. 1041). Thereafter, she complained of the State Bar's decision in a letter, dated January 19, 2012, directed to the then Acting Chief Trial Counsel of the State Bar.

[7] The State Bar had previously notified the Judicial Council of the Ninth Circuit in May 2011 that it would be difficult to pursue any complaint that Respondent's complaints against various federal appellate justices were frivolous without having access to the actual underlying complaints. As stated by the State Bar at that time: "As you may be aware, to prevail in State Bar disciplinary proceedings, our office must prove by clear and convincing evidence that an attorney committed willful misconduct. Although the Judicial Council's order of September 30, 2010, will certainly be a useful piece of evidence to establish that Mr. Sanai engaged in misconduct by filing frivolous misconduct complaints, it would be insufficient standing alone to prove by clear and convincing evidence that Mr. Sanai engaged in misconduct warranting discipline, especially since the order does not include any specific findings of fact but rather includes only the conclusion that Mr. Sanai abused the misconduct complaint procedure." (Ex. 1039, p. 2.)

In May 2012, Respondent was notified that the *'10* case had been re-opened by the State Bar, resulting in the subsequent filing of count 6 in the pending NDC.[8] (Ex. 1043.) When asked during cross-examination why the *'10* case was re-opened at that time, the State Bar's witness stated that he did not know. When asked who made the decision to prosecute the re-opened *'10* case, the witness identified attorney Schaeffer.

All counts in the NDC, other than count 6 [regarding Respondent's complaints about the federal judges], are now encompassed within case No. 12-O-10457 (the *'12* case). No explanation was given by the State Bar's witness at trial regarding why the *'12* case was opened other than to say that it was based on information learned while investigating the *'10* case. The State Bar's witness, however, was unable to provide any specifics as to what that information was or whether there was any information with regard to the Washington matters that was not already in the State Bar's files for the earlier cases. The witness also could not identify any person who had provided information to the State Bar who was not a "complainant." Finally, no reason has been given as to why the matter was opened under the new *'12* number, rather than by re-opening the *'05*, *'06*, or *'08* case.

The alleged misconduct which forms the basis for the remaining counts took place in 2004 (Count 4), 2005 (Counts 1, 2, 3, and 5), 2006 (Counts 8), and 2007 (Count 7). The NDC in this matter was filed in 2014. The State Bar had received complaints and documentation regarding all of the misconduct alleged in those counts well more than five years prior to the filing of the NDC. Hence, the five-year rule of limitations of rule 5.21(A) has expired for each of those counts unless that rule is inapplicable or the running of the five-year period was tolled.

[8] Given the State Bar's inability to provide this court with a copy of the actual complaints filed by Respondent against the federal judges, this court - as accurately predicted by the State Bar in May 2011 - eventually dismissed that count at trial due to the State Bar's failure to provide clear and convincing evidence that those complaints were frivolous. The evidence was not sufficient even to enable this court to identify all of the judges against whom complaints had been filed.

In the State Bar's motion seeking reconsideration of this court's order denying its motions to quash Respondent's subpoenas, the State Bar argues that it referred in the original motions to quash to an earlier privilege log that had previously been provided to this court in conjunction with the State Bar's effort to avoid having to disclose documents during discovery. It argues that this reference relieved it of any obligation to provide that privilege log to this court in conjunction with its motions to quash. It also contends that the privilege log, not signed or affirmed as true by any individual, substantiates its claims of privilege. A review of this privilege log reveals that the State Bar has asserted that every disputed document is subject to a claim of "Attorney Work Product Privilege."

While this court is inclined to disagree with the State Bar's arguments,[9] a review of the privilege log, when combined with the testimony of the State Bar's prior witness, makes clear that Respondent is correct that this court should reconsider its prior decision to defer consideration of the rule 5.21 issue. The testimony of the State Bar's witness did not show that any of the remaining counts "were investigated and initiated by the State Bar based on information received from an independent source other than a complainant." Instead, that testimony merely reaffirmed that all of the alleged misconduct, as well as documentation of that

[9] As previously explained by this court in its original order, the State Bar, with or without the privilege log, has generally fallen far short of establishing that the bulk of these documents are protected by the attorney work product rule. Moreover, even documents protected by that rule are subject to disclosure on a finding that denial of discovery "will unfairly prejudice the party seeking discovery in preparing that party's claim or defense or will result in an injustice." (Code Civ. Proc., § 2018.030, subd. (b).) This court finds that such is the case here. That conclusion is buttressed by the State Bar's use of its files to provide the basis for the testimony offered at trial by its own witness, who is the author of some of the disputed documents.

However, the good cause disclosure rule, quoted above, is expressly limited by subdivision (a) of section 2018.030, which states that "an attorney's impressions, conclusion, opinions, or legal research or theories is not discoverable under any circumstances." In reviewing the privilege log, the court notes that the State Bar only sought to describe a few of the documents in dispute as falling within the absolute privilege of subdivision (a). Those documents are numbered in the privilege log as follows: Documents 11, 13, 60, 61, 62, 85, 99, 115, 116, 126, 127, 138, 160, 161, 192, 212, 213, 217-247, 258, and 259.

conduct, had been received by the State Bar from complainants well prior to five years before the filing of the NDC. The witness did not identify any new evidence that the State Bar had received from any source independent of a complainant at any time prior to five years before the filing of the NDC.

The privilege log provided by the State Bar makes clear that the State Bar has asserted an "Attorney Work Product Privilege" against any further disclosure of evidence, including any testimony from the most knowledgeable State Bar employees, regarding the basis for the filing of the remaining charges against Respondent. Having relied on claims of privilege to avoid such disclosure, both during discovery and trial, the State Bar cannot now reverse its position and offer any of such evidence in rebuttal to Respondent's rule 5.21(A) defense. Accordingly, under the circumstances of this case, it is not inappropriate for this court to decide the rule of limitations issue at this time.

This court finds that counts 1-5 and 7 are barred by the five-year rule of limitations set forth in rule 5.21(A). The State Bar's contention that those counts are subject to rule 5.21(G) is unpersuasive and unsupported by the evidence. Further, its contention that the running of the rule of limitations with regard to counts 2-5 and 7 is subject to tolling because of Respondent's ongoing obligation to report the sanction orders is contrary to both law and fact. Instead, the evidence is clear and convincing that Respondent reported the sanctions orders to the State Bar in 2006, when he was contacted at that time by the State Bar about those orders. After he had done so, the pending cases were then closed. As previously noted, why those matters were subsequently re-opened in 2012 under a different case number could not be explained by the State Bar's witness. There is no evidence that the matters were reopened based on any new evidence regarding Respondent's prior failure to timely report the orders.

Because the dismissal of counts 1-5 and 7 makes the disputed production of documents by the State Bar and the requested testimony of Brooke Schaeffer and Joseph Carlucci irrelevant to the remaining issues in this matter, their motions to quash are granted. That determination, however, is without prejudice to Respondent's ability to renew his request to subpoena such individuals as witnesses with documents in the event that any of the dismissed counts are reversed on appeal.

On the issue of the alleged tolling of rule 5.21(A), this court reaches a different decision with regard to Count 8. While the alleged misconduct in that matter occurred in October 2006, the issue of whether that conduct was inappropriate is tied to the issue of whether Respondent's filing of the Abstract of Judgment was wrongful. It has become clear to this court during the trial and subsequent discussions with counsel that the Los Angeles litigation is still ongoing and that there remains the possibility that Respondent's conduct can and might ultimately be determined in that matter to have been legally correct. There has been no final determination in that civil matter in that regard. Under such circumstances, the running of the five-year limitations period is tolled pursuant to rule 5.21(C)(3).

This court previously notified the parties of its concern that resolution of Count 8 should be abated until the pending Los Angeles litigation has been resolved, and it then provided them with an opportunity to be heard on that issue. Good cause appearing, this court now orders that resolution of Count 8 is abated pursuant to rule 5.50(B) until the pending Los Angeles litigation has been resolved.

In three related matters, motions to quash have been filed on behalf of various individuals who also received trial subpoenas from Respondent, including Michael Salz; Frederick Bennett, Leslie Green, Sheri Carter, and Judges Terry Green and Kevin Brazile of the Los Angeles County Superior Court; and Cathy Catterson and Molly Dwyer of the Ninth Circuit.

Michael Salz is Respondent's opposing attorney in the Los Angeles litigation and has already appeared as a witness for the State Bar in this matter with regard to Count 8. Respondent wishes to re-call him as a witness during Respondent's case-in-chief, which Respondent is clearly entitled to do. However, Respondent has also served Salz with a subpoena requiring Salz to produce documents. While Salz argues in his motion to quash that many of the requested documents are irrelevant to the proceeding, resolution of that motion is best deferred until the Los Angeles litigation has been resolved.

A motion to quash was also filed on behalf of Frederick Bennett, Leslie Green, Sheri Carter, and Judges Terry Green and Kevin Brazile of the Los Angeles County Superior Court. Frederick Bennett is court counsel for the Los Angeles County Superior Court and, as previously noted, was the individual who complained about Respondent's misconduct in the Washington litigation at the request of Respondent's opposing counsel in that matter. Bennett previously acted as counsel for Judge Elizabeth Grimes in several private matters involving Respondent, and Respondent contends that Bennett's testimony and documents are relevant to showing that there has been an inappropriate conspiracy between various individuals and judges such that the decisions of the federal and state courts, offered into evidence by the State Bar in this proceeding, lack validity or, in the alternative, should not be given the weight normally afforded such determinations. Because Bennett was the original complainant in 2005 with regard to the Washington litigation (Counts 1-5), if those counts had not been dismissed, Respondent would have been entitled to call him as a witness at trial, especially as his contacts with the State Bar relate to the rule of limitations issue. Those counts, however, have now been dismissed. With regard to testimony by Bennett and the other witnesses from the Los Angeles County Superior Court possibly relevant to the remaining Count 8, resolution their motion to quash should also be deferred until after the Los Angeles litigation is resolved.

Finally, motions to quash have been filed by Cathy Catterson and Molly Dwyer, both employees of the Ninth Circuit.[10] As previously noted, Catterson was in communication with the State Bar regarding the Ninth Circuit's complaint that Respondent had filed complaints against various federal judges (Count 6). Had that count not been dismissed, Catterson's testimony, and possibly Dwyer's, would have been relevant. That count, however, has now been dismissed. Because the dismissal of that count makes their testimony and production of documents irrelevant to the issues in this matter, their motions to quash are granted. That determination, however, is without prejudice to Respondent's ability to renew his request to subpoena such individuals as witnesses with documents in the event that any of the dismissed counts are reversed on appeal.

For the reasons stated above, Counts 1-5 and 7 are dismissed with prejudice. Resolution of the remaining count, Count 8, is abated pending final resolution of the pending Los Angeles litigation. This abatement extends to the motions to quash of Michael Salz, Frederick Bennett, Leslie Green, Sheri Carter, and Judges Terry Green and Kevin Brazile.

The motions to quash of Cathy Catterson, Molly Dwyer, Joseph Carlucci and Brooke Schaeffer are granted, without prejudice to Respondent's ability to renew his request to subpoena such individuals as witnesses with documents in the event that any of the dismissed counts are reversed on appeal.

IT IS SO ORDERED.

Dated: March 20, 2015

DONALD F. MILES
Judge of the State Bar Court

[10] The court exercises its discretion to receive both the replies and the sur-replies of the parties regarding these motions. Respondent's requests to strike the replies are denied.

CERTIFICATE OF SERVICE

[Rules Proc. of State Bar; Rule 5.27(B); Code Civ. Proc., § 1013a(4)]

I am a Case Administrator of the State Bar Court of California. I am over the age of eighteen and not a party to the within proceeding. Pursuant to standard court practice, in the City and County of Los Angeles, on March 20, 2015, I deposited a true copy of the following document(s):

ORDER GRANTING MOTIONS TO RECONSIDER DENIAL OF RESPONDENT'S MOTION TO DISMISS AND STATE BAR'S MOTION TO QUASH; DISMISSING COUNTS 1-5 AND 7; GRANTING MOTION TO QUASH SUBPOENAS RE NINTH CIRCUIT EMPLOYEES; AND ABATING RESOLUTION OF COUNT 8 AND RELATED MOTIONS TO QUASH PENDING RESOLUTION OF UNDERLYING CIVIL ACTION

in a sealed envelope for collection and mailing on that date as follows:

☒ by first-class mail, with postage thereon fully prepaid, through the United States Postal Service at Los Angeles, California, addressed as follows:

CYRUS M. SANAI
SANAIS
433 N CAMDEN DR STE 600
BEVERLY HILLS, CA 90210

☒ by interoffice mail through a facility regularly maintained by the State Bar of California addressed as follows:

BROOKE SCHAFER, Enforcement, Los Angeles
KEVIN BUCHER, Enforcement, Los Angeles

I hereby certify that the foregoing is true and correct. Executed in Los Angeles, California, on March 20, 2015.

Tammy Cleaver
Case Administrator
State Bar Court

APPENDIX N

UNITED STATES COURT OF APPEALS
For the Ninth Circuit

No. 19-55429

CYRUS SANAI, an individual

Plaintiff, and Appellant

vs.

JAMES MCDONNELL, an individual; MARK BORENSTEIN, an individual; and DOES 1 through 10, inclusive,

Defendants;

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
HONORABLE ROBERT GARY KLAUSNER
DISTRICT COURT CASE NO. CV 18-5663-RGK-E

MOTION FOR DISQUALIFICATION AND RECUSAL OF JUDGES AND DISCLOSURE

Cyrus M. Sanai, SB#150387
SANAIS
433 North Camden Drive
Suite 600
Beverly Hills, California, 90210
Telephone: (310) 717-9840
cyrus@sanaislaw.com

MOTION FOR DISQUALIFICATION AND RECUSAL OF JUDGES AND DISCLOSURE

I. MOTION

For the reasons set forth below, Appellant Cyrus Sanai ("Sanai") hereby files a motion to disqualify the following Circuit Judges: Berzon, Thomas, Goodwin, Wallace, Schroeder, D. Nelson, Canby, O'Scannlain, Fernandez, Kleinfield, Tashima, Graber, McKeown, Wardlaw, Fletcher, Fisher, Gould, Paez, Tallman, Rawlinson, Clifton, Bybee, Callahan, Bea, M.D. Smith, Jr., Ikuta, N. R. Smith, Murguia, Christen, Nguyen, and Watford.

This motion also moves that all Circuit Judges, including the Circuit Judges not named above (Farris, Leavy, Trott, Hawkins, Silverman, Hurwitz, Owens, Friedland, Bennett, R.D. Nelson, Miller, Bress, Hunsaker and Bade), and all future circuit judges and any other judges assigned to make decisions in this case, make the following disclosures on the record:

1. Whether or not they are friends of disgraced former Circuit Judge Alex Kozinski;

2. Whether they had any knowledge, direct or indirect, of Kozinski's sexual harassment and distribution of pornography within the Court prior to December 2017;

3. Whether they have had any contact, direct or indirect with Kozinski since his resignation or would otherwise consider himself or herself as his friend;

4. Whether they in any way participated or supported the efforts to censure Appellant Sanai, disbar Appellant Sanai, or interfere in the employment of anyone at the request of Kozinski or Circuit Judge Reinhardt.

5. The dates, if any, the judge served on the Judicial Council.

6. The relationship any judge has with Mark Borenstein, or any other Defendant, or any past or current member of Division Eight of the Second Appellate District of the Court of Appeal of the State of California.

II. BACKGROUND TO APPEAL

This appeal, and a related appeal (Sanai v. Staub, 9th Cir. Case No. 19-55427) involve a question of first impression in the Ninth Circuit Court of Appeal: where a party provides admissible of evidence of a past or existing professional or personal relationship between a federal judge and a party or key witness in the litigation, must the federal judge disclose the material facts concerning the relationship, including whether it is still ongoing?

The Sixth and Eleventh Circuit have answered this question in the affirmative:

> We believe instead that litigants (and, of course, their attorneys) should assume the impartiality of the presiding judge, rather than pore through the judge's private affairs and financial matters. Further, judges have an ethical duty to "disclose on the record information which the judge believes the parties or their lawyers might consider relevant to the question of disqualification." *Porter v. Singletary,* 49 F.3d 1483, 1489 (11th Cir. 1995). . . . [The judge] possibly did not consider the matter sufficiently relevant to merit disclosure, but his non-disclosure did not vest in [the parties] a duty to investigate him.

Am. Textile Mfrs. Inst., Inc. v. Limited, Inc., 190 F.3d 729, 741 (6th Cir. 1999).

Neither the Ninth Circuit nor the United States Supreme Court

has ever addressed this issue. This appeal presents this issue, and the scope of appellate disqualification in the federal courts in the wake of *Williams v. Pennsylvania* (2016) 579 U.S. ____, 136 S.Ct. 1899, 195 L.Ed.2d 99; *Caperton v. A.T. Massey Coal Co.* (2009) 556 U.S. 868, 129 S.Ct. 2252, 173 L.Ed.2d 1208.

This case involves the relationship between the district court judge, R. Gary Klausner and a key witness in this case Frederick Bennett. Mr. Bennett is key figure in the pleadings. See Docket #41 at 3-7. Mr. Bennett is a defendant in the related case. Bennett represented Judge Klausner multiple times in Judge Klausner's prior job, and it appears Judge Klausner hired Bennett in this position. *See* Motion for Recusal, Dock. Nos. 65. Judge Klausner refused to disclose anything about this relationship. *See* Dock. No. 65. A motion to recuse was denied by a different district court judge on the grounds, inter alia, that insufficient evidence was presented about the relationship. Dock. No. 68.

The action was dismissed by Judge Klausner based on the Rooker-Feldman doctrine. In doing so, Judge Klausner rejected the

ruling of the judge he replaced and the published precedent of every Court of Appeals to have ruled on the issue since 2005, and instead cited unpublished district court cases, a including a decision which pointed out the rejection of published decision by other courts:

> With respect to the Injunctive Orders, they appear to be non-final, interlocutory orders. In 2001, the Ninth Circuit held that *Rooker-Feldman* applies to interlocutory orders. *See Doe & Assocs. Law Offices v. Napolitano,* 252 F.3d 1026, 1030 (9th Cir. 2001) (approving of *Richardson v. D.C. Ct. of App.,* 83 F.3d 1513, 1515 (D.C. Cir. 1996)). In 2005, relying on *Exxon Mobil Corp. v. Saudi Basic Indust. Corp.,* 544 U.S. 280 (2005), the Ninth Circuit stated that *Rooker-Feldman* only applies after state court proceedings have ended, i.e. "when the state courts finally resolve the issue that the federal court plaintiff seeks to relitigate in a federal forum. . . ." *Mothershed,* 410 F.3d at 607 n.3 (amended opinion). After 2005, however, the Ninth Circuit in several unpublished cases cited *Doe & Assocs.* for the proposition that *Rooker-Feldman* applied to interlocutory orders. *See, e.g., Hanson v. Firmat,* 272 Fed. Appx. 571, 572 (9th Cir. 2008); *Melek v. Kayashima,* 262 Fed. Appx. 784, 785 (9th Cir. 2007); *Bugoni v. Thomas,* 259 Fed. Appx. 11, 11-12 (9th Cir. 2007); *see also Ismail v. County of Orange,* 2012 U.S. Dist. LEXIS 65793, *25-*26 (C.D. Cal. Mar. 21, 2012); *cf. Marciano,* 431 Fed. Appx. at 613 (discussing only *Motjershed*).
>
> The Court is not convinced that the parties have adequately addressed *Rooker-Feldman.* The parties have not discussed or even cited *Mothershed* or *Doe & Assocs.* Nevertheless, it is unnecessary to resolve *Rooker-Feldman's* application or non-application to Plaintiffs' declaratory requests concerning the Injunctive Orders.

CMLS Management, Inc. v. Fresno County Superior Court, No. 11-cv-1756-A WI-SKO, 2012 WL 2931407(E.D. Cal. July 18, 2012)at *10.

A timely appeal of the dismissal judgment and orders denying the motion to vacate the order of dismissal and the motion to vacate the judgment of dismissal was filed. Docket No. 31.

The same issue of a prior attorney-client relationship between defendant Bennett and a judge arises in respect of Circuit Judge Nguyen. She was a judge on the Los Angeles County Superior Court from 2002 to 2009, when Bennett served as "Court counsel", frequently acting as the attorney for individual judges.

This motion for disqualification arises from Justice Nguyen's relationship with defendant Bennett and the still ongoing fallout of disgraced former Chief Judge of the Ninth Circuit Alex Kozinski's efforts to turn his chambers into a Pasadena branch of the Pussycat Theater.

II. THE LONG-RUNNING HISTORY OF JUDICIAL RETALIATION RELATED TO THE DISCLOSURE OF CIRCUIT JUDGE KOZINKSI'S USE OF PORNOGRAPHY AND SEXUAL HARASSMENT

As set forth in the attached declaration and exhibits, public information would case a reasonable person to believe that all but twelve of the Circuit Judges in this Court were aware that Circuit Judge Alex Kozinski distributed pornography for his own pleasure and as a tool of sexual harassment; protected Kozinski when his behavior was questioned by L. Ralph Mecham, former head of the United States Administrative Office of the Courts; actively thwarted investigation of Judge Kozinski by refusing to follow Chief Justice Roberts' order to transfer Sanai's judicial misconduct complaint against Kozinski and others relating to this matter to the Third Circuit investigating committee; assigned the complaints to Kozinski's best friend on the Court, the late Judge Reinhardt; and retaliated against Sanai by censuring him and unsuccessfully seeking his disbarment. *See* Decl. ¶¶2 *et seq.*

III. ANY REASONABLE PERSON WOULD BELIEVE THAT CROSSING OR OFFENDING AN APPELLATE JUSTICE WOULD IMPAIR THE IMPARTIALITY OF JUDGE AND HIS OR HER COLLEAGUES

The efforts to ignite proceedings to disbar Sanai were initially unsuccessful, but after repeated pressure by Kozinski's acolyte, Cathy Catterson, the California State Bar Court held a trial, and Sanai was exonerated on all but one charge, and that charge is going to trial later this year. Decl.¶¶31-5. In particular, after repeatedly urging the State Bar Court to disbar Sanai, the Judicial Council refused to cooperate with the prosecution of the charge, and actively fought subpoenas; the Judicial Council refused to even provide copies of the judicial misconduct complaint filed by Sanai.

The result was that the charges that Catterson brought were dismissed in 2015 with a finding that Sanai's judicial misconduct complaints, to the extent they could be determined from public records, were entirely justified and proper. Decl. ¶33. Last month the Bar's trial counsel stipulated it would not file an appeal of the dismissed charges, thus the Judicial Council's efforts to disbar Appellant failed on

the grounds that the Judicial Council refused to provide any evidence behind its complaint.

However, the bar proceedings instigated by Catterson at the direction of the judicial council raised a new issue for Sanai—documents disclosed by the Bar Trial Counsel revealed that defendant Bennett, on behalf of then Superior Court Judge Elizabeth Grimes, had filed a secret bar complaint against Sanai as agent for attorneys in his family litigation, and in that communication admitted that he was acting on behalf of Judge Grimes. Bennett, acting as Grimes' attorney, had explicitly denied that his formal, unsuccessful bar complaint against Sanai had been filed on her behalf to the Commission on Judicial Appointments in 2010, when Sanai opposed her appointment to the California Court of Appeal.

The meritoriousness of Sanai's misconduct complaints was confirmed three years later when a Washington Post national security reporter, having heard rumours about Judge Kozinski, contacted Sanai and others and published a blockbuster pair of articles showing that Kozinski had been openly sexually harassing his clerks and third

parties for years, with this pornography-laded server exposed by Sanai 13 years previously a major tool. M. Zapotosky, Prominent appeals court Judge Alex Kozinski accused of sexual misconduct," *The Washington Post,* Dec. 8, 2017. This exposure had four major consequences.

First, Judge Kozinski resigned in disgrace, and moved back to being an attorney practicing in California.

Second, Judge Kozinski's former clerk and daughter in law, Leslie Hakala, was the subject of direct retaliation by Kozinski after he resigned through Cicuit Judge Reinhardt and Ikuta. Decl. ¶37. Ms. Hakala was married to Judge Kozinski's eldest son Yale, and she was a long-time employee of the SEC in Los Angeles. Approximately four years ago she obtained a coveted partnership at K&L Gates; approximately three years ago her marriage fell apart, and she filed for divorce from Yale Kozinski. The divorce was extremely bitter, as Ms. Hakala was the breadwinner. When the Washington Post articles came out last November, her counsel sought to subpoena Judge Kozinski to obtain information about his treatment of Ms. Hakala in the context of

the legal battles. The younger Kozinski then acceded to Ms. Hakala's demands and the divorce was settled. After Hakala played the #metoo card and the divorce was finalized, several judges with personal relationship with attorneys at K&L Gates, including Judge Kozinski's close friend, the late Stephen Reinhardt, and Kozinski's former clerk Sandra Ikuta, independently told K&L Gates partners that Ms. Hakala's continued presence at the firm would injure its representation of its clients in federal court. Ms. Hakala was then fired. Decl. ¶37.

Third, the federal courts assembled a working group that proposed changes to the federal ethics and judicial misconduct proceeding rules. Though these rules were heavily criticized, including by Sanai and Mr. Mecham, they were passed. Decl. ¶38.

Fourth, inspired by the working group, research attorneys within the California Court of Appeal issues an internal petition to take similar steps within the California Court of Appeal. *See* Carter Stoddard, "Petition Sparked Johnson Investigation" *Daily Journal,* August 13, 2019 at 1. When Second Appellate District Judge Elwood Lui inquired whether this petition was directed at a particular person, the lawyer

organizing the petition identified an incident in 2012 where Justice Johnson's research attorney found evidence that someone had been using her office for sex on the weekends. "Judges Get Whatever They Want, Atty Tells Misconduct Panel", *law360.com,* August 12, 2019 (quoting research attorney Katherine Wohn). Justice Lui then made further inquiries, and heard direct testimony of sexual harassment from a California Highway Patrol officer. Justice Lui sent an email setting out his finding to the entire Appellate Court by accident, which email was then leaked to the Daily Journal. This unleashed a torrent of reports about Johnson.

All of the women who had suffered from Justice Johnson's behavior kept quiet because they were afraid of judicial retaliation. The *In Re Johnson* case demonstrates that virtually no one believed that the Commission on Judicial Performance could police the misconduct of appellate justices. The entire world has learned that attorneys working in the Second Appellate District, California Highway Patrol officers working to protect the judges, attorneys working outside the Court, and even the Justices themselves believe that there is a

culture and practice of judicial retaliation for crossing or offending a justice as to which there is no protection and no remedy by any institution in California, including this Commission. This has been attested to in testimony documented in two legal journals, law360.com and the *Daily Journal*. *See, e.g.* Carter Stoddard, "Women describe fear of retaliation by state justice" *Daily Journal*, August 7, 2019 at 1 (describing fear of judicial retaliation); Carter Stoddard, "Women lawyers, clerks say justice made crude remarks " *Daily Journal*, August 6, 2019 at 1 ("I was concerned about retaliation"—Roberta Burnette, sole practitioner); Carter Stoddard, "CHP officer says justice propositioned her repeatedly", *Daily Journal*, August 14, 2019 at 1 ("I didn't want the retaliation"—Tatiana Sauquillo, CHP officer); ; Carter Stoddard, "Justice paints complicated relationship with colleague", *Daily Journal*, August 8, 2019 at 1 ("Several women testified they didn't speak up about this behavior because of fear of retaliation or blow-back from the legal community"). These facts would cause any reasonable person to believe that the Ninth Circuit would treat whistle-blowers any differently.

IV. JUDICIAL DISQUALIFICATION LAW

Judicial disqualification of circuit judges is determined on a statutory and due process standards. The statutory standard, Title 28 U.S.C. 455 provides in relevant part:

> "(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
> ....
> Scienter is not an element of a violation of 455(a). The judge's lack of knowledge of a disqualifying circumstance may bear on the question of remedy, but it does not eliminate the risk that "his impartiality might reasonably be questioned" by other persons. To read 455(a) to provide that the judge must know of the disqualifying facts, requires not simply ignoring the language of the provision - which makes no mention of knowledge - but further requires concluding that the language in subsection (b)(4) - which expressly provides that the judge must know of his or her interest - is extraneous. A careful reading of the respective subsections makes clear that Congress intended to require knowledge under subsection (b)(4) and not to require knowledge under subsection (a).

Liljeberg v. Health Svcs. Acq. Corp., 486 U.S. 847, 858-9 (1988)

The due process standard is whether an observor, knowing the publicly available facts, would find that there is a dangerous risk of an

absence of impartiality. *Williams, supra*; *Caperton, supra* . Under *Williams,* disqualification in an appellate court is infectious; one disqualified judge or justice who sits on the court requires disqualification. There is no requirement that disqualification be proved by admissible evidence. *See, e.g. Caperton* (relying on hearsay records).

The facts of both the Kozinski case and Johnson case show that any reasonable person would doubt the impartiality of an appellate tribunal where the litigant or lawyer has offended a member of the tribunal by validly accused a member of misconduct.

The record in this Court's handling of Sanai's complaints against Kozinski show direct retaliation—Sanai was censured for, *inter alia,* validly accusing members of the Ninth Circuit Judicial Council of covering up for Kozinski due to their desire to keep his sexual harassment out of the press. The fact that the Judicial Council demanded that a bar proceeding be held against Sanai, but refused to show the entirely accurate accusations in his misconduct complaint,

demonstrated that the censure order and subsequent efforts before the Bar was frivolous, harassing conduct.

Most of the victims and witnesses to Judge Kozinski's conduct kept quiet until after he was exposed; many still fear retaliation by his friends on the Ninth Circuit and the Judicial Council. *See* M. Zapatosky, "Nine more women say judge subjected them to inappropriate behavior, including four who say he touched or kissed them," *The Washington Post,* December 15, 2017 ("Many of Kozinski's accusers have talked only on the condition that their names and other identifying information not be published, out of fear that he might retaliate against them or the institutions for which they work.") Even after Kozinski resigned they decline to come forward and with good reason. Kozinski, through his friends on the Court such as Circuit Judges Ikuta, Bea, Schroeder and McKeown, still has the power to destroy people's careers, as he demonstrated with his former daughter-in-law. *See* Decl ¶37.

V. ANALYSIS OF DISQUALIFICATION

Disqualification of the following judges is required because

they have been publicly identified as friends of Judge Kozinski or were his clerks: Schroder, O'Scannlain, McKeown, Paez, Fletcher, Bybee, Bea, Ikuta and Watford. Decl. ¶39.

Disqualification of the following Circuit Judges is required as they served on the Judicial Council from 1999 to date, and were aware (or a reasonable person would conclude they were aware) of Judge Kozinski's pornography issues, and later, sexual harassment, and either did nothing or actively refused to authorize investigations. Thomas, Berzon, Wallace, Schroeder, Canby, Kleinfeld, Tashima, Graber, McKeown, Fletcher, Fisher, Gould Paez, Rawlinson, Clifton, Bybee, Callahan, M. D. Smith, N.R. Smith, Murguia, and Christen. Decl.¶40.

Disqualification of the following judges is required because they had chambers in Pasadena and had been informed (or a reasonable person would believe they had to have been informed) by their clerks of the pornography distribution that Kozinski engaged in within the Court. Goodwin, Nelson, Fernandez, Tashima, Wardlaw, Fisher, Paez, Ikuta, Nguyen and Watford.

Decl.¶41.

Disqualification of the following judges is required because they were directly involved in retaliation against myself or Leslie Hakala and in covering up Kozinski's misconduct after my first judicial misconduct complaint. Thomas, Schroeder, Berzon, Gould, McKeown, Tallman, and Rawlinson. Decl.¶42.

Disqualification of the following judges is required because they were subjects of valid judicial misconduct complaints which were wrongfully dismissed in order to cover up the full extent of Judge Kozinski's misconduct. Thomas, Berzon, Schroeder, Fernandez, Graber, McKeown, Fletcher, Fisher, Tallman and Rawlinson. Decl.¶43.

The following sui generis grounds for disqualification are as follows: As to Circuit Judge McKeown, she was the subject of direct criticism by myself and Mr. Mecham in the production of the inadequate working group rule revisions. Judge Tallman because of his personal relationship with myself and my family. Decl.¶44. As discussed above, Judge Nguyen served on the Los Angeles

County Superior Court and had some kind of professional and possibly personal relationship with Defendant Bennett. A chart is attached at the end of the declaration to assist in figuring out the specific reasons for disqualification.

V. DISCLOSURE IS REQUIRED FOR THOSE CIRCUIT JUDGES FOR WHICH DISQUALIFICATION IS NOT REQUESTED.

Sanai has not identified reasons to disqualify Circuit Judges Farris, Leavey, Trott, Hawkins, Silverman, Owens, Friedland, R.D. Nelson, Miller, Bade, Bress, Hunsaker or Bennett; however, Circuit Judge Bennett must disclose if he is related to Frederick Bennett. Even if a judge agrees to recuse, disclosure is still required, both in the public interest and for purposes of correctly identifying the proper subjects for subpoenas should discovery be necessary down the line.

Other circuit have recognized a duty to disclose on the record information which the parties or lawyers might consider relevant to the question of judicial disqualification.

> We believe instead that litigants (and, of course, their attorneys) should assume the impartiality of the presiding judge, rather than pore through the judge's private affairs and financial matters. Further, judges have an ethical duty

> to "disclose on the record information which the judge believes the parties or their lawyers might consider relevant to the question of disqualification." *Porter v. Singletary,* 49 F.3d 1483, 1489 (11th Cir. 1995). . . . [The judge] possibly did not consider the matter sufficiently relevant to merit disclosure, but his non-disclosure did not vest in [the parties] a duty to investigate him.

Am. Textile Mfrs. Inst., Inc. v. Limited, Inc., 190 F.3d 729, 741 (6th Cir. 1999).

The obligation to uncover conflicts and disclose them is on the jurist. *Ceats, Inc. v. Continental Airlines, Inc.,* 755 F.3d 1356 (Fed. Cir. 2014) (magistrate judge has duty to disclose relationship with law firm under obligations analogous to 28 U.S. §455). This includes an obligation to disclose matters in the public record. *Listecki v. Official Comm. of Unsecured Creditors,* 780 F.3d 731, 750-1 (7th Cir. 2015).

VI. CONCLUSION.

The circuit judges should either recuse or provide the disclosures requested in Section I above. There are no grounds for refusing to do so, and the Respondents have not in their recently filed briefs articulated any arguments that the Ninth Circuit law is or should be different.

motions. Dated: December 2, 2019,

By:/s Cyrus Sanai
Appellant

DECLARATION OF CYRUS SANAI

1. I am an attorney admitted in California and to this Court. I am the Appellant in this lawsuit. The following matters are from personal knowledge or are made based on information disclosed to me by persons with personal knowledge, including L. Ralph Mecham and federal court clerks and employees who have spoken to me.

2. The Ninth Circuit was aware as early as 1998 that it had a significant and ever growing problem involving employees of the federal judiciary using government-owned computers to download pornography. A true and correct copy of G. Walters, Memorandum of Circuit Executive, April 23, 1998, is attached hereto as Exhibit 1. The heaviest user of pornography for browsing purposes was Circuit Judge Alex Kozinski. When the United States Administrative Office of the Courts, and the former circuit executive Greg Walters, proposed firewalls and blocking software, Kozinski opposed it. The Judicial Conference took responsibility for this program and implemented a monitoring system that showed significant and increasing downloading of music and video

files, some of which the late Judge Edwin Nelson believed included child pornography.

3. In 2001, the monitoring system was disabled unilaterally in San Francisco. Who did this is a matter of dispute. L. Ralph Mecham told me, and publicly accused Judge Kozinski, of taking this action personally and suggests that this constituted criminal activity. A true and correct copy of his accusation is attached hereto as Exhibit 2. The late Judge Nelson ascribed it to the Ninth Circuit's executive committee acting unilaterally. Recently Judge Sidney Thomas claimed in an article that the entire Ninth Circuit Judicial Council unanimously approved the action. Whatever the case, it appears clear that Judge Kozinski was the moving force behind this action. While I had no personal knowledge of the circumstances behind the disabling of this software, Mr. Mecham's direct knowledge of this issue suggests that he is telling the truth. Even if the Ninth Circuit's Judicial Council or Executive Committee did approve what Judge Kozinski did, it is undisputed that the 11th Circuit and 10th Circuit had no idea this was being done; more important, if the motivation of the action was to allow

de facto unfettered access to pornography by crippling the monitoring system, then the action was wrongful no matter how many judges approved it.

4. Kozinski was losing the war, and directly attacked Mecham in print in the Wall Street Journal. See A. Kozinski, Privacy on Trial, *Wall Street Journal,* September 21, 2001, a true and correct copy of which is attached hereto as Exhibit 3. In that article, Judge Kozinski represented to the world the following:

> The policy Judge Nelson seeks to defend as benign and innocuous would radically transform how the federal courts operate. At the heart of the policy is a warning–very much like that given to federal prisoners–that every employee must surrender privacy as a condition of using common office equipment. Like prisoners, judicial employees must acknowledge that, by using this equipment, their "consent to monitoring and recording is implied with or without cause." Judicial opinions, memoranda to colleagues, phone calls to your proctologist, faxes to your bank, e-mails to your law clerks, prescriptions you fill online–you must agree that bureaucrats are entitled to monitor and record them all.
>
> This is not how the federal judiciary conducts its business. For us, confidentiality is inviolable. No one else–not even a higher court–has access to internal case communications, drafts or votes. Like most judges, I had assumed that keeping case deliberations confidential was a bedrock principle of our judicial system. But under the proposed policy, every federal judge will have to agree that

> court communications can be monitored and recorded, if some court administrator thinks he has a good enough reason for doing so.
>
> Another one of our bedrock principles has been trust in our employees. I take pride in saying that we have the finest work force of any organization in the country; our employees show loyalty and dedication seldom seen in private enterprise, much less in a government agency. It is with their help–and only because of their help–that we are able to keep abreast of crushing caseloads that at times threaten to overwhelm us. But loyalty and dedication wilt in the face of mistrust. The proposed policy tells our 30,000 dedicated employees that we trust them so little that we must monitor all their communications just to make sure they are not wasting their work day cruising the Internet.
>
> How did we get to the point of even considering such a draconian policy? Is there evidence that judicial employees massively abuse Internet access? Judge Nelson's memo suggests there is, but if you read the fine print you will see that this is not the case.
>
> Even accepting the dubious worst-case statistics, only about 3% to 7% of Internet traffic is non-work related.

5. Kozinski's statements were misleading, and the Judicial Council knew it. The problem that the Ninth Ciruit was facing was not pornography viewed by employees on their own, it was Kozinski's own bizarre sexual fetishes. However, none of the Judicial Council at the time stepped forward to correct Judge Kozinksi's false statements.

6. While Kozinski succeeded in keeping open access to pornography,

he soon realized that there was no way to stop internal tracking of his access to porngraphy. Kozinski utilized pornography for three purposes. First, his sexual titillation. Second, he enjoyed using it as a tool to harass women. Third it was a way of testing women's limits to his sexual approaches.

7. From at least 1998, the Ninth Circuit Judicial Council was aware, from information provided to it by Greg Walters, that Kozinski was the heaviest user of pornography. In addition, his close friends on the bench, in particular Judges Reinhardt and Ikuta, were aware of it and had watched it with him. All of Judge Kozinski's clerks had been made to watch the pornography, and Kozinski had invited, or in some cases, as a "joke", compelled other clerks from other chambers in Pasadena to watch pornography. All of the Circuit Judges who had chambers in Pasadena were aware from being informed by their clerks of Judge Kozinksi's behavior in this regard. In addition, beginning in that time period, professors at elite law schools began receiving feedback from clerks and externs about Kozinski's predilections.

8. After 2001, Judge Kozinski, realizing that his pornography

viewing would be easily tracked by system administrators, decided on a new mechanism for viewing and distributing pornography. He set up a home server and placed his favorite, curated pornography and other materials on it, along with his public writings and other material he wanted to distribute outside the Court email system. This server, set up around 2002, made it impossible for the internet service monitoring system to determine what it was that Kozinski was accessing on his site, since all that would be reported would be accesses to Kozinski's website.

9. In 2005 I submitted an opinion piece to *The Recorder* of San Francisco concerning the ongoing controversy over citation of unpublished opinions.[1] I addressed a matter of great public interest that was about to be decided by the Judicial Conference, then-proposed (and now adopted) Federal Rule of Appellate Procedure 32.1. Judge Kozinski's testimony to Congress on this subject was cited by me as representing the view of those opposing citation of unpublished opinions, and Howard Bashman's commentary was quoted as representative of the side favoring citation. I also urged the Court to

grant more rehearings en banc to settle perceived or actual conflicts in Ninth Circuit authority, starting with the conflicts surrounding the Court's *Rooker-Feldman* precedent.

10. It was while researching Judge Kozinski's views on the subject of citation of unpublished appellate dispositions that I first came across alex.kozinski.com, specifically the directory alex.kozinski.com/articles/. There were numerous links discoverable by Google to articles in this directory, some of which had clearly been supplied by Judge Kozinski himself.

11. Four days after my article was published, the Judicial Conference decided the issue in favor of permitting citations. Judge Kozinski was quoted condemning this move by the Judicial Conference, and expressing his hope that the Supreme Court would reject it.[2]

12. Two days later, Judge Kozinski published his response to my article in *The Recorder*.[3] Judge Kozinski laid out a response to the

---

1 C. Sanai, *Taking the Kozinski Challenge,* The Recorder, September 16, 2005
2 Tony Mauro, *Cites to Unpublished Opinions Ok'd,* Legal Times, September 21, 2005
3 Alex Kozinski, *Kozinski Strikes Back,* The Recorder, September 23, 2005, a true and correct copy of which is attached as Exhibit 4.

arguments in the pending petition and a novel analysis of the Ninth Circuit's past precedent concerning the *Rooker-Feldman* doctrine.. Judge Kozinski's article did not address the primary subject of my article, which is the citation policy of the Ninth Circuit. It ignored mydiscussion of the debate between the majority and dissent over what constitutes binding precedent in the Ninth Circuit.[4] Instead, Judge Kozinski focused the first part of his article solely on refuting my contentions that there is a severe conflict in the Ninth Circuit's authority concerning the *Rooker-Feldman* doctrine. He began the second part of his article as follows:

> Despite his colorful language, Mr. Sanai's article raises no legitimate question about whether the Ninth Circuit has been derelict in following circuit or Supreme Court precedent. But the article does raise serious issues of a different sort. Mr. Sanai's article urges us to "grant en banc rehearing of the next decision, published or unpublished, which asks the court to resolve the split among *H.C.*, *Napolitano* and *Mothershed*." A petition for en banc rehearing raising this very issue crossed my desk just as Mr. Sanai's article appeared in print. The name of the case? *Sanai v. Sanai*. A mere coincidence of names? Not hardly. The petition, signed by Mr. Sanai, cites the same cases and makes the same arguments as his article — including the

[4] *See Barapind v. Enomoto,* 400 F.3d 740, 751 fn. 8 (9th Cir. 2005)(en banc)

reference to "Catch-22."

Kozinski Strikes Back, supra.

13. Judge Kozinski placed case-related documents on his personal website, www.alex.kozinski.com, and had the web version of his article link to the .pdf file of the selection of these documents on his website. Subsequently, Judge Kozinski's wife revealed that Judge Kozinski's actions was motivated not just be the Sanai litigation, but also by the exceptionally rare removal for misconduct of a well-connected Los Angeles County Superior Court Judge from a completely separate case, *Sanai v. Saltz.*[5]

14. I filed a judicial misconduct complaint against Judge Kozinski in October of 2005. The order concerning the complaint was issued on December 19, 2006, more than 14 months later.[6] It terminated the complaint on the grounds (a) that corrective action had been taken as to Judge Kozinski's publication in the Recorder, and (b) there was no evidence of any website controlled by Judge Kozinski which held such

[5] *See* Letter from Judge Kozinski's wife, Marci Tiffany, patterico.com/2008/06/16/alex-kozinskis-wife-speaks-out.

[6] *In Re Complaint of Judicial Misconduct (Kozinski),* No. 05-89098 (2006)

materials.

15. A key fact in the complaint was that Judge Kozinski had scanned in documents from the record of the case, and linked the documents to the on-line versions of his article at the website "law.com". Various .pdf scans were placed on alex.kozinski.com.[7]

16. The Recorder and law.com site makes its web-based articles available for a period of one year, then erases them. Accordingly, the Kozinski article and the link to the .pdf files he had published are no longer accessible on the site. Judge Schroeder wrote that her limited inquiry "found no posting of complainant's case-related information on any website maintained by the judge", a finding she could only have made without fear of immediate contradiction after the article was

[7] However, though the evidence of Judge Kozinski's publication of case-related materials is no longer on the law.com site, it still available on the well-known blog How Appealing, which is financed by the law.com site but run separately by Howard Bashman. The online version of the article is found at http://pda-appellateblog.blogspot.com/2005_09_01_pda-appellateblog_archive.html. The on-line version of the article has a link, "read the pdf". This link points to the link /alex.kozinski.com/judge.thibodeau.pdf. The site alex.kozinski.com itself has been rendered inaccessible; the "How Appealing" link is a proxy server

erased on the law.com site.

17. Judge Schroeder's delay of more than one year caused the loss of this evidence. As the chief circuit judge at the time, Judge Schroeder was charged under the Judicial Discipline Rules then in effect with evaluating a complaint and dismissing it or finding it is moot and concluding the proceeding pursuant to Section 352(b) of Title 28, or appointing a special committee to investigate the charges pursuant to Section 353 thereof. In particular Section 352(a) of Title 28 of the United States Code states that the "chief shall expeditiously review any complaint...."

18. Judge Schroeder made the explicit factual finding of "no posting of complainant's case-related information on any website maintained by the judge." This finding of fact is contrary to the truth. The online version of Judge Kozinski's article on the Recorder's website, "law.com" included a link to the site alex.kozinski.com The link was active when Complainant filed the complaint, and at least a month thereafter.

---

snapshot that is holding an image of the original link.

Judge Schroeder's delay resulted in the elimination of that article from the law.com site proper, but not from the related but separately-managed "How Appealing" site.

19. Schroeder and the appellate members of the Judicial Council at the time were aware that Kozinski had shifted his pornography viewing to his server.

20. Judge Schroeder took these actions to give Kozinski time to take his website off-line and scrub the contents. Schroeder was aware from he communications with Kozinski about my complaint that he needed time for most of the evidence to disappear, which she willingly gave him.

21. I filed a petition to review Judge Schroeder's order, which was denied by the Judicial Council with its form order.

22. At some time near the issuance of Judge Schroeder's order in

2006, Judge Kozinski took down the website alex.kozinski.com. Sometime in 2007, Judge Kozinski concluded that it was safe to reactivate the alex.kozinski.com website.

23. Judge Kozinski therefore brought the site back on-line and began distributing links to the portion of the site which includes his articles, including a .pdf scan of the paper version of the "Kozinski Strikes Back" article. (The paper version differs from the on-line version in one important respect—the online version included a hyperlink to case materials posted by Judge Kozinski on alex.kozinski.com/judgethibodeau, which materials have either been moved or removed, while the paper version obviously had no such link).

24. I filed a second judicial misconduct complaint in November of 2007 regarding Judge Kozinski's redistribution of "Kozinski Strikes Back". Judge Kozinski assigned the matter to Judge Schroeder, who, true to form, sat on it.

25. The more I thought about the treatment of Judge Kozinski's alex.kozinski.com site, the more puzzled I became. Why did Judge Schroeder pretend the site did not exist? Why did Judge Kozinski take the site down, then put it back up?

26. On the night before Christmas Eve, after putting my children to sleep with tales of the excitement of the next day, I decided to find out what Judge Kozinski might be distributing via alex.kozinski.com website, so he entered "alex.kozinski.com" into the Google search engine.

27. I had found the reason Judge Kozinski and the Ninth Circuit Judicial Council refused to acknowledge the existence of the alex.kozinski.com site, I passed the information to John Roemer of the Daily Journal. His editors killed the story, but Terry Carter of the ABA Journal began working on it. When I read the article about Judge Kozinski presiding over the Ira Isaacs obscenity trial, I tipped the Los Angeles Times. The Los Angeles Times reporter Scott Glover

independently accessed the site and apparently found files and documents that had been placed in the directory after I had done his downloading and thus saw documents that Complainant never saw. Judge Kozinski recused himself from the Ira Isaacs trial, leading to an ongoing battle over whether double jeopardy applied.

28. When the Los Angelest Times broke the story, Kozinski filed a misconduct complaint against himself. Justice Roberts issues an order transferring that complaint, and any future complaints releated to the same events, to the Third Circuit.

29. I filed a complaint with the Ninth Circuit, but because I had alleged additional facts pointing out what Judge Kozinski did with the pornography—distributing in his chambers—the Judicial Council violated Justice Roberts' order and stayed my complaints by order of August 10, 2008 signed by Circuit Judges Thompson, Thomas and McKeown. For unknown reasons Judges Graber and Berzon did not participate, but they did not recuse either.

32. The initial entreaties to the bar were rejected, but the Bar's then-new Chief Trial Counsel, Jayne Kim, decided to go forward (she was later forced to resign after she and her mentor at the bar had a falling out.).

33. The orders dismissing all but one of the charges are attached as Exhibits 8 and 9. As set forth therein, the State Bar Court judge wrote that:

> In this count the State Bar alleges that between October 2008 and September 2010, Respondent "filed and maintained formal judicial complaints with the Ninth Circuit Judicial Council against approximately 19 federal judges, when such complaint were frivolous and made for improper reasons . . . . " It alleges that the filing of these complaints constituted acts of moral turpitude.
>
> In his motion, Respondent argues that the evidence received by this court is insufficient to establish clear and convincing evidence to support this count.
>
> The State Bar did not put in evidence the complaints actually filed by Respondent against the federal judges. In response to this court's inquiry, it was informed by the State Bar that it was unable to do so due to the Ninth Circuit's refusal to

> provide those complaints to the State Bar. Being unable even to read the complaints filed by Respondent, this court cannot conclude that any ofthose complaints were filed frivolously or constituted an act of moral turpitude. To the extent that this court is aware of the content of one of those complaints, the record shows that it was apparently justified and resulted in a formal apology by the judge and a self-administered recusal by him from the pending matter involving Respondent.

Exhibit 8 at 4.

34. In a subsequent order dismissing more charges, the State Bar Court judge wrote as follows:

> In 2010, a complaint was made to the State Bar by the Judicial Council of the Ninth Circuit regarding Respondent's purportedly frivolous complaints to it about a number of federal judges. This complaint by the Judicial Council of the Ninth Circuit subsequently formed the basis for Count 6 of the pending NDC. When the complaint was received, the State Bar opened case No. 10-0-09221 (the '10 case) and contacted Respondent about the matter. Then, after learning that the Judicial Council of the Ninth Circuit would not release to the State Bar the actual complaints filed by Respondent against the federal judges, the State Bar decided to issue a warning letter to Respondent in November 2011, and closed the case.[7] (Ex. 1040.) That decision was explained, both orally and in writing, by the State Bar to Cathy Catterson, a representative of the Judicial Council ofthe Ninth Circuit, on November 8, 2011. (Ex. 1041). Thereafter, she complained of the State Bar's decision in a letter, dated January 19, 2012,

directed to the then Acting Chief Trial Counsel of the State Bar.

[7] The State Bar had previously notified the Judicial Council of the Ninth Circuit in May 2011 that it would be difficult to pursue any complaint that Respondent's complaints against various federal appellate justices were frivolous without having access to the actual underlying complaints. As stated by the State Bar at that time: "As you may be aware, to prevail in State Bar disciplinary proceedings, our office must prove by clear and convincing evidence that an attorney committed willful misconduct. Although the Judicial Council's order of September 30 2010, will certainly be a useful piece of evidence to establish that Mr. Sanai engaged in misconduct by filing frivolous misconduct complaints, it would be insufficient standing alone to prove by clear and convincing evidence that Mr. Sanai engaged in misconduct warranting discipline, especially smce the order does not mclude any specific fmdings of fact but rather includes only the conclusion that Mr. Sanai abused the misconduct complaint procedure." (Ex. 1039, p. 2.)

[8]Given the State Bar's inability to provide this court with a copy of the actual complaints filed by Respondent against the federal judges, this court – as accurately predicted by the State Bar in May 2011 –eventually dismissed that count at trial due to the State Bar's failure to provide clear and convincing evidence that those complaints were frivolous. The evidence was not sufficient even to enable this court to identify all of the judges against whom complaints had been filed.

35. The last charge will require me to issue subponeas to Kozinski, Catterson, and the Judicial Council. One of my defense

theories focuses on the documented link between Kozinski's retaliatory conduct and *Sanai v. Saltz*, which was first revealed in a post by Kozinski's then-wife, Marcie Tiffany. Another rests on the prosecutorial misconduct of bringing the charge urged by the Judicial Council when the Office of Chief Trial Counsel predicted it would fail without evidence from the Judicial Council. The trial is set for Februarhy of 2020. The trial counsel stipulated last month on the record that the charges that were dismissed will not be subject of an appeal. Accordingly, the dismissals are final. Based on the finality, and the need to obtain the Ninth Circuit's records in the misconduct proceedings, I will be filing a lawsuit in the Northern District of California against the Judicial Council, Judge Kozinski, Ms. Catterson and others for injunctive relief, declaratory relief, and as against Kozinski and Catterson, damages.

36. The meritoriousness of my misconduct complaints was confirmed a decade aftere I discovered Kozinski's pornography

when a Washington Post national security reporter, having heard rumours about Judge Kozinski, contacted me and others and published a blockbuster pair of articles showing that Kozinski had been openly sexually harassming his clerks and third parties for years, with this pornography-laded server exposed by Sanai 13 years previously a major tool. This exposure had four major consequences.

37. Judge Kozinski's former clerk and daughter in law, Leslie Hakala, was the subject of direct retaliation by Kozinski after he resigned through Cicuit Judge Reinhardt and Ikuta. Ms. Hakala was married to Judge Kozinski's eldest son Yale, and she was a long-time employee of the SEC in Los Angeles. Approximately four years ago she obtained a coveted partnership at K&L Gates; approximately three years ago her marriage fell apart, and she filed for divorce from Yale Kozinski. The divorce was extremely bitter, as Ms. Hakala was the breadwinner. When the Washington Post articles came out last November, her counsel

sought to subpoena Judge Kozinski to obtain information about his treatment of Ms. Hakala in the context of the legal battles. The younger Kozinski then acceded to Ms. Hakala's demands and the divorce was settled. After Hakala played the #metoo card and the divorce was finalized, several judges with personal relationship with attorneys at K&L Gates, including Judge Kozinski's close friend, the late Stephen Reinhardt, and Kozinski's former clerk Sandra Ikuta, independently told K&L Gates partners that Ms. Hakala's continued presence at the firm would injure its representation of its clients in federal court. Ms. Hakala was then fired.

38. Third, the federal courts assembled a working group that proposed changes to the federal ethics and judicial misconduct proceeding rules. Though these rules were heavily criticized, including by the undersigned counsel and Mr. Mecham, they were passed.

39. Disqualification of the following judges is required because they have been publicly identified as friends of Judge Kozinski or were his clerks: Schroder, O'Scannlain, McKeown, Paez, Fletcher, Bybee, Bea, Ikuta and Watford.

40. Disqualification of the following Circuit Judges is required as they served on the Judicial Council from 1999 to date, and were aware (or a reasonably person would conclude they were aware) of Judge Kozinski's pornography issues, and later, sexual harassment, and either did nothing or actively refused to authorize investigations. Thomas, Wallace, Schroeder, Canby, Kleinfeld, Tashima, Graber, McKeown, Fletcher, Fisher, Gould Paez, Rawlinson, Clifton, Bybee, Callahan, M. D. Smith, N.R. Smith, Murguia, and Christen. Some of all of these judges will be defendants in the lawsuit I will be filing discussed in paragraph 35, *supra.*

41. Disqualification of the following judges is required because

according to the Court's website they had chambers in Pasadena and had been informed (or a reasonable person would believe they had to have been informed) by their clerks of the pornography distribution that Kozinski engaged in within the Court. Goodwin, Nelson, Fernandez, Tashima, Wardlaw, Fisher, Paez, Ikuta, Nguyen and Watford.

42. Disqualification of the following judges is required because they were directly involved in retaliation against myself or Leslie Hakala and in covering up Kozinski's misconduct after my first complaint as discussed above: Thomas, Schroeder, McKeown, Gould, Berzon, Tallman, and Rawlinson.

43. Disqualification of the following judges is required because they were subjects of my valid judicial misconduct complaints which were wrongfully dismissed in order to cover up the full extent of Judge Kozinski's misconduct. Thomas, Schroeder, Fernandez, Graber, McKeown, Fletcher, Fisher, Tallman and

Rawlinson.

44. The following specific grounds for disqualification are as follows: (a) As to Circuit Judge McKeown, she was the subject of direct criticism by myself and Mr. Mecham in the production of the inadequate working group rule revisions; (b) as to Judge Tallman because of his personal relationship with myself and my family; and (c) as to Circuit Judge Nugyen, she was a Los Angeles County Superior Court judge from 2002 to 2009 during the time period in which Bennett represented and advised all Superior Judges, and therefore a reasonable person might doubt her impartiality in respect of any case where Bennett is a witness.

45. The following chart summarizes the reasons for disqualification:

No.	Circuit Judge	Friend and/or Clerk of Kozinski	On Judicial Council from 1999 to date	Chambers in Pasadena with Kozinski	Participated in Retaliation or Cover-up	Subject of Misconduct Complaint	Other Reasons
1.	Sidney R. Thomas		X		X	X	
2.	Alfred T. Goodwin			X			
3.	J. Clifford Wallace		X				
4.	Mary M. Schroeder	X	X		X	X	
5.	Jerome Farris						
6.	Dorothy W. Nelson			X			
7.	William C. Canby, Jr.		X				
8.	Diarmuid F. O'Scannlain	X					
9.	Edward Leavy						
10.	Stephen S. Trott						
11.	Ferdinand F. Fernandez			X		X	
12.	Andrew J. Kleinfeld		X				
13.	Michael Daly Hawkins						
14.	A. Wallace Tashima		X	X			
15.	Barry G. Silverman						

No.	Circuit Judge	Friend and/or Clerk of Kozinski	On Judicial Council from 1999 to date	Chambers in Pasadena with Kozinski	Participated in Retaliation or Cover-up	Subject of Misconduct Complaint	Other Reasons
16.	Susan P. Graber		X			X	
17.	M. Margaret McKeown	X	X		X	X	X
18.	Kim McLane Wardlaw			X			
19.	William A. Fletcher	X	X			X	
20.	Raymond C. Fisher		X	X		X	
21.	Ronald M. Gould		X		X		
22.	Richard A. Paez	X	X	X			
23.	Marsha S. Berzon		X		X	X	
24.	Richard C. Tallman				X	X	X
25.	Johnnie B. Rawlinson		X		X	X	
26.	Richard R. Clifton		X				
27.	Jay S. Bybee	X	X				
28.	Consuelo M. Callahan		X				
29.	Carlos T. Bea	X					

No.	Circuit Judge	Friend and/or Clerk of Kozinski	On Judicial Council from 1999 to date	Chambers in Pasadena with Kozinski	Participated in Retaliation or Cover-up	Subject of Misconduct Complaint	Other Reasons
30.	Milan D. Smith, Jr.		X				
31.	Sandra S. Ikuta	X		X	X		
32.X	N. Randy Smith		X				
33.X	Mary H. Murguia		X				
34.X	Morgan Christen		X				
35.	Jacqueline H. Nguyen			X			X
36.	Paul J. Watford	X		X			
37.	Andrew D. Hurwitz						
38.	John B. Owens						
39.	Michelle T. Friedland						
40.	Mark J. Bennett						? (unknown if related to Bennett)
41.	Ryan D. Nelson						
42.	Eric D. Miller						
43.	Bridget S. Bade						

No.	Circuit Judge	Friend and/or Clerk of Kozinski	On Judicial Council from 1999 to date	Chambers in Pasadena with Kozinski	Participated in Retaliation or Cover-up	Subject of Misconduct Complaint	Other Reasons
44.	Daniel Bress						
45	Danielle Hunsaker						

I declare, under penalty of perjury of the law of the United States that the foregoing statements of fact are true and correct.

Dated as of December 2, 2019 in Beverly Hills, California

/s/ Cyrus Sanai

CERTIFICATE OF COMPLIANCE

I certify that the foregoing motion is double-spaced (except for quotations in excess of 49 words from legal authorities and the record) and utilizes a proportionately spaced 14-point typeface. The motion (excluding the Declaration, Exhibits, Cover, and Certificate of Compliance) comprises a total of 20 pages.

Dated: December 2, 2019

By:/s Cyrus Sanai
Appellant

EXHIBITS

EXHIBIT 1

N55

Office of the Circuit Executive

UNITED STATES COURTS FOR THE NINTH CIRCUIT

95 Seventh StreetGregory B. Walters, Circuit Executive
Post Office Box 193939Phone: (415) 556-6100
San Francisco, CA 94119-3939Fax: (415) 556-6179

---

to: Judicial Council

from: Greg Walters, *Circuit Executive*

date: April 23, 1998

re: Internet Access to Pornographic Material

Judge Kozinski's memo (attached) raises a question about the management of the Internet Project that requires your attention. In a nutshell, the question before you is whether we should continue to block access to pornographic sites on the Internet for the Judges and Staff of the Ninth Circuit.

Background of the Internet Project

At its September 1997 session, the U. S. Judicial Conference approved a judiciary-wide policy regarding access to the Internet from computers connected to the DCN. The policy requires access to the Internet be provided only through national gateway connections approved by the Administrative Office pursuant to procedures adopted by the Committee on Automation and Technology of the USJC. (See IRM bulletin 97-19, attached)

The Office of the Circuit Executive for the Ninth Circuit maintains one of these three national Internet gateways from the judiciary's internal data communications network (DCN). The Administrative Office and the Fifth Circuit maintain the other two gateways. Our office provides Internet services to approximately 10,000 users in the Eight, Ninth and Tenth circuits.

The determination of the location of the gateways was based on considerations of geography as well as personnel expertise and infrastructure at the sites.

The Internet access project was established for three purposes:

1. To provide Internet access to members of the Judiciary,
2. To provide in-bound and out-bound Internet e-mail services,

3. To provide website hosting services for court units and assist in development and implementation of such sites.

The decision to limit the number of gateways to three was made to preserve the integrity of Data Communications Network (DCN). The security of the entire judiciary's network relies on properly maintained firewalls at the gateways. The fewer access points, the better the security. Rather than allowing each court unit in the United States to provide independent access to the Internet, the USJC Committee on Automation and Technology determined that all Internet traffic should flow through one of these three sites thus dramatically reducing the potential for security intrusions. A firewall is usually a computer and software that sits between an internal network (the DCN) and the Internet, monitors all traffic and and only allows authorized traffic to traverse the firewall.

After a thorough review of the available options, the three gateways agreed upon standard hardware and software configurations. The products that were put in place were Firewall-1 and WebSense. Firewall-1 is the most widely used firewall product. It offers high-level security without decreasing the performance of the network. Firewall-1 logs every Internet transaction, both in-bound and out-bound, for security purposes. The logs are highly detailed, including date, time, Internet address of user, site accessed, and protocol used.

WebSense is a software product that prevents users on a network from accessing web sites based on an site-denial list. The site-denial list is created by selecting predefined categories determined by WebSense employees. WebSense differs from many filtering products by categorizing websites based upon an actual visit by an employee. In addition to the filtering capabilities, WebSense also offers extensive site access reports based on firewall logs.

Currently, the 9th Circuit is the only gateway with both Firewall-1 and WebSense installed and operational. The 5th Circuit is waiting for a new server before installation of WebSense. The AO has both installed, but has not implemented WebSense's blocking feature. They are now awaiting the outcome of your deliberations.

The Eight and Tenth Circuit's were contacted and both elected to leave the blocking software intact pending the results of your review.

Appropriate Usage Policies.

The Policy statement approved by the USJC in September called for each court to establish responsible usage policy statements. The language of that policy is included in Information Resources Management Bulletin (IRM 97-19) put out by the Administrative Office. The full Bulletin is attached. In says in part:

Experience in the private sector and in other government agencies has revealed four principal areas of concern associated with uncontrolled access to the Internet for employees: institutional embarrassment, misperception of authority, lost productivity, and capacity demand. When accessing the Internet from a judiciary gateway, users need to keep in mind several points: they should use discretion and avoid accessing Internet sites which may be inappropriate or reflect badly on the judiciary; those not authorized to speak on behalf of their units or the judiciary should avoid the appearance of doing so; users should exercise judgment in the time spent on the Internet to avoid an unnecessary loss of productivity or inappropriate stress on capacity.

The Ninth Circuit also requires that Internet usage policies be established by each court unit executive before access is given to their users. All of the courts within the Ninth Circuit have provided us with formal procedures with the exception of the Court of Appeals. We have been bringing their users online with the approval of the Clerk of Court. We have not required formal written policies by the unit executives of the Eight and Tenth circuits.

We developed and circulated a "model" usage policy for the consideration of the courts. Most of the Court units within the Ninth Circuit adopted this policy or some variant on it. The model policy follows:

Office of the Circuit Executive Model Policy:
"Policy for the Acceptable Use of the
Public Internet Network"

June 30, 1997

Introduction:

The following model policy for acceptable use of the public Internet network is supplied to court units so they may more easily draft a use policy that reflects local business needs. Prior to any court supplying widespread Internet access to employees via the Judiciary's Data Communications Network, it is strongly suggested that they adopt this policy, or a modified version, and make it available to all staff that will be able to access the Internet.

Policy for the Acceptable Use of the Public Internet Network

General Policy

1. Use of the public Internet network accessed via computer gateways owned, or operated on the behalf of the United States District Court for the District of XXX ("the Court") imposes certain responsibilities and obligations on Court employees and officials ("Users") and is subject to Court policies and local, state and federal laws. Acceptable use always is ethical, reflects honesty, and shows restraint in the consumption of shared computing resources. It demonstrates respect for intellectual property, ownership of information, system security mechanisms, and an individual's right to freedom from harassment and unwarranted annoyance.

2. Use of Internet services provided by the Court may be subject to monitoring for security and/or network management reasons. Users of these services are therefore advised of this potential monitoring and agree to this practice. This monitoring may include the logging of which users access what Internet resources and "sites." Users should further be advised that many external Internet sites also log who accesses their resources, and may make this information available to third parties.

3. By participating in the use of Internet systems provided by the Court, users agree to be subject to and abide by this policy for their use. Willful violation of the principles and provisions of this policy may result in disciplinary action.

Specific Provisions

1. Users will not utilize the Internet network for illegal, unlawful, or unethical purposes or to support or assist such purposes. Examples of this would be the transmission of violent, threatening, defrauding, obscene, or unlawful materials.

2. Users will not utilize Internet network equipment for partisan political purposes or commercial gain.

3. Users will not utilize the Internet systems, e-mail or messaging services to harass, intimidate or otherwise annoy another person.

4. Users will not utilize the Internet network to disrupt other users, services or equipment. Disruptions include, but are not limited to, distribution of unsolicited advertising, propagation of computer viruses, and sustained high volume network traffic which substantially hinders others in their use of the network.

5. [Local verbiage Option A]

Users will not utilize the Internet network for private, recreational,

non-public purposes.

[Local verbiage Option B]
Use of the public Internet system will be treated similarly to "local telephone calls," and staff will keep the use of the Internet system for personal or non-public purposes to a minimum. Users should exercise discretion in such use, keeping in mind that such use is monitored and traceable to the court and to the individual user.

6. Users will utilize the Internet network to access only files and data that are their own, that are publicly available, or to which they have authorized access.

7. Users will take precautions when receiving files via the Internet to protect Court computer systems from computer viruses. Files received from the Internet should be scanned for viruses using court-approved virus scanning software, as defined by Court policy.

8. Users will refrain from monopolizing systems, overloading networks with excessive data, or otherwise disrupting the network systems for use by others.

Blocking Software.

The Administrative Office has established a policy for their own employees that prohibits any unofficial use of the Internet. They actively track the Internet activity of all of their employees and have fired at least two employees for accessing pornographic material. An AO employee who is on the Internet for official business and inadvertently accesses a pornographic site must file a form explaining the event. According to the AO, many of the executive branch agencies have adopted this same "tracking" approach.

An alternative to tracking is to "block" access to selected sites. There is a variety of software packages that accomplis this. Some of them search the web using keywords and automatically block any site that includes an objectionable word. The WebSense software that was selected by all three national sites uses a different approach. They have employees who review all new sites and classify them.

WebSense serves a dual purpose. It provides the capacity to block sites based upon category and has an add-on product that simplifies report generation from the firewall logs. The categories that WebSense uses are determined by a visit by a WebSense employee. This method is much more effective than other products that use a keyword, or imbedded rating approach.

We are using WebSense to block three categories of sites: pornographic, adult, and

sexuality/lifestyles. We implemented the blocking for several reasons:

1. There is no reason that a user, during the normal course of business, needs access to these sites.
2. Visits by judicial employees to these sites could result in embarrassment to the judiciary. All visits to websites are logged at the firewall for security purposes, but they are also logged at the site that is visited. Marketing agencies often use these figures to determine site popularity and advertising rates. Since every visit to a site by a user from the judiciary results in a **uscourts.gov** name resolution in their log, this can cause potential embarrassment for the judiciary.

3.Potential for sexual harassment claims due to employees "posting" sexually explicit images on their screen while viewing and/or downloading pictures from these sites. (See attached article)

Judge Kozinski's memo alerted us to an issue of which we were previously unaware: gay, lesbian and bisexual sites are restricted by our current category restrictions. WebSense has grouped all gay and lesbian sites into the sexuality/lifestyles category. The "pornographic" category is only for heterosexual sex according to WebSense. Unfortunately, if we allow the sexuality/lifestyles category, we will not only allow gay and lesbian bookstores, but also gay and lesbian sex, bestiality, sado/masochism, fetishes, and more. We have contacted WebSense about this unusual classification.
In the meantime, we have the ability to allow sites that are inappropriately blocked. When a user encounters a blocked site that he or she would like access to, he or she can write or call and ask that the blocking for that site be removed.

Considerations for The Judicial Council.

There are a variety of alternatives for you to consider. At one extreme, we could allow absolute unfettered access to the Internet for all employees. At the other extreme, we could establish a complete circuit-wide prohibition against personal use of the Internet similar to the policy in place for employees of the Administrative Office. There are many alternatives between those extremes. The software is fairly flexible and we are not overly limited by technical considerations.

What follows are five variants for you to consider.

1. **No Tracking/No Blocking**. Allow complete access to all sites on the Internet. If we remove our blocking software at the gateway level, all 10,000 users in the three circuits would have full access to all Internet sites regardless of content. The potential for misuse and embarrassment to the judiciary is high. It should be kept in mind that all Internet traffic would

still be logged. Keeping a log at the firewall is essential for maintaining the security of the DCN. The OCE will not scan the logs and look for inappropriate usage. Additionally it should be noted that all of the commercial sites maintain a log of visitors for their site that can trace the visit back to the actual machine that was used to access the site. A visit to any site from a computer coming through this firewall will leave an electronic trail that concludes with...."**uscourts.gov**".

I asked the staff to run a list of the sites that were visited in the month before we put the blocking software in place. As you can see from this partial listing, there is ample opportunity for institutional embarrassment.

2. **Local Blocking.** Allow complete access through the gateway, but require courts to purchase their own "mini-firewall" to control users access. CAC District court has implemented one of these products, BorderManager from Novell, for this purpose. The advantage of this option is that it is highly flexible and each court unit could tailor their own policies. Unfortunately, this is very costly software. WebSense costs between $2,500 and $10,000 per location plus an on-going maintenance amount. Each location is defined as each place with an independent computer network. In this circuit alone we would be required to purchase and maintain around 50 or 60 copies of the software. This would be an expensive and complex undertaking that would diminish the security and integrity of the Data Communications Network. It would cost a minimum of $125,000 to implement this solution in just the Ninth Circuit.

3. **Full Access to Some Users.** The blocking software that we are using would allow us to offer complete access to a few users based on IP address or network segment. In other words, we could provide Judge Kozinski's chambers with complete access and continue to block others. This solution is possible if there are only a handful of sites that are given this level of access. If there were more than a very few of these types of exceptions, it would quickly overwhelm our staff and the other over local systems staff.

4. **District Wide Access.** A viable option is to allow each district and the Court of Appeals to make their own determination as to whether they want to block access to these sites or not. While it is technically possible to allow tailored access to units smaller than the entire district, it would be an administrative nightmare to try and manage such a system. In the Ninth Circuit alone there are 15 districts plus the Court of Appeals. Between the Eight, Ninth and Tenth circuits there are 33 districts and Three Courts of Appeal. If we were to tailor access at the unit level, we would be maintaining sixty unique polices in the Ninth Circuit and up to 125 or so between the three circuits. Exercising this option at anything less than a district wide level is not feasible with current staff due to the extreme administrative workload. The only way to successfully implement this policy would be to receive funding from the AO for a dedicated position.

5. **Current Implementation.** A final alternative would be to continue blocking access to pornographic materials for all users as we currently do. In other words we would leave the

blocking software in tact. If we were to pursue this approach, it would make sense to approach WebSense to see if they could sever the relationship between the gay and lesbian sites and the pornographic sites. This is the safest, cheapest alternative.

STAFF RECOMMENDATION

I recommend that you adopt the following policy governing access to the Internet for all court units within the Ninth:

1. Continue to block access to pornographic sites at the firewall as the default setting.

2. Allow each district (not court unit) and the Court of Appeals to request that the blocking be turned off for the users under their control.

The advantages of this hybrid approach are several:

Each district could elect to have access blocked at the firewall or to offered unlimited access to their users.

Each district could elect to purchase and maintain their own software, but wouldn't be required to.

This system would be fairly easy to maintain at the circuit level since all decisions would have to be made at the district-wide level. All of the court units within a district would have the same policy at the firewall level, either blocking on or blocking off.

N63

OFFICE OF THE CIRCUIT EXECUTIVE

UNITED STATES COURTS FOR THE NINTH CIRCUIT

95 SEVENTH STREET
POST OFFICE BOX 193939
SAN FRANCISCO, CA 94119-3939

GREGORY B. WALTERS, CIRCUIT EXECUTIVE
PHONE: (415) 556-6100
FAX: (415) 556-6179

TO: Hon. Proctor Hug, *Chief Judge*
Greg Walters, *Circuit Executive*

FROM: Matthew Long, *Assistant Circuit Executive for Automation and Technology*

DATE: April 28, 1998

RE: Adult Site Access by Judicial Employees

We have finished processing the firewall logs for the month of February. The actual dates of the logs analyzed are from February 4 to March 3, 1998. This twenty-eight day period gives us a sampling of Internet usage by users from the 8th, 9th, and 10th circuits in the month prior to the installation of WebSense.

We used two methods to try to extract adult site accesses through our firewall. First we used a keyword search on adult-oriented themes to locate domain names that corresponded to sex sites, e.g. sex, porn, adult, etc. Once we compiled a large list of names, we traced the viewing habits of individual users who had visited these sites. This allowed us to augment our database and produce more accurate numbers.

Of the 28,000 different sites accessed in February, approximately one-third did not resolve to a name, thus making it difficult to get exact figures for adult site accesses. For example, a site would be listed in the log as 207.204.211.25 instead of www.sex.com. Many adult sites deliberately do not resolve, either to save money on name registration or to maintain anonymity. I believe our figures to be a good estimate, but could be as much as 10-25% below the actual numbers.

Here are the rounded figures for Internet access through our gateway:

Total web accesses*:	2,500,000
Total sites accessed:	28,000
Total adult site accesses:	**90,000**
Total adult sites accessed:	1,100
Adult site access percentage:	3.6%
Adult site percentage:	3.9%

*Every time a user clicks on a link on a webpage, it counts as a web access hit. For

example, if a user visited www.usatoday.com clicked on a story link and then clicked the back button, our log would show three web accesses and one site accessed (usatoday).

I've attached a partial listing of some of the adult sites accessed through our firewall. The list contains some very graphic names, but should be a good sample of the types of sites that were accessed. We have not verified that all of these are adult sites; therefore, there may be several on the list that are not. The full 28-page listing is available if you need it for the council meeting.

Attach.

Adult Sites Accessed through the Ninth Circuit Gateway

February 4 to March 3, 1998

Partial Listing

1adultvideo.com
1porn.com
69oralsex.com
adamsxxx.com
adult7.com
adultad.com
adultcentral.com
adulthosting.com
algol.cybererotica.com
allteens.com
amateurfresh.com
amateurindex.com
amazon-cum.com
asiannudes.com
assland.com
babe.swedish-erotica.com
babes.sci.kun.nl
bestgirl.com
bigchicks.com
bitemypussy.com
blondes.nudepictures.com
butts-n-sluts.com
cam.digitalerotica.com
canadianschoolgirls.com
comfortablynude.com
ctc.sexcenterfolds.com
cubby.shaven-girls.com
cumberland.premiernet.net
cyber.playboy.com
cyberteens.www.conxion.com
electraporn.com
erotic-x.com
eroticnet.babenet.com
famousbabes.com
faraway.cybererotica.com
fetishtime.com
foot-fetish.com
freehardcorelive.com
gay.adultclubs.com
gayteenboys.com
girls2die4.com

CONFIDENTIAL

girlsinlingerie.com
girltown.com
girltown.tierranet.com
gorgeousgirls.com
hardcore.sexmonkey.com
hardcoresex.com
hot-live-sex.com
hotcunt.hotcunt.com
hotporno.com
hotsexlinks.com
hotteen.com
hotteensex.com
karasxxx.com
kristysteenpalace.com
kristysteens.com
lynx2.sexbooth.com
mail.amateurdirectory.com
mail.cum2oasis.com
mail.freebie-sex.com
naked4u.com
nude-celebs.com
nudeadultpics.com
nudeceleboutpost.com
nudeeroticsex.com
nudehollywood.com
nudes.com
one.123adult.com
orientalpussy.com
pg.pornoground.com
phils-porno-parlor.com
pics.callgirls-xxx.com
porndirectory.com
porndog.mco.net
pornrock.com
pussybabe.com
pussyland.com
pussyteens.com
realhardcore.com
s2.nastyfetish.com
sexdragon.com
sexpictures.com
sexploitation.com
sexscape.com
sexsluts.com
sexwars.com

CONFIDENTIAL

sexworlds.com
showgirl.net
sinfulteens.com
sixchicks.com
sluttyamateurs.com
sucksex.com
supermodels.nudepictures.com
superpics.adulthosting.com
technoteen.com
teenbutts.com
teensexworld.com
teensexx.com
teentwat.teentwat.com
teenvirgins.com
time4sex.com
traxxx1.focus.de
ultrafreexxx.com
ultrahardcore.com
universaladultpass.com
vh1.adultlinks.com
vividsex.com
vlad.adultorigin.com
vlad2.absolutexxx.com
voiceofwomen.com
w3.purehardcore.com
west.sucksex.com
wetfetish.com
ww1.voyeurweb.com
www.2adult.com
www.3sex.com
www.4adultsonly.com
www.aahsex.com
www.adult2.com
www.adultbytes.com
www.adultlink.com
www.adultphotos.com
www.adults-online.com
www.adultsights.com
www.adultswap.com
www.advancingwomen.com
www.all-americangirl.com
www.allerotica.com
www.altsex.org
www.amateur-x-pics.com
www.amateur-x.com

CONFIDENTIAL

www.amateurexhibitionists.com
www.amateurmagazine.com
www.amateursonline.com
www.amateursonly.com
www.amateursweb.com
www.analbabes.com
www.asexycafe.com
www.asian-teens.com
www.asianxxxpics.com
www.atomicpussy.com
www.awsomebabes.com
www.axxxess.com
www.babes4free.com
www.bigsextoys.com
www.bisexualbabes.com
www.celebritybabes.com
www.chatgirls.com
www.clubsex.net
www.cockorama.com
www.cocktailbar.com
www.collegenudes.com
www.cruisingforsex.com
www.cumasyouare.com
www.cumorahcu.com
www.cumpany.com
www.cyberporn.inter.net
www.cyberporndirectory.com
www.dailyxxx.com
www.delicious-pussy.com
www.dormgirls.com
www.dreamgirls.com
www.erotica.co.uk
www.eroticpix.inter.net
www.eroticworld.net
www.euroflixxx.com
www.fastporn.com
www.finegirls.com
www.free-xxx-pictures.com
www.free-xxx-porn.com
www.free-xxxpics.com
www.freegirlsex.com
www.gayhardcore.com
www.girl.co.jp
www.girlies.cz
www.girlsagent.com

CONFIDENTIAL

www.girlswithgirls.com
www.groupsexdogs.com
www.hardcoreclub.com
www.hollywoodnudes.com
www.hollywoodteens.com
www.hot4sex.com
www.hottestwomen.com
www.hotwiredxxx.com
www.hotxxxteens.com
www.imengonude.com
www.internet-xxxmodels.com
www.intersex.inter.net
www.jessicasteen.com
www.lasvegassex.com
www.lensexpress.com
www.leo-xxx.com
www.littleteen.com
www.maturebabes.com
www.naked-celebs.com
www.nastychat.com
www.nastysex.com
www.net-erotica.com
www.net2sex.com
www.onlyxxx.com
www.playgirlmag.com
www.playsex.com
www.porn-king.com
www.pornado.com
www.porndorm.com
www.pornet.com
www.pornexchange.com
www.pornocopia.net
www.pornojapan.com
www.pornotimes.com
www.pornplus.com
www.pornstories.com
www.pornusa.com
www.powerotic.com
www.private.sex.se
www.purehardcore.com
www.pussylink.com
www.pussyvision.com
www.realamateur.com
www.realsex.com
www.ripvoyeur.com.hk

CONFIDENTIAL

www.schoolgirlz.com
www.sex-crawler.com
www.sex.se
www.sex4ya.com
www.sexcabin.com
www.sexcat.com
www.sexclubxxx.com
www.sexdv8.com
www.sexe.com
www.sexelsewhere.com
www.sexfiction.com
www.sexfinder.com
www.sexfreebies.com
www.sexgalleries.com
www.sexgalore.com
www.sexhigh.com
www.sexhungryjoes.com
www.sexinabox.com
www.sexinc.com
www.sexlink.net
www.sexodus.com
www.sexplanet.com
www.sexshopper.com
www.sexsounds.com
www.sexsource.com
www.sexswap.com
www.sextv.com
www.sexvote.com
www.sexybloomers.com
www.sexyfriends.com
www.sexyinternet.com
www.sexypics.com
www.sexysin.com
www.sexysites.com
www.showgirl.com
www.smokingpussy.com
www.smutcity.com
www.smutland.com
www.smutpix.inter.net
www.sororitypussy.com
www.spice-girls.co.uk
www.tecumseh.com
www.teen-porn-club.com
www.teenage-tarts.com
www.teenchallenge.com

CONFIDENTIAL

www.teenhideout.com
www.teenie-sex.com
www.teennympho.com
www.teenpanties.inter.net
www.teens-n-colors.com
www.teenstar.com
www.teenstories.com
www.teeny.com
www.thesluts.com
www.totallysex.com
www.uk.playboy.com
www.ukhardcore.com
www.ultimatehardcore.com
www.voyeurplay.inter.net
www.voyeurstories.com
www.voyeurweb.com
www.xtremehardcore.com
www.xxx-18.com
www.xxx4u.net
www.xxxcat.com
www.xxxcounter.com
www.xxxman.com
www.xxxreferral.com
www.xxxstories.com
www.xxxstuff.com
www.xxxvisions.com
www.youngerotica.com
www.zoosex.com
www1.playboy.com
www2.adultsights.com
www2.amateurfresh.com
www2.playboy.com
www4.playboy.com
www7.hollywoodhardcore.com
www8.girlsofrussia.com
wwwserv.weirdsex.com
xxx-pics.net
xxx.com
xxxads.adulthosting.com
xxxempire.com
xxxlinkexchange.com
xxxnewspics.com
xxxo.com
xxxvids.com
xxxxxx.com

CONFIDENTIAL

EXHIBIT 2

October 12, 2007

Judge Ralph K. Winter Jr., Chairman
Judicial Conference Committee on Judicial Conduct and Disability
US Court House, 141 Church Street
New Haven, CT 06510

Dear Judge Winter,

RE: Public Comment on Proposed Rules Governing Judicial Conduct and Disability Proceedings.

TEST CASE TO ASSESS, IN PART, THE ADEQUACY OF THE PROPOSED RULES

The following factual case is offered as a possible test of the adequacy of the proposed new rules. Although the Breyer Committee discussed in general several instances when Circuit Councils did not deal appropriately or adequately with complaints filed against a few Federal Judges, it is not clear if the Committee considered this case. When given the facts which were publicly known, lawyers at the General Services Administration (GSA) and the Administrative Office of the United Stated Courts (AO) and even Chief Justice William H. Rehnquist agreed that at least one felony probably had been committed by a United States Circuit Judge acting in concert with a Circuit Executive. The facts were known by the Circuit Chief Judge, the Circuit Council and indeed by the Judicial Conference of the United States. Yet, no complaint was filed against the Judge by the Circuit Chief Judge or by any member of the Circuit Council or the Judicial Conference. Moreover, although probably outside the purview of your Committee, to my knowledge, no disciplinary action was taken against the Circuit Executive by the Circuit Chief Judge or the Circuit Council, which clearly did have jurisdiction.

It is my strongly held view that this total absence of action is the worst example of failure by those responsible for disciplining Judges that I witnessed during my 21 years as AO Director.

I present this case so that your Committee can determine if disciplinary action was mandated against the offending Judge under the old Rules and Statutes. If not, do the new Rules close what is thus a gaping loophole in the old Rules and mandate disciplinary action, and by whom?

Commendation for Winter and Breyer Committees

First let me commend you and your committee for the draft rules that you have proposed to amend current Judicial Conduct and Disability Rules. My admiration extends also to the report to the Chief Justice by the Judicial Conduct and Disability Act Study Committee entitled "Implementation of the Judicial Conduct and Disability Act of 1980," Chaired by Justice Stephen Breyer with 5 Federal Judges also serving. Taken together, these two reports will do much to maintain and increase public and Congressional confidence in the Federal Judges as your new Rules are applied by the Circuit Councils in considering complaints of misconduct filed against Federal Judges.

As you know, over the years some leaders in Congress and Academe have suggested that in some instances the Judges on Circuit Councils have not been willing to discipline appropriately their colleagues when complaints were filed. Moreover, some Circuit Chief Judges have failed to file complaints against their colleagues even though the facts apparently justified such action.

As you know, I served as Director of the Administrative Office of the United States Courts (AO) for 21 years. Early in my service Representative Robert Kastenmeyer (D. Wisc.) Chaired the House Judiciary Committee. He believed that Circuit Councils may not have been carrying out their duties in some instances when complaints were filed against Federal Judges House hearings were held and although the Judiciary was urged to improve, no legislative action was taken at that time. Then about three years prior to my 2006 retirement, major concerns were expressed by several current Congressional members alleging lack of objectivity by Circuit Councils in handling some complaints particularly by Representative James Sensenbrenner (R. Wisc.) then

Chairman of the House Judiciary Committee. Allegations were made that there was an "old boy network" of Judges who protected and would not act against their colleagues. He was sharply critical of what he perceived to be the failure of certain Circuit Councils to deal appropriately or adequately with complaints against a few Judges. He expressed these views with a high degree of passion both publicly and in two personal appearances before the Judicial Conference of the United States. Of course I had kept Chief Justice William Rehnquist informed of his criticisms well before he presided over the Conference services meeting where Sensenbrenner spoke. Then I met with the Chief Justice after the second Sensenbrenner "lecture" and we agreed that he should visit Sensenbrenner at his House office, a most unusual thing for any Chief Justice to do. But the Chief agreed that this issue was sufficiently important to do so. After talking with Sensenbrenner he told him that he planned to appoint a special committee of Judges to study the issue, to be chaired by Justice Stephen Breyer.

At least two very important results came from that process; first, the Judiciary bought some time because had there been no such actions, Chairman Sensenbrenner made it very clear that he was going to impose an Inspector General on the Judiciary to make sure that the Judges behaved themselves. Second, it has now resulted in the excellent work product from both the Breyer committee and your important Conference committee. If adopted, your proposed Rules will increase the confidence in Judges among Congress, the public, the Bar and the Media.

My comment on the proposed Rules themselves will be confined to posing a factual situation, which in my view should have been considered by the Ninth Circuit Council but never was. In my opinion it is still a dark cloud hanging over the reputation of the Judicial Branch. The current rules could and should have been applied through a formal complaint against the Judge involved either by the Chief Circuit Judge or other Judges. I believe the current rules allow and may require a complaint by the Chief Judge of the Circuit. However such a complaint never was forthcoming from her or from any other Judge.

Factual Case to Test the Proposed New Rules

In 2001, Ninth Circuit Judge Alex Kozinski, in the company of the then Circuit Executive Greg Walters and perhaps one other Ninth Circuit Judge illegally (according to GSA's lawyers and ours) seized and then sabotaged the vital Judiciary Internet Gateway Security System then located in San Francisco. As a result thousands of computer hackers throughout the world were permitted to invade the records of courts, judges and court staff not only in the Ninth Circuit but also in the Eighth and Tenth Circuit, which were similarly served by that Gateway. Moreover, skilled hackers once they broke through the system in San Francisco could penetrate into every Court in the United States. The National Security Agency (NSA) expert who consulted with the Judicial Conference Internet and Technology (IT) Committee said that from a security standpoint this action by Kozinski was "insane."

GSA lawyers who are responsible for computer systems policy in the Federal government said that this action was not only "illegal" but constituted at least one felony. They along with our own internal lawyers cited title 18 USC1361, which states that:

> "whoever willfully injures or commits any depredation against any property of the United States, or of any Department or Agency thereof ... shall be punished by a fine of $1,000 and depending on the circumstances a prison term of 1 to 10 years."

Likewise section 1362 states that:

> "whoever willfully injures or maliciously destroys any ... system, or other means of communications, operated or controlled by the United States ... or willfully or maliciously interferes in any way with the working or use of any such line, or system, or willfully or maliciously obstructs, hinders, or delays the transmission of any communication over any such line, or system or attempts or conspires to do such an act, shall be fined under this title or imprisoned not more than 10 years or both."

For your Committee to determine the application to this case of either the old or your proposed new rules, it is important to know the facts that led up to this extraordinary unsupportable action by Judge Kozinski and Greg Walters. During 2000 and 2001 there was a major increase in the use of Internet Bandwidth by Federal Courts throughout most of the United States. This greatly elevated the cost and gave rise to the strong suspicion that the court computer systems were being abused. This was of great concern to the Judicial Conference Information Technology (IT) Committee, which had been given considerable responsibility by the Judicial Conference to monitor the costs and management of judicial computer systems throughout the country. The Committee, then Chaired by the late District Judge Ed Nelson, directed my staff at the AO to monitor internet bandwidth use throughout the country to determine why there had been such a major increase in bandwidth use. The Committee also directed that the study must be confined solely to general bandwidth information. The staff was expressly forbidden to examine either e-mail or individual computers used by any Judge or court employees anywhere in the country. This was done to assure privacy.

When this initial bandwidth study was completed, the results were presented to the IT Committee which learned that by far the greatest proportion of the bandwidth increase occurred through the illegal downloading of pornography and some other movies and NAPSTER music on court computers in Federal courts on Federal time throughout the United States. In short there was a wholesale violation of the Federal law and waste of taxpayer funds throughout the country, particularly in 39 courts.

Judges and Court Employee Privacy Fully Protected

It is important to note once again that my staff faithfully followed the direction of the IT Committee and confined their study solely to internet bandwidth use. Thus the computers and e-mail of individual court employees, law clerks and Judges were not examined or studied. The IT Committee then issued instructions which in most instances, I was asked to send to the entire court family so that this systematic breaking of

Federal Law in the Courts would be ended, and the Judiciary avoid serious embarrassment. But Judge Kozinski chose to comment publicly to the New York Times, to at least one National news magazine and wrote a lengthy essay for the Wall Street Journal editorial page on his mistaken version of the study. By doing so, he created considerable media attention and public awareness to the Judiciary's severe problem of illegally using court computers.

The facts described above are indisputable since Judge Kozinski publicly admitted his role in illegally seizing the vital Internet security facility disabling it, and thus opening judicial records up to thousands of computer hackers throughout the world endangering the security of the entire Judicial Branch. Not only did he admit his illegal actions but he also boasted about them in the National press. One National magazine published his picture with an article in which he recounted his sabotage of the security system featuring his comment "What is a Judge to do?" Virtually every other Judge in the United States would have said that what a Judge is to do is obey Federal law, not waste Federal money and not to believe apparently that a Federal Judge is above the law just because of his office. Judge Kozinski was so proud of his sabotage action that he actually filmed a reenactment and made copies of the tape, one of which was sent and viewed at a nationwide Judiciary computer staff meeting in Jacksonville, Florida. On the tape he described triumphantly to all the many court computer experts assembled from throughout the country precisely how he seized the computer security facility and disabled it so it would no longer protect Judge's records. Present, however, was the great Chairman of the Judicial Conference IT Committee which had directed that the bandwidth use study be made. Judge Nelson recognized that the Kozinski tape was intended in part to be a direct attack on him and his committee before the professional staff in order to embarrass him and his fellow committee members. He said he could not understand how Judge Kozinski could possibly justify his illegal action to destroy the security system and endanger Judges records and then reenact the crime on film.

For Judge Nelson and for any objective observer it was impossible to connect the destruction by Kozinski of the security system with a Committee request to study bandwidth which in no way violated the privacy of Judges or court staff but did reveal that some employees in

Federal Courts, at least 39 Courts, were downloading pornography and some even viewing them in the court facilities on court time. Judge Nelson believed that the Kozinski action was designed entirely to cover up this outrageous waste of Federal taxpayer money and equipment in too many of the courts.

Kozinski even volunteered publicly that one of his law clerks had downloaded pornography in his court. He did not mention the extent to which he and his other law clerks also downloaded pornographic movies and NAPSTER music.

Chief Justice Rehnquist was appalled by the Kozinski Security Sabotage

When Chief Justice William Rehnquist learned of Kozinski's actions and then learned that he was boasting in public about his deliberate violation of Federal law he said "Tell Alex to watch pornography at home and not download and watch it in the courts."

Chief Justice Rehnquist was so disturbed by Kozinski's actions and his public boasting that he directed the Judicial Conference Executive Committee immediately "to take firm disciplinary action against all those involved" including, of course, Kozinski and Walters. He also believed that the Kozinski/Walters action might have been taken with the tacit or active endorsement of the Chairman of the Circuit Council, Judge Mary Schroeder, and perhaps the entire Ninth Circuit Council. Thus the minutes for the Executive Committee emergency teleconference of May 31, 2001 show that the Chief Justice "concluded something needs to be done that would get the attention of the Ninth Circuit Council." He said that "more needed to be done than a remonstrance and more than a slap on the wrist." He directed the Committee and me to determine if the Ninth Circuit Council Judges and Circuit staff could be cut off completely from the data communications network (DCN) thus depriving them of their computers and other automated facilities. Indeed he specifically asked us, "Can we cut off computers?"

At the time of the Executive Committee meeting, Associate AO Director Pete Lee was in Alaska attending a gathering of Chief Judges from the Ninth Circuit Chaired by Circuit Chief Judge Mary Schroeder. He

reported on the phone for the Executive Committee and me that she was "now talking to them" (the Chief Judges) and said "she is afraid that the record of the extensive downloading of pornography in the courts will be embarrassing to some of the Judges who are up for Supreme Court or other appointments." According to Lee, she also said that she and a Circuit Executive, Walters, were willing to "put the security system back up" and make it operational "if we (the Executive Committee members and the AO) agree not to measure sex explicit movies that are being down loaded in the courts." Significantly, there was no talk at the Alaska meeting according to Lee about fear of reading Judges e-mail which they knew did not occur. Rather the concern was about possible embarrassment to Judges caused by reports of pornography downloading in the Courts.

No Disciplinary Action Taken

Given the gravity of this situation, coupled with the exceptionally strong views of the Chief Justice, I was truly surprised when a narrow majority of the Executive Committee refused to recommend or take any disciplinary action with respect to Kozinski or Walters or the Ninth Circuit Council. All they agreed to do was to have the Chairman, District Judge Charles Haden (N.D. West VA) call Chief Judge Schroeder to work out an agreement to restore that the security system to working condition. Haden then promised to her that the IT committee would no longer require the monitoring of bandwidth use by the courts. In short, Judges Schroeder and Kozinski and Circuit Executive Greg Walters got precisely what they wanted. There would be no discipline of the offenders. Moreover, no longer would there be any monitoring of the extent to which pornographic movies and NAPSTER music were being illegally downloaded by Federal Courts. Later, the Judicial Conference took what can only be described as cosmetic action essentially leaving it up to each individual court to develop a system of its own in the hope that Federal law is not being violated in that court. The Administrative Office was directed by the Conference to obtain an annual report on the quality and adequacy of the plans developed by each court throughout the country to require legal compliance. Based upon the last report which I say which was for 1995-96 some courts have no plan at all while other courts have

inadequate plans. Fortunately, some have good working plans. In short, even the cosmetic action goals are not being met in too many of the courts throughout the country. If this sorry state of affairs is once again treated in the media and considered by Congress, the Judiciary stands to be held up to ridicule and embarrassment throughout the United States.

Result of the Failure to Discipline

The conclusion reached in this case study is that a Judge and/or a court administrator can violate Federal law and commit felonies but will not be disciplined in any way. Likewise, in too many courts, Judges and court staff appear largely to be free to download pornography and NAPSTER music if they choose without detection and with no discipline built into the system of these courts to assure that Federal law is being obeyed.

Chief Justice orders Removal of an Internet Security Gateway from the Ninth Circuit

To say that Chief Justice Rhenquist was angry about the failure of the Conference Executive Committee to carry out his direction to discipline the Ninth Circuit perpetrators coupled with the limited cosmetic action taken by the Judicial Conference along with the failure of the Ninth Circuit to consider complaints would be a gross understatement. The Chief Justice lectured the Executive Committee sternly about their failure to take appropriate action to discipline Judge Kozinski, Greg Walters and the Ninth Circuit Council.

As stated, Chief Justice Rehnquist was highly disturbed about what he perceived to be the complete failure of the Ninth Circuit Council and Chief Judge Schroeder either to take disciplinary action against Judge Kozinski and/or on Circuit Executive Greg Walters. However there was one action that he could take to further express his displeasure and restore some integrity to the system. He ordered me to remove the Internet Gateway security system from San Francisco taking it entirely out of the Ninth Circuit and relocating it in another Circuit. He did this so that neither Judge Kozinski nor Greg Walters nor the Circuit Council could

again sabotage Judicial Branch security equipment and thus endanger the security of the entire Federal Court system. It is now located near Kansas City, Missouri.

Chief Justice Rehnquist further evidenced his continuing acute displeasure caused by the failure of the Ninth Circuit Council or the Executive Committee to take "stern disciplinary action. When Judge Schroeder recommended appointment to the Conference IT Committee of the other Circuit Judge who reputedly accompanied Judge Kozinski, he turned it down flatly. Instead he appointed a District Judge from Idaho whom I recommended.

Judicial Conference Procedures Ignored by Kozinski

Sabotaging the security system was not the only avenue available to Judge Kozinski if he objected to the policy of the Judicial Conference IT Committee seeking to uncover and forestall possible waste, abuse, and violation of Federal law through examining bandwidth use throughout the Judicial Branch. The IT Committee is a creature of the Judicial Conference and responsible to it. Kozinski could have complained to Chief Judge Schroeder who is a member of the Conference by right of office and to the elected District Judge on the Conference from the Ninth Circuit and to ask for a reconsideration of this policy and if necessary ask that it be done on an emergency basis. He also could have lodged a complaint and request for similar action with the Chief Justice who presides over the Judicial Conference and appoints all Conference Committee members including the IT Committee. Likewise he could have gone to Judge Ed Nelson the Chairman of the IT Committee and to the Committee itself seeking such action. The Ninth Circuit has always had a representative Judge who serves on that Committee but there is no record that Kozinski ever complained to that Judge. Thus, instead of going through the accepted Conference channels, which permit expeditious action when necessary, he chose to take the law into his own hands and constitute himself a judicial vigilante. He decided to defy openly both the Conference Committee and the Conference itself presided over by the Chief Justice and preceded to violate Federal Criminal law, which clearly applies to him. Moreover he and Greg Walters violated the

contract made between the Ninth Circuit Executive and the IT Committee in which the Circuit staff agreed to manage the internet security gateway in San Francisco in behalf not only the Ninth Circuit but also the Eighth and Tenth Circuits. Incidentally neither Judge Kozinski nor Judge Schroeder nor Greg Walters consulted with either of the other two Circuits before summarily shutting down the system thus endangering all Judges and court staff in both of those Circuits.

Kozinski "Privacy" Straw Man

Judge Kozinski obviously decided that he could not prevail in the public relations arena if he tried to justify illegally sabotaging the Judiciary's Internet security system in San Francisco solely in order to assure that Judges and court staff could continue to illegally download pornography and NAPSTER music. Therefore, he created a fictitious straw man in an attempt to explain his extraordinary unilateral vigilante action. He falsely claimed both inside the Judiciary and extensively throughout the public media that the bandwidth survey mandated by the IT Committee somehow resulted in Judge's e-mail being read and their individual computers monitored. He did this even though Judge Nelson told him that it wasn't true! No Judge's e-mail was read or monitored in any way nor were their computers monitored. Unfortunately, Kozinski managed to persuade some uninformed media and indeed some of his fellow Judges who did not know the facts that he was the great defender of their privacy. In fact, he was the defender solely of the unfettered ability of all Judges and court employees to illegally download pornography and view it in Federal courts, an objective with which no Federal Judge or Congress would agree.

To my knowledge, the only time individual computers ever were examined to determine if they were being used for illegal purposes was carried out by the Ninth Circuit Council itself in 1998, not by the IT Committee or the AO. The Council discovered that there was a significant amount of abuse in the Ninth Circuit. But there is no record that the Circuit Council disciplined the offenders however.

COMMENT AND QUESTIONS ON THE APPLICATION OF THE PROPOSED NEW RULES TO THE ABOVE FACTUAL SITUATION

1. The conduct described above was not known to members of the Bar or to litigants. It appears therefore from the Committee commentary on Rule 3 that there are only two ways a "complaint" could be filed against Judge Kozinski. One would be by a knowledgeable Federal Judge. The second is that the "complaint" may be "identified" by the Chief Judge. But in the absence of a complaint by another Judge, is the Chief Circuit Judge required to file a complaint? For example, in the above-described situation Chief Judge Schroeder was fully aware of what Judge Kozinski had done but neither she nor any informed Judge filed a complaint. The comment under Rule 3 seems to say that the Chief Judge is not required to file a complaint but "may" file and "often is expected to trigger the process" by "identifying a complaint". Is this a case when a complaint was "expected" to be filed or where one "must" be filed by the Chief Judge?

In the test case, it is theoretically possible that a Ninth Circuit staff member or someone from the AO who were aware of these facts, as indeed many were, could file a complaint against Judge Kozinski. However as a practical matter this likely would not work because of the probable repercussions against such employees. Thus, if the Circuit Chief who, is aware of such misconduct does not elect to identify a complaint, this creates an important loophole in the regulations, which would allow such illegal conduct to go unchallenged. The proposed rules of the Committee ought to consider the possibility of making such action mandatory for the Circuit Chief Judge.

2. If the Circuit Chief Judge is not only aware of possible misconduct or illegal action by another Judge in the Chief's Circuit and may have actually approved or ratified the misconduct or illegality in advance, it is virtually certain that the Chief Judge would not file a complaint. The new Rules as you have proposed them do not appear to deal with this very real possibility. You may wish to

revise the rules to set up an alternate procedure to make sure that a complaint is filed in such circumstances.

3. It does not appear from the existing Rules or the proposed new Rules that there is a statute of limitations that applies to the filing of a complaint of misconduct against a Federal Judge. If that is the case and if the statute has not run, a complaint could still be filed against Judge Kozinski for the illegal action that he took in 2001. Is the Chief Judge required to file a complaint now under the old rules?

4. Under the new Rules, if Rule 5(a) governs and the requirements of Rule 7 and Rule 3(a) too have been met and no complaint has been filed under Rule 6, a Chief Judge "must identify a complaint" and by written orders stating the reasons, begin the review provided in Rule 11. In your Committee's view, is Judge Schroeder obliged to file such a complaint? If so, this probably means that she may be obliged to file one.

5. Rule 29 of your proposed rules provides that the new rules "will become effective 30 days after promulgation by the Judicial Conference of the United States." Thus Judge Schroeder would have to file a complaint, under the new rules but they may not be in effect by November 8, 2007 when she must step down as Chief Judge. If she refuses, who must file a complaint prior to November 8th if anyone?

6. Under current law Judge Alex Kozinski will become the new Circuit Chief Judge on November 8, 2007 succeeding Judge Mary Schroeder. If approved, the new rules will be in effect after Judge Kozinski becomes the Chief Judge. At the time is Chief Judge Kozinski obliged to issue a complaint against himself? I assume the answer is no. I further assume, however, that he would be disqualified under Rule 25. Therefore the new Rules require that the complaint "must be assigned to the Circuit Judge in regular active service who is the most senior in date of commission of those who are not disqualified." If most or all of the members of the current Circuit Council were members of the Council when

Judge Kozinski took his illegal action in 2001, then I assume that the Rules may require each of those individuals to be disqualified particularly if in 2001 they approved Kozinski's illegal action in advance. However Rule 25(G) provides that notwithstanding any other provision of these rules to the contrary, a member of the Judicial Council who is a subject of the complaint may participate in the disposition thereof if the Judicial Council votes that it is necessary and appropriate and in the interest of sound Judicial administration that such subject Judges should be eligible to act. Does this open the door for Judge Kozinski to participate in the Committee handling of his complaint or one filed against him even though he is disqualified as Chief Circuit Judge because he would be the object of the complaint? That section does appear to open the door to him to participate and for any other members of the Council who in 2001 approved his actions in advance, if that occurred.

7. It is clear that the proposed Rules apply only to Federal Judges. They do not therefore cover a Circuit Executive such as Greg Walters who aided and abetted in the committing of a felony according to the facts and the analysis of various lawyers. There is no record that the Circuit Chief Judge or anyone else disciplined him. This clearly is an embarrassment to the Judicial Branch particularly since Walters currently is working on 'detail' for the Administrative Office, which is supervised and directed by the Judicial Conference whose policies and rules he openly defied. This is a notable loophole and your committee may wish to direct an inquiry to the appropriate Judicial Conference Committee, probably Judicial Resources, suggesting that this loophole should be repaired.

In summation: As a result of the illegal action taken by Judge Kozinski, Greg Walters and perhaps one other Ninth Circuit Judge, coupled with the total failure of the Ninth Circuit Council and the Judicial Conference even to consider disciplining for Judge Kozinski under current law and Rules procedures, the Federal Judiciary could be censured by Congress for permitting its laws to be openly flaunted with no response by the Judiciary. Also, it could be justifiably

criticized by the media. This is particularly true and doubly serious because the disabling of the security system obviously took place for one reason and one reason only namely that Judge Kozinski and his allies wanted to make it possible for Federal Judges and court staff to be totally free of detection when or if they download illegal pornography movies and NAPSTER music on Federal Court computers, on Federal Court time, in Federal Court buildings using Federal taxpayer money. Therefore in the interest both of good government and the reputation of the Judicial Branch the new Rules should require Circuit Chiefs and Circuit Councils or suitable alternative Judicial Branch organizations to initiate and consider complaints in this and similar factual situations. Certainly Chief Justice Rehnquist strongly believed that the system must require "stern discipline" in such a situation, discipline that is totally absent thus far and I agree with him fully.

Summary of Central Questions for Your Committee

- Is it mandatory for the Chief Circuit Judge or any other Judge to file a complaint against Judge Kozinski under the old Rules? If not, does your Committee have authority to mandate the filing and consideration of such a complaint?
- Do the proposed Rules require the Ninth Circuit Chief Judge to initiate a complaint against Kozinski that is then considered by the Circuit Council? If not, is it mandatory upon any other Judicial organization such as your Committee to initiate a complaint? If not, your Committee may wish to revise the Proposed Rules to assure that such disciplinary action is taken to restore integrity to the Rules process while at the same time avoiding serious embarrassment to the Judicial Branch for its failure to act.

CC: William R. Burchill Jr., Associate Director and General Council

Mr. William R. Burchill Jr., Associate Director and General Council
Administrative Office of the US Courts
Thurgood Marshall Federal Judiciary Building
Washington DC 20544

Judge Ralph K. Winter Jr., Chairman
Judicial Conference Committee on Judicial Conduct and Disability
US Court House, 141 Church Street
New Haven, CT 06510

EXHIBIT 3

WSJ.com OpinionJournal
from THE WALL STREET JOURNAL Editorial Page

AT LAW

Privacy on Trial

Big Brother is watching you, your honor.

BY ALEX KOZINSKI
Tuesday, September 4, 2001 12:01 a.m.

An open letter to federal judges:

The U.S. Bureau of Prisons maintains the following sign next to all telephones used by inmates:

"The Bureau of Prisons reserves the authority to monitor conversations on the telephone. Your use of institutional telephones constitutes consent to this monitoring. . . ."

I'm planning to put signs like these next to the telephones, computers, fax machines and other equipment used in my chambers because, according to a policy that is up for a vote by the U.S. Judicial Conference, we may soon start treating the 30,000 employees of the judiciary pretty much the way we treat prison inmates.

Exaggeration? Not in the least. According to the proposed policy, all judiciary employees--including judges and their personal staff--must waive all privacy in communications made using "office equipment," broadly defined to include "personal computers . . . library resources, telephones, facsimile machines, photocopiers, [office supplies." There is a vague promise that the policy may be narrowed in the future, but it is the quoted language the Judicial Conference is being asked to approve on Sept. 11.

Not surprisingly, the proposed policy has raised a public furor. This has so worried the policy's proponents that Judge Edwin Nelson, chairman of the Judicial Conference's Automation and Technology Committee, took the unprecedented step of writing to all federal judges to reassure them that the proposed policy is no big deal. I asked that my response to Judge Nelson be distributed to federal judges on the same basis as his memo, but my request was rejected. I must therefore take this avenue for addressing my judicial colleagues on a matter of vital importance to the judiciary and the public at large.

The policy Judge Nelson seeks to defend as benign and innocuous would radically transform how the federal courts operate. At the heart of the policy is a warning--very much like that given to federal prisoners--that every employee must surrender privacy as a condition of using common office equipment. Like prisoners, judicial employees must acknowledge that, by using this equipment, their "consent to monitoring and recording is implied with or without cause." Judicial

opinions, memoranda to colleagues, phone calls to your proctologist, faxes to your bank, e-mails to your law clerks, prescriptions you fill online--you must agree that bureaucrats are entitled to monitor and record them all.

This is not how the federal judiciary conducts its business. For us, confidentiality is inviolable. No one else--not even a higher court--has access to internal case communications, drafts or votes. Like most judges, I had assumed that keeping case deliberations confidential was a bedrock principle of our judicial system. But under the proposed policy, every federal judge will have to agree that court communications can be monitored and recorded, if some court administrator thinks he has a good enough reason for doing so.

Another one of our bedrock principles has been trust in our employees. I take pride in saying that we have the finest work force of any organization in the country; our employees show loyalty and dedication seldom seen in private enterprise, much less in a government agency. It is with their help--and only *because* of their help--that we are able to keep abreast of crushing caseloads that at times threaten to overwhelm us. But loyalty and dedication wilt in the face of mistrust. The proposed policy tells our 30,000 dedicated employees that we trust them so little that we must monitor all their communications just to make sure they are not wasting their work day cruising the Internet.

How did we get to the point of even considering such a draconian policy? Is there evidence that judicial employees massively abuse Internet access? Judge Nelson's memo suggests there is, but if you read the fine print you will see that this is not the case.

Even accepting the dubious worst-case statistics, only about 3% to 7% of Internet traffic is non-work related. However, the proposed policy acknowledges that employees are entitled to use their telephone and computer for personal errands during lunchtime and on breaks. Because lunches and breaks take up considerably more than 3% to 7% of the workday, we're already coming out ahead. Moreover, after employees were alerted last March that downloading of certain files put too much strain on the system, bandwidth use dropped dramatically. Our employees have shown they can be trusted to follow directions.

What, then, prompted this bizarre proposal? The answer has nothing to do with bandwidth or any of the other technical reasons articulated by Judge Nelson. Rather, the policy became necessary because Leonidas Ralph Mecham, director of the Administrative Office of the U.S. Courts, was caught monitoring employee communications, even though the Judicial Conference had never authorized him to do so. Unbeknownst to the vast majority of judges and judicial employees, Mr. Mecham secretly started gathering data on employee Internet use. When the Web sites accessed from a particular computer affronted his sensibilities, Mr. Mecham had his deputy send a letter suggesting that the employee using that computer be sanctioned, and offering help in accomplishing this. Dozens of such letters went out, and one can only guess how many judicial employees lost their jobs or were otherwise sanctioned or humiliated as a consequence.

When judges of our circuit discovered this surreptitious monitoring, we were shocked and dismayed. We were worried that the practice was of dubious morality and probably illegal. We asked Mr. Mecham to discontinue the monitoring. Rather than admitting fault and apologizing, Mr. Mecham dug in his heels. The monitoring continued for most of the country until Mr. Mecham was ordered to stop by the Judicial Conference Executive Committee.

Hell hath no fury like a bureaucrat unturfed. In a fit of magisterial petulance, Mr. Mecham demanded that his authority to monitor employee communications be reinstated without delay. A compliant Automation Committee hastily met in secret session to draft the proposed policy, pointedly rejecting all input from those who might oppose it. In their hurry to vindicate Mr. Mecham's unauthorized snooping, the committee short-circuited the normal collegial process of deliberation and consultation.

Salving Mr. Mecham's bureaucratic ego, and protecting him from the consequences of his misconduct, is hardly a basis for adopting a policy that treats our employees as if they live in a gulag. Important principles are at stake here, principles that deserve discussion, deliberation and informed debate. As Chief Judge James Rosenbaum of Minnesota has stated, "giving employers a near-Orwellian power to spy and snoop into the lives of their employees, is not tenable." If we succumb to bureaucratic pressure and adopt the proposed policy, we will betray ourselves, our employees and all those who look to the federal courts for guidance in adopting policies that are both lawful and enlightened.

I therefore suggest that all federal judges reading these words--indeed all concerned citizens--write or call their Judicial Conference representatives and urge them to vote against the proposed policy. In addition, we must undo the harm we have done to judicial employees who were victims of Mr. Mecham's secret, and probably illegal, snooping. The Judicial Conference must pass a resolution that offers these employees an apology and expungement of their records.

Moreover, we should appoint an independent investigator to determine whether any civil or criminal violations of the Electronic Communications Privacy Act were committed during the months when 30,000 judicial employees were subjected to surreptitious monitoring. If we in the judiciary are not vigilant in acknowledging and correcting mistakes made by those acting on our behalf, we will surely lose the moral authority to pass judgment on the misconduct of others.
Mr. Kozinski is a judge on the Ninth U.S. Circuit Court of Appeals in California. His unmonitored e-mail address is kozinski@usc.edu.

Copyright © 2008 Dow Jones & Company, Inc. All Rights Reserved.

PRINT WINDOW CLOSE WINDOW

EXHIBIT 4

CAL LAW
CALIFORNIA'S LEGAL NEWS SOURCE

Select '**Print**' in your browser menu to print this document.

©2005 ALM Properties, Inc.
Page printed from: Cal Law

Back to Article

Kozinski Strikes Back

Alex Kozinski
The Recorder
09-23-2005

Last week in this space, Cyrus Sanai took up what was headlined as the "Taking the Kozinski Challenge" by purporting to show that the Ninth Circuit routinely ignores circuit and Supreme Court precedent in its published and unpublished opinions. According to Mr. Sanai, Ninth Circuit panels "silently dustbinned" inconvenient opinions, paid "lip service" to Supreme Court case law, vaulted "somersaults" in creating three lines of authority "none of which agree with each other," and adopted a rule that has "the 'absolute simplicity' of Joseph Heller's 'Catch-22.'"

Were this criticism justified, it would be an embarrassing illustration of judicial lawlessness. Fortunately, it isn't.

For reasons of his own, Mr. Sanai chose as the centerpiece of his article an arcane area of federal jurisdiction known as the *Rooker-Feldman* doctrine. This doctrine holds that district courts may not entertain lawsuits challenging the validity of state court judgments. Were it otherwise, district courts would effectively become appellate tribunals for state court decisions — a role reserved to the U.S. Supreme Court.

This much is clear. The closer question is what happens where the state courts conclusively resolve a federal issue in an interlocutory order. May the losing party challenge that order by bringing a federal action, or must it await review by writ of *certiorari* after final judgment? According to Mr. Sanai, we held in *H.C. ex rel. Gordon* v. *Koppel*, 203 F.3d 610 (9th Cir. 2000), that "*Rooker-Feldman* did not apply to ongoing state proceedings."

Not so. *H.C.* arose out of a state court order transferring temporary custody from mother to father. The mother then brought a federal lawsuit seeking to enjoin the state judge from enforcing his order. The district court dismissed on *Rooker-Feldman* grounds and the mother appealed.

Our opinion considered both *Rooker-Feldman* and *Younger* abstention, and affirmed on the basis of *Younger*. As to *Rooker-Feldman*, the opinion did not hold (as Mr. Sanai imagines) that the doctrine never applies to orders entered in the course of ongoing state litigation. *H.C.* merely found that, because temporary custody could change during the course of the litigation, "there is no final state judgment *or order* to which the *Rooker-Feldman* doctrine might relate and *we need not reach the question of the doctrine's applicability to this action*." *Id.* at 613 (emphasis added). *H.C.* expressly left open whether *Rooker-Feldman* applies to an interlocutory order that finally resolves the federal issue: "Nor are we asked to review a final state judgment of an order of an interlocutory nature." *Id.*

Doe & *Associates Law Offices* v. *Napolitano*, 252 F.3d 1026 (9th Cir. 2001), reached this question. At issue in *Napolitano* was a grand jury subpoena seeking client records from a law firm. The firm unsuccessfully petitioned the state court to quash the subpoena, then brought a federal lawsuit seeking to enjoin its enforcement. The district court eventually dismissed on *Rooker-Feldman* grounds.

Napolitano thus confronted the question left open in *H.C.*: Does *Rooker-Feldman* bar a federal lawsuit challenging a state-court order that conclusively resolves an issue, even though the litigation continues as to other issues? *Napolitano* held that such a federal lawsuit is barred by *Rooker-Feldman.* One might disagree, as Mr. Sanai clearly does, but his claim that *Napolitano* "dustbinned" *H.C.* is unsupported.

Mr. Sanai next claims that *Napolitano* was overruled by *Exxon Mobil Corp.* v. *Saudi Basic Industries Corp.*, 125 S. Ct. 1517 (2005), yet we stubbornly refused to acknowledge this in *Mothershed* v. *Justices of the Supreme Court*, 410 F.3d 602 (9th Cir. 2005). But *Exxon Mobil* did not address the issue resolved by *Napolitano* — whether *Rooker-*

Feldman applies to interlocutory but final state court orders. The question in *Exxon Mobil* was whether *Rooker-Feldman* bars federal lawsuits brought before the state courts have adjudicated the federal question.

N95

Mothershed did not rely on *Napolitano* and so had no reason to decide whether *Napolitano* was affected by *Exxon Mobil.* Rather, *Mothershed* found *Exxon Mobil* inapplicable because the state courts in *Mothershed* had conclusively resolved the federal issues before the federal lawsuit was brought. Is this the only plausible reading of *Exxon Mobil?* Perhaps not — though I believe it's a fair reading. Certainly, however, Mr. Sanai's claim that *Mothershed* paid mere "lip service" to *Exxon Mobil* is seriously overstated. All that can fairly be said about *Mothershed* is that it selected one permissible interpretation of a Supreme Court opinion that was not directly on point.

Mr. Sanai's claim that our *Rooker-Feldman* jurisprudence is in hopeless disarray is especially off the mark because this is an area where we have been vigilant in maintaining consistency. This is due in no small part to the fact that our colleague, Judge William Fletcher, is not merely one of the great minds of the federal judiciary, but a federal courts professor and a recognized authority on *Rooker-Feldman.* Judge Fletcher can be a bit of a nudge in prodding us to interpret *Rooker-Feldman* correctly, and so three years before the Supreme Court decided *Exxon Mobil*, our court took *en banc Ahmed* v. *Washington*, 276 F.3d 464 (9th Cir. 2001), where a panel had committed the very error the Supreme Court eventually corrected in *Exxon Mobil.* Though the parties settled, rendering the appeal moot, the *en banc* panel vacated the incorrect panel opinion, keeping our case law out of harm's way when the Supreme Court unanimously reversed other circuits in *Exxon Mobil*.

Despite his colorful language, Mr. Sanai's article raises no legitimate question about whether the Ninth Circuit has been derelict in following circuit or Supreme Court precedent. But the article does raise serious issues of a different sort. Mr. Sanai's article urges us to "grant *en banc* rehearing of the next decision, published or unpublished, which asks the court to resolve the split among *H.C., Napolitano* and *Mothershed*." A petition for *en banc* rehearing raising this very issue crossed my desk just as Mr. Sanai's article appeared in print. The name of the case? *Sanai* v. *Sanai.* A mere coincidence of names? Not hardly. The petition, signed by Mr. Sanai, cites the same cases and makes the same arguments as his article — including the reference to "Catch-22."

Mr. Sanai's byline modestly lists him as "an attorney with Buchalter Nemer in Los Angeles." The firm's Web site identifies him as "a Senior Counsel and English solicitor ... [whose] practice focuses on project finance, corporate finance and business transactions, with a particular expertise in international finance transactions." The careful reader would therefore have no cause to doubt that Mr. Sanai is a disinterested observer of this court's *Rooker-Feldman* jurisprudence. Nothing alerts the reader to the fact that Mr. Sanai has been trying for years to get the federal courts to intervene in his family's state-court dispute, an effort referred to by a highly respected district judge as "an indescribable abuse of the legal process, ... the most abusive and obstructive litigation tactics this court has ever encountered. ..." Nor would the reader — unless he happened to enter Mr. Sanai's name in the Westlaw CTA9-ALL database — realize that, as part of the same imbroglio, he and certain members of his family have hounded a state trial judge off their case (read the PDF); been held in contempt and sanctioned under 28 U.S.C. §1927 and had their *ninth* sortie to our court in the same case designated as "frivolous" and "an improper dilatory tactic" by the district court. A detached observer, Mr. Sanai is not.

By failing to disclose his long-standing, active and abiding interest in the legal issue he discusses in his article, Mr. Sanai has done the reading public a disservice, cloaking his analysis with a varnish of objectivity. Worse, by publishing the article while he had a case raising this precise issue, Mr. Sanai used *The Recorder* to call unfair attention to his petition for rehearing, to the detriment of opposing parties who limited their advocacy to the briefs. And, by gratuitously drawing my name repeatedly into the controversy, he has also managed to disqualify me from participation in his case, skewing the *en banc* voting process.

Whether our court is diligent in applying circuit law and faithful to Supreme Court precedent are issues that deserve public attention. Contrary to Mr. Sanai's bold assertion, I have never claimed that intra-circuit conflicts never arise, and my colleagues and I welcome legitimate efforts to tell us when our circuit law needs mending. It is important, however, to draw a clear line between case advocacy and objective public debate. This Mr. Sanai has neglected to do.

Alex Kozinski *is a judge on the Ninth Circuit U.S. Court of Appeals.*

EXHIBIT 5

JUDICIAL CONFERENCE OF THE UNITED STATES
COMMITTEE ON INFORMATION TECHNOLOGY

HONORABLE EDWIN L. NELSON, CHAIR

HONORABLE DAVID A. BAKER
HONORABLE PAUL J. BARBADORO
HONORABLE ALICE M. BATCHELDER
HONORABLE DAVID H. COAR
HONORABLE LEWIS A. KAPLAN
HONORABLE ROBERT B. KING
HONORABLE J. THOMAS MARTEN
HONORABLE CATHERINE D. PERRY
HONORABLE JAMES ROBERTSON
HONORABLE ROGER G. STRAND
HONORABLE L. T. SENTER, JR.
HONORABLE DIANE W. SIGMUND
HONORABLE THOMAS I. VANASKIE

May 10, 2002

Honorable Howard Coble
Chairman, Subcommittee on Courts,
the Internet, and Intellectual Property
Committee on the Judiciary
United States House of Representatives
B351A Rayburn House Office Building
Washington, DC 20515

Dear Mr. Chairman:

I understand that on May 2, 2002, the Judiciary Subcommittee on Courts, the Internet, and Intellectual Property held a business meeting to consider H.R. 4125, the "Federal Courts Improvement Act." At the meeting Mr. Berman first offered and then withdrew an amendment relating to "monitoring" of electronic communications on the judicial branch's Data Communications Network (the "DCN"). I am told that Mr. Berman may again offer his amendment when H.R. 4125 is considered by the full committee. Those of us who serve on the Judicial Conference Committee on Information Technology (the "IT Committee") believe the proposed amendment would constitute an unwarranted and unneeded intrusion into the internal workings of the Third Branch and would, in fact, cause substantial harm to the judiciary's ongoing automation efforts.

As you are aware, the work of the Judicial Conference of the United States is supported and facilitated by the work of 24 committees, the members being appointed by the Chief Justice of the United States who serves as the presiding officer of the Judicial Conference. The IT Committee, formerly the Committee on Automation and

Technology, which I chair, is comprised of 14 judges–one from each of the regional circuits, one magistrate judge and one bankruptcy judge. The IT Committee is responsible for providing policy recommendations to the Judicial Conference on its subject-matter jurisdiction, planning, and oversight of the judiciary's many automation programs.

I am told Mr. Berman expressed some concern that on two occasions, in 1998 and 2000, Administrative Office (the "AO") personnel may have monitored or blocked Internet communications on the DCN. In 1998, the AO was not involved at all and the action in 2000 was directed by the IT Committee.

During the early spring of 1998, at the direction of the Ninth Circuit Council, the Ninth Circuit technical staff installed and activated at the Ninth Circuit Internet gateway a filtering software system called WebSense, with the goal being to determine access through that gateway to adult-oriented materials by DCN users in the Ninth Circuit. AO personnel were not involved.

Findings by Ninth Circuit staff which resulted from the short-term use of WebSense are revealing. On April 28, 1998, Ninth Circuit technical staff reported to the then chief judge of that circuit that a local review by staff of that court of logs over a 28-day period revealed that users in the three circuits served by that gateway had accessed approximately 1100 "adult" web sites approximately 90,000 times. Two explanatory notes may put those figures in better perspective. While 90,000 "adult" site accesses may seem high, one must remember that every click on a new link, even at one site, will be recorded as a separate access. On the other hand, 3.6% of total accesses may not seem particularly high, but if one remembers that "adult" sites tend to be graphics and media intensive, the actual traffic generated by those accesses was probably higher than 3.6% of the total traffic, up to 40% to 50% of available bandwidth.

That staffer attached to his memorandum to his chief judge a 7 page "partial listing" of some 300 "adult" sites that had been accessed. An examination of the names of sites shown on the list suggests that transfers of files to or from many such sites would likely violate federal law prohibiting the sexual exploitation of children. Some such names–ones that I can repeat here were: allteens.com; cyberteens.com; hotteen.com; hotteensex.com; and hollywoodteens.com.

As a result of the findings of the filtering, the Circuit determined to block access to adult-oriented sites. Placement and removal of WebSense on the Ninth Circuit Gateway were decisions taken by appropriate authorities in the Ninth Circuit.

At its meeting in January 1999, the IT Committee recommended to the full Judicial Conference, that it authorize the AO to install software at each of the national gateways to block access to adult-oriented, pornographic Internet web sites. At its meeting in March 1999, the Judicial Conference declined to accept that recommendation, believing that such blocking was a matter more appropriately addressed by each court. Subsequently, the Ninth Circuit stopped blocking.

At its meeting in December 2000, the IT Committee was informed that demand for bandwidth (capacity) on the DCN for access to the Internet had almost doubled over the preceding 10 months. Several members of the committee had received anecdotal complaints and the AO had received numerous specific complaints about slow access to and responses from the Internet. Concerned that IT resources purchased with tax payer funds be used appropriately, the IT Committee directed committee staff from the AO to determine the cause of the increased demand and to report to the committee at its meeting in June 2001.

Responding to the committee request, in January 2001, AO personnel activated two filters or "signatures" on the already installed and operating intrusion detection software at the three national gateways to identify high volume files passing through those gateways. Experience has taught us that music and movie files tend to be among the largest on the Internet. One twenty-second video/movie clip may be the equivalent of sending two thousand pages of typed text. Signatures activated on the intrusion detection software were intended to detect and log the passage of such large files. The logging consisted of recording several items of data: (1) the date and time; (2) the IP address inside the DCN; (3) the IP address outside the DCN; and (4) the name of the file passing through the gateway. The user inside the DCN could not be identified because the AO has no way to do that. It can only identify the judiciary facility to which any IP address has been assigned. The information captured showed that a substantial portion of Internet traffic was non-business related and that a few judiciary users were engaged in extraordinarily high volume downloading of music and movies. Many of the Internet site and video file names suggested they contained pornography. Others suggested they might contain depictions of children engaged in sexually explicit conduct, prohibited by federal law. Finally, many were music files that were most likely copyrighted.

Let me emphasize again that neither the Director of the AO, nor the employees of the AO, nor the IT Committee members knew then or know today, the identities of any DCN users who were involved with this downloading. Only local IT staff, operating under the direction of local judges, have the ability to determine the identity of any user

of the DCN. Moreover, this so-called "monitoring" captured the content of video and music files only to extent that the web site and file names suggested such content.

Use of the "offending" intrusion detection signatures was discontinued in early June 2001 after the Executive Committee of the Ninth Circuit Judicial Council unilaterally, and without notice to either the Eight or Tenth Circuits, directed its technical staff to disable all aspects of the intrusion detection system at the Ninth Circuit gateway. Reasonable people may disagree about the serious level of risk created by this action but it is clear that the intrusion detection system was, and is, an integral part of the DCN security apparatus and that simply "turning it off" exposed DCN users in the Eighth, Ninth, and Tenth Circuits, and perhaps throughout the entire federal judiciary, to considerable risks to the security of their electronically stored data and electronic communications and, indeed, to their privacy interests.

The intrusion detection software was reactivated in a short time, but only without the music and movie signatures as demanded by the Ninth Circuit Council.

In a special meeting on July 27, 2001, the IT Committee recommended to the Judicial Conference that it adopt on an interim basis the Internet appropriate use policy developed by the Federal Chief Information Officers Council of the General Services Administration. Excluded from that recommendation was a provision of the executive policy which sought to define and limit privacy interests of executive officers and employees. In a mail ballot following its shortened meeting of September 11, 2001, the Conference accepted the IT Committee recommendation.

In the interim, the IT Committee has developed controls that allow the AO to change intrusion detection signatures at the national gateways only in certain specified circumstances. For example, the AO may respond to emergency situations as they arise by adding needed security signatures but such signatures may remain in place for no more than 14 days without the explicit approval of the committee chair or his designee. The need for this emergency response authority was demonstrated in late October and early November 2001 when the DCN was hard hit by the NimdaE email virus.

At least four significant factors counsel against the adoption of this amendment:

- It represents the sort of micro management of judiciary affairs that would seriously threaten the independence of the Third Branch and of the many judges, both Article III and Article I, who serve in that branch.

- It would seriously impair the ability of the courts to administer and manage its wide area network–the foundation on which many of the courts' information technology programs depend. For example, the courts are rapidly developing and implementing modern and robust case management systems that will provide the ability to create and maintain electronic case files. A new and modern technologically advanced financial accounting system that will permit the courts to better manage and account for appropriated funds is being deployed. Both these and other projects require a technologically advanced and secure wide area network.

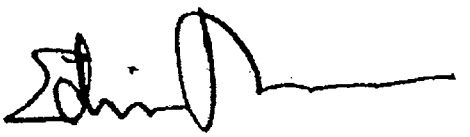
- Under the present state of the law, the federal judiciary is governed by the provisions of the Electronic Communications Privacy Act (the "ECPA"). This amendment would, in my opinion, call into question the status of the judiciary under the ECPA, while leaving intact provisions of law that allow other government and private entities to protect their IT infrastructures and their users. It is unclear to me why the federal courts, with exceptionally higher interests in the security and integrity of the information that is created, transmitted, and stored on court systems than many others, should be afforded less protection than are they.

- There is no articulated need for the proposed amendment. Instead, the Judicial Conference and its Committee on Information Technology are fully engaged in addressing these issues and have demonstrated that they are sensitive to the privacy and security needs of judges and judiciary employees. As judges we are quite capable of considering all sides of virtually any issue, weighing the competing interests, and striking appropriate balances between them. That is what judges do.

Finally, let me debunk a misconception that seemingly gained acceptance among some judges last year. There is not now; there has never been; and there are no plans ever to "monitor" judiciary email. We just last week completed the implementation of the Lotus Notes email system throughout almost virtually all of the entire federal judiciary. Judiciary users now have the capability to encrypt any piece of email to any other judiciary user so it can be read only by the intended recipient. We are investigating the means by which we can provide similar encryption capabilities for email going to or coming from the Internet.

If you or any members of your committee have any additional concerns or questions, I will be pleased to answer them, either by phone, mail, *encrypted* email, or, if you prefer, in person.

Sincerely,



Edwin Nelson
Chairman, Committee on
Information Technology

cc: Members of the Judiciary Subcommittee
on Courts, the Internet, and Intellectual Property
Members of the Judicial Conference Committee
on Information Technology

EXHIBIT 6

This is **G o o g l e**'s cache of http://alex.kozinski.com/articles/articles.by.ak.list.htm as retrieved on Aug 2, 2007 07:09:15 GMT.
G o o g l e's cache is the snapshot that we took of the page as we crawled the web.
The page may have changed since that time. Click here for the current page without highlighting.
This cached page may reference images which are no longer available. Click here for the cached text only.
To link to or bookmark this page, use the following url: `http://www.google.com/search?q=cache:acjiw4A3mswJ:alex.kozinski.com/articles/articles.by.ak.list.htm+alex+kozinski.com&hl=en&ct=clnk&cd=1&gl=us`

Google is neither affiliated with the authors of this page nor responsible for its content.

These search terms have been highlighted: **alex kozinski com**

ALEX KOZINSKI
(As of March 30, 2006)

1. A Market Oriented Revision of the Patent System, 21 UCLA L. Rev. 1042 (1974) and 6 Patent L. Rev. 111 (1974). (http://**alex.kozinski.com**/articles/Market-oriented_Revision_of_Patent_System.pdf)

2. That Can of Worms: The Speedy Trial Act, A.B.A. J., July 1976, at 862. (http://**alex.kozinski.com**/articles/That_Can_of_Worms.pdf)

3. Taking it with You Through U.S. Customs, L.A. Lawyer, Oct. 1978, at 43. (http://**alex.kozinski.com**/articles/Taking_it_with_You_Through_US_Customs.pdf)

4. Structure of the United States Legal System, in Practical Guide to Investment in the United States 1 (John I. Forry ed., 1979). (http://**alex.kozinski.com**/articles/Structure_of_the_US_Legal_System%201.pdf)

5. Rules of the Supreme Court of the United States, 94 Harv. L. Rev. 312 (1980) (book review, with W.H. Allen). (http://**alex.kozinski.com**/articles/Rules_of_the_SCOTUS.pdf)

6. Ten Principles for the New Federal Practice, 31 Fed. Bar News & J. 16 (1984). (http://**alex.kozinski.com**/articles/Ten_Principles_for_New_Federal_Practice.pdf)

7. Litigation with the Federal Government, ALI-A.B.A. CLE Rev., Sept. 21, 1984. (http://**alex.kozinski.com**/articles/Litigation_with_Federal_Govt.pdf)

8. Taking the Fifth Seriously, Harv. Salient, Oct. 1987, at 6. (http://**alex.kozinski.com**/articles/Taking_the_Fifth_Seriously.pdf)

9. A Tribute to Chief Justice Warren E. Burger, 100 Harv. L. Rev. 975 (1987). (http://**alex.kozinski.com**/articles/Tribute_to_Chief_Justice_Warren_Burger.pdf)

10. Foreword in Economic Liberties and the Judiciary (James A. Dorn & Henry G. Manne eds., George Mason Press 1987). (http://**alex.kozinski.com**/articles/Economic_Liberties_and_the_Judiciary.pdf)

11. It is a Constitution We Are Expounding, 1987 Utah L. Rev. 977 (debate with J.D. Williams).

(http://alex.kozinski.com/articles/It_is_a_constitution_we_are_expounding.pdf)

12. Torts are No Piece of Cake, Wall St. J., Oct. 6, 1988, at A20 (reviewing Peter W. Huber, Liability: The Legal Revolution and its Consequences (1988)). (http://alex.kozinski.com/articles/Torts_are_no_piece_of_cake.pdf)

13. Rescuing Contracts from High Weirdness, Wall St. J., Aug. 3, 1988. (http://alex.kozinski.com/articles/Rescuing_Contracts_from_High_Weirdness.pdf)

14. Takings, Reason, May 1988, at 78 (book review). (http://alex.kozinski.com/articles/Takings_Reason.pdf)

15. Hunt for Laws' "True" Meaning Subverts Justice, Wall St. J., Jan. 31, 1989, at A14. (http://alex.kozinski.com/articles/Hunt_for_Laws_True_Meaning_Subverts_Justice.pdf)

16. Commercial Free Speech in the Marketplace of Ideas, 41 Rutgers L. Rev. 719 (1989) (symposium moderator). (http://alex.kozinski.com/articles/Commercial_Free_Speech_Marketplace_Ideas.pdf)

17. Life Is Not A Novel, Wall St. J., July 18, 1989, at A12 (reviewing Nathaniel Branden, Judgment Day: My Years with Ayn Rand (1989)). (http://alex.kozinski.com/articles/Life__Is_Not_a_Novel.pdf)

18. What I Ate for Breakfast and Other Mysteries of Judicial Decisionmaking, 43 Cons. Fin. L.Q. Rep. 254 (1989), reprinted in 26 Loy. L.A. L. Rev. 993 (1993). (http://alex.kozinski.com/articles/What_I_Ate_for_Breakfast.pdf)

19. The Virtues of an Ordered Mind, Legal Times, Nov. 27, 1989, at 50 (reviewing Ruggero J. Aldisert, Logic for Lawyers: A Guide to Clear Legal Thinking (1989)). (http://alex.kozinski.com/articles/Virtues_of_an_Ordered_Mind.pdf)

20. Freedom's Scents: A Romanian Remembers, Wall St. J., Nov. 28, 1989, at A6. (http://alex.kozinski.com/articles/Freedoms_Scents_A_Romanian_Remembers.pdf)

21. Romanians Must Now Build a Society, L.A. Daily J., Jan. 18, 1990, at A14. (http://alex.kozinski.com/articles/Romanians_Must_Now_Build_Society.pdf)

22. Guide to Nintendo Shopping, Wall St. J., Jan. 31, 1990, at A14. (http://alex.kozinski.com/articles/Guide_to_Nintendo_Shopping.pdf)

23. Who's Afraid of Commercial Speech?, 76 Va. L. Rev. 627 (1990) (with Stuart Banner), reprinted as When Speech Isn't Free in Philip Morris Mag., Summer 1991, at 26, in 350 FTC: Watch 8 (Sept. 9, 1991), and in 2 Int'l Health & Dev. 7 (Summer 1991). (http://alex.kozinski.com/articles/Who's_Afraid_Commercial_Speech.pdf)

24. Trouble in Santa Teresa, N.Y. Times, May 27, 1990, § 7, at 13 (reviewing Sue Grafton, "G" is for Gumshoe (1990)). (http://alex.kozinski.com/articles/Trouble_in_Santa_Teresa.pdf)

25. Of Profligacy, Piracy, and Private Property, 13 Harv. J.L. & Pub. Pol'y. 17 (1990) (debate introduction). (http://alex.kozinski.com/articles/Of_Profligacy_Piracy_Private_Property.pdf)

26. Through the Open Door: What Is It Like to Be an Immigrant in America?, Wall St. J., July 3, 1990, at A8. (http://**alex.kozinski.com**/articles/Through_the_Open_Door.pdf)

27. Trouble in Super Marioland, Wall St. J., July 27, 1990, at A9. (http://**alex.kozinski.com**/articles/Trouble_in_Super_Marioland.pdf)

28. Death, Lies & Videotape, Forward, Aug. 24, 1990, at 1, reprinted in A.B.A. J., Jan. 1991, at 71. (http://**alex.kozinski.com**/articles/Death_Lies_&_Videotape.pdf)

29. Dicta: Kozinski Learns About Privacy, L.A. Daily J., March 11, 1991. (http://**alex.kozinski.com**/articles/Dicta_Kozinski_Learns_about_Privac.pdf)

30. Puzznic and Other Video Enigmas, Wall St. J., Mar. 20, 1991, at A18. (http://**alex.kozinski.com**/articles/Puzznic_and_Other_Video_Enigmas.pdf)

31. Tribute to Gideon Kanner, 24 Loy. L.A. L. Rev. 517 (1991). (http://**alex.kozinski.com**/articles/Tribute_to_Gideon_Kanner.pdf)

32. My Pizza with Nino, 12 Cardozo L. Rev. 1583 (1991). (http://**alex.kozinski.com**/articles/My_Pizza_with_Nino.pdf)

33. Confessions of a Bad Apple, 100 Yale L.J. 1707 (1991). (http://**alex.kozinski.com**/articles/Confessions_of_a_bad_apple.pdf)

34. The Dark Lessons of Utopia, 58 U. Chi. L. Rev. 575 (1991), reprinted in The St. Croix Rev., June 1993, at 43, in The Freeman, Feb. 1992, at 58, and in Econ. Educ. Bull., Feb. 1992, at 1. (http://**alex.kozinski.com**/articles/The_Dark_Lessons_of_Utopia.pdf)

35. A Drummer Tries to Remember Jim Morrison, Wall St. J., June 14, 1991, at A8 (reviewing John Densmore, Riders on the Storm (1991)). (http://**alex.kozinski.com**/articles/Drummer_Tries_to_Remember_Jim_Morrison.pdf)

36. Romania's Big Bamboozle, N.Y. Times Book Rev., June 30, 1991, at 16 (reviewing Andrei Codrescu, The Hole in the Flag (1991)). (http://**alex.kozinski.com**/articles/Romanias_Big_Bamboozle.pdf)

37. Thomas Affair: A Valuable Civics Lesson, Wall St. J., Oct. 24, 1991, at A16. (http://**alex.kozinski.com**/articles/Thomas_Affair_Valuable_Civics_Lesson.pdf)

38. The Bulwark Brennan Built, Colum. Journalism Rev., Nov./Dec. 1991, at 8 (reviewing Anthony Lewis, Make No Law: The Sullivan Case and the First Amendment (1991)). (http://**alex.kozinski.com**/articles/The_Bulwark_Brennan_Built.pdf)

39. Books for Christmas, 24 The American Spectator 14 (Dec. 1991). (http://**alex.kozinski.com**/articles/Books_for_Christmas.pdf)

40. Judging Between Archrivals, Wall St. J., Dec. 24, 1991, at A5.

(http://alex.kozinski.com/articles/Judging_Between_Archrivals.pdf)

41. "What's the Alternative?": A Roundtable on the Confirmation Process, A.B.A. J., Jan. 1992, at 41. (http://alex.kozinski.com/articles/What's_the_Alternative.pdf)

42. Scholarship of the Absurd: Bob Bork Meets the Bald Soprano, 90 Mich. L. Rev. 1578 (May 1992) (reviewing Walter Adams and James W. Brock, Antitrust Economics on Trial: A Dialogue on the New Laissez-Faire (1991)). (http://alex.kozinski.com/articles/Scholarship_of_Absurd_Bob_Bork_Meets_Bald_Soprano.pdf)

43. Foreword in Sexual Harassment in Employment Law (Barbara Lindemann & David D. Kadue, BNA 1992), reprinted as Locking Women Workers in a Gilded Cage in Legal Times of Washington, May 25, 1992, at 26. (http://alex.kozinski.com/articles/Foreword_in_Sexual_Harassment.pdf)

44. The Wrong Stuff, 1992 B.Y.U. L. Rev. 325, reprinted as How You Too Can . . . Lose Your Appeal, Montana Lawyer, Oct. 1997, at 5. (http://alex.kozinski.com/articles/The_Wrong_Stuff.pdf)

45. Dances mit Forverts, Forward, July 10, 1992, at 1. (http://alex.kozinski.com/articles/Dances_mit_Forverts.pdf)

46. Administrative Search (Update), Encyclopedia of the American Constitution (Supp. I 1992), at 8. (http://alex.kozinski.com/articles/Administrative_Search_Update.pdf)

47. The Calamira Trial, International Ass'n of Jewish Lawyers & Jurists, (Jerusalem Dec. 29, 1992). (http://alex.kozinski.com/articles/The_Calamira_Trial.pdf)

48. Remarks Concerning Professor Bruff's Proposals, 39 UCLA L. Rev. 1249 (1992). (http://alex.kozinski.com/articles/Remarks_Concerning_Prof_Bruff.pdf)

49. Color and Caution, The New Republic, Feb. 1, 1993, at 72 (reviewing Andrew Kull, The Colorblind Constitution (1992)). (http://alex.kozinski.com/articles/Color_and_Caution.pdf)

50. The Anti-History and Pre-History of Commercial Speech, 71 Tex. L. Rev. 747 (1993) (with Stuart Banner). (http://alex.kozinski.com/articles/Antihistory_and_Prehistory_of_Commercial_Speech.pdf)

51. The View From the Bench, A.B.A. J., May 1993, at 114 (reviewing Ruggero J. Aldisert, Winning on Appeal: Better Briefs and Oral Argument (1992)). (http://alex.kozinski.com/articles/The_View_from_the_Bench.pdf)

52. The Nintendo Story, Wall St. J., May 11, 1993, at A12 (reviewing David Sheff, Game Over: How Nintendo Zapped an American Industry, Captured Your Dollars, and Enslaved Your Children (1993)). (http://alex.kozinski.com/articles/The_Nintendo_Story.pdf)

53. A Penumbra Too Far, 106 Harv. L. Rev. 1639 (1993) (with Eugene Volokh). (http://alex.kozinski.com/articles/A_Penumbra_Too_Far.pdf)

54. Sanhedrin II: The Case of Ivan Demjanjuk, The New Republic, Sept. 13, 1993, at 209.

(http://alex.kozinski.com/articles/Sanhedrin_II.pdf)

55. Interbranch Relations: Hearings Before the Joint Comm. on the Organization of Congress, 103d Cong., 1st Sess. 279 (1993) (on the proper use of legislative history). (http://alex.kozinski.com/articles/Interbranch_Relations.pdf)

56. Lawsuit, Shmawsuit, 103 Yale L.J. 463 (1993) (with Eugene Volokh). (http://alex.kozinski.com/articles/Lawsuit_Shmawsuit.pdf)

57. Trademarks Unplugged, 68 N.Y.U. L. Rev. 960 (1993), reprinted in 84 Trademark Rep. 441 (1994). (http://alex.kozinski.com/articles/Trademarks_unplugged.pdf)

58. Conspiracy, What Conspiracy?, Times Literary Supplement, Nov. 26, 1993, at 11 (reviewing Gerald Posner, Case Closed (1993)). (http://alex.kozinski.com/articles/Conspiracy_what_Conspiracy.pdf)

59. Echoes of Tomorrow: The Road to Serfdom Revisited, 23 Sw. U. L. Rev. 429 (1994) (with David Schizer). (http://alex.kozinski.com/articles/Echoes_of_Tomorrow_Serfdom_Revisited.pdf)

60. Cruising the Information Superhighway, Wall St. J., July 18, 1994, at A8 (reviewing Harley Hahn and Rick Stout, The Internet Yellow Pages (1994)). (http://alex.kozinski.com/articles/Cruising_Information_Superhighway.pdf)

61. Introduction to Law, Economics & Civil Justice xiii (Patrick B. McGuigan ed., Free Congress Foundation 1994). (http://alex.kozinski.com/articles/Introduction_to_Law_Econ_CivilJustice.pdf)

62. Mickey & Me, 11 Univ. of Miami Entertainment & Sports L. Rev. 465 (1994). (http://alex.kozinski.com/articles/Mickey_and_Me.pdf)

63. Round Table Discussion: Science, Environment, and the Law, 21 Ecology L.Q. 343 (1994). (http://alex.kozinski.com/articles/Roundtable_Science_Environment_Law.pdf)

64. The Case of Punitive Damages v. Democracy, Wall St. J., Jan. 19, 1995, at A18. (http://alex.kozinski.com/articles/Case_of_Punitive_Damages.pdf)

65. Justice Sutherland, One of Us, Nat'l Rev., Feb. 20, 1995, at 64 (reviewing Hadley Arkes, The Return of George Sutherland: Restoring a Jurisprudence of Natural Rights (1994)). (http://alex.kozinski.com/articles/Justice_Sutherland_One_of_Us.pdf)

66. For an Honest Death Penalty, N.Y. Times, March 8, 1995, at A15 (with Sean Gallagher). (http://alex.kozinski.com/articles/For_an_Honest_Death_Penalty.pdf)

67. Skiers Beware Riders of the Apocalypse, Wall St. J., March 15, 1995, at A12. (http://alex.kozinski.com/articles/Skiers_Beware_Riders_Apocalypse.pdf)

68. Introduction to Volume Nineteen, 19 Harv. J.L. & Pub. Pol'y 1 (1995). (http://alex.kozinski.com/articles/Introduction_to_Volume19.pdf)

69. Don't Drop the Torah!, in Proceedings of the Sixth Annual Symposium of the Constitutional Law Resource Center, 1995, at 85, reprinted as When Just Isn't Right in Farbrengen, Tishrei 5760/1999,

at 15, and reprinted in part under original title in Calif. Lawyer, Feb. 2000, at 21-22. N109
(http://**alex.kozinski.com**/articles/Dont_Drop_the_Torah_Symposium.pdf)
(http://**alex.kozinski.com**/articles/When_Just_Isnt_Right.pdf)
(http://**alex.kozinski.com**/articles/Don't_Drop_the_Torah_CalLawyer.pdf)

70. Death: The Ultimate Run-On Sentence, 46 Case W. Res. L. Rev. 1 (1995) (with Sean Gallagher). (http://**alex.kozinski.com**/articles/Death_Ultimate_Run-on_Sentence.pdf)

71. Plug 'n' Pray, Forbes, July 29, 1996, at 84. (http://**alex.kozinski.com**/articles/Plug_n_Pray.pdf)

72. Diary, Slate, http://slate.com/diary/96-07-19/diary.asp (Jul. 19-Aug. 1, 1996) Jul. 24-Jul. 26, 1996 reprinted in The Slate Diaries (Jodi Kantor, Cyrus Krohn & Judith Shulevitz eds., 2000). (http://**alex.kozinski.com**/articles/Diary_Slate.pdf)

73. So You Want to Become a Federal Judge by 35?, Nat'l L.J., Aug. 19, 1996, at C6. (http://**alex.kozinski.com**/articles/So_You_Want_to_become_Federal_Judge.pdf)

74. Defying Death for the Heck of It, Wall St. J., Aug. 30, 1996, at A7 (reviewing Michael Bane, Over the Edge: A Regular Guy's Odyssey in Extreme Sports (1996)). (http://**alex.kozinski.com**/articles/Defying_Death_Heck_of_It.pdf)

75. Spook of Earl: The Spirit and Specter of the Warren Court, in The Warren Court: A Retrospective 377 (Bernard Schwartz ed., 1996). (http://**alex.kozinski.com**/articles/Spook_of_Earl.pdf)

76. Foreword in Reel Justice, (Paul Bergman & Michael Asimow, Andrews and McMeel 1996). (http://**alex.kozinski.com**/articles/Foreword_in_Reel_Justice.pdf)

77. In Praise of Moot Court--Not!, 97 Colum. L. Rev. 178 (1997) and American Lawyer, Jan./Feb. 1997, at 91. (http://**alex.kozinski.com**/articles/In_Praise_of_Moot_Court_NOT.pdf)

78. Tinkering With Death, The New Yorker, Feb. 10, 1997, at 48. (http://**alex.kozinski.com**/articles/Tinkering_with_Death.pdf)

79. Teetering on the High Wire, 68 U. Colo. L. Rev. 1217 (1997). (http://**alex.kozinski.com**/articles/Teetering_on_the_High_Wire.pdf)

80. Keynote Colloquy: Finding Justice in the Internet Dimension, 20 Seattle U. L. Rev. 619 (1997). (http://**alex.kozinski.com**/articles/Finding_Justice_in_the_Internet_Dimension.pdf)

81. The Great Dissenter, N.Y. Times Book Rev., July 6, 1997, (reviewing Reason and Passion: Justice Brennan's Enduring Influence (E. Joshua Rosenkranz & Bernard Schwartz eds., 1997)). (http://**alex.kozinski.com**/articles/The_Great_Dissenter.pdf)

82. Post-Mortem Talks with Jury Enlighten Judge, Nat'l L.J., Sept. 8, 1997, at A21. (http://**alex.kozinski.com**/articles/Post_Mortem_Talks_with_Jury_Enlighten.pdf)

83. Tread Carefully When Approaching the Bench, Nat'l L.J., Oct. 27, 1997, at A19. (http://**alex.kozinski.com**/articles/Tread_Carefully_When_Approaching_Bench.pdf)

84. Bending the Law, N.Y. Times Book Rev., Nov. 2, 1997, at 46 (reviewing Daniel A. Farber and Suzanna Sherry, Beyond All Reason (1997)). (http://**alex.kozinski.com**/articles/Bending_the_Law.pdf) N110

85. The Modern View of Capital Punishment, 34 Amer. Crim. L. Rev. 1353 (1997) (debate with Professor Stephen Bright), reprinted in The Angolite, July/Aug. 1998, at 26. (http://**alex.kozinski.com**/articles/Modern_View_Capital_Punishment.pdf)

86. Original Mean[der]ings, 49 Stan. L. Rev. 1583 (1997) (reviewing Jack N. Rakove, Original Meanings: Politics and Ideas in the Making of the Constitution (1996)) (with Harry Susman). (http://**alex.kozinski.com**/articles/Original_Meanderings.pdf)

87. Brave New World, 30 U.C. Davis L. Rev. 997 (1997). (http://**alex.kozinski.com**/articles/Brave_New_World.pdf)

88. The Annotated **Alex**, Calif. Lawyer, Jan. 1998, at 35. (http://**alex.kozinski.com**/articles/The_Annotated_Alex.pdf)

89. How I Stopped Worrying and Learned to Love the Press, 3 Comm. L & Pol'y 163 (1998) (Symposium on the 50th Anniversary of the Hutchins Commission Report). (http://**alex.kozinski.com**/articles/Stopped_Worrying_Learned_Love_Press.pdf)

90. The Many Faces of Judicial Independence, 14 Ga. St. U. L. Rev. 861 (1998). (http://**alex.kozinski.com**/articles/Many_Faces_of_Judicial_Independence.pdf)

91. A Dissenting View From the Bench, in Science, Technology, and the Law 51 (New York Academy of Sciences 1998). (http://**alex.kozinski.com**/articles/A_Dissenting_View_from_Bench.pdf)

92. The Breakfast Table, Slate (with Nadine Strossen), available at http://www.slate.com/Code/Breakfast/Breakfast.asp?show=09/xx/98, where xx = 21 through 25 inclusive. (http://**alex.kozinski.com**/articles/Breakfast_Table_Strossen_and_Kozinski.pdf)

93. Clerkship Politics, 2 Green Bag 2d 57 (1998) (with Fred Bernstein). (http://**alex.kozinski.com**/articles/Clerkship_Politics.pdf)

94. Constitutional Federalism Reborn, 22 Harv. J.L. & Pub. Pol'y 93 (1998). (http://**alex.kozinski.com**/articles/Constitutional_Federalism_Reborn.pdf)

95. Should Reading Legislative History Be an Impeachable Offense?, 31 Suffolk U. L. Rev. 807 (1998). (http://**alex.kozinski.com**/articles/Should_Reading_Legislative_History_Impeachable_Offense.pdf)

96. Conduct Unbecoming, 108 Yale L.J. 835 (1999) (reviewing Edward Lazarus, Closed Chambers (1998)). (http://**alex.kozinski.com**/articles/Conduct_Unbecoming.pdf)

97. An Unfair Attack on a Decent Judgment, Nat'l Post, March 8, 1999, at A18. (http://**alex.kozinski.com**/articles/Unfair_Attack_on_Decent_Judgment.pdf)

98. Time and Place (letter to the Editor), Nat'l Post, March 15, 1999, at A19.

(http://alex.kozinski.com/articles/Time_and_Place.pdf)

99. The Case of the Speluncean Explorers: A Fiftieth Anniversary Symposium, 112 Harv. L. Rev. 1834, 1876 (1999). (http://alex.kozinski.com/articles/Case_of_Speluncean_Explorers.pdf)

100. Keeping Secrets: Religious Duty vs. Professional Obligation, 38 Washburn L.J. 747 (1999) (with Leslie A. Hakala). (http://alex.kozinski.com/articles/Keeping_Secrets_Religious_Duty_v_Professional_Obligation.pdf)

101. What's So Fair About Fair Use?, The 1999 Donald C. Brace Memorial Lecture, 46 J. Copyright Soc'y 513 (1999) (with Christopher Newman). (http://alex.kozinski.com/articles/Whats_So_Fair_About_Fair_Use.pdf)

102. Carthage Must Be Destroyed, 12 Fed. Sentencing Rep. 67 (1999). (http://alex.kozinski.com/articles/Carthage_must_be_Destroyed.pdf)

103. The Toyota Principle, 56 Wash. & Lee L. Rev. 923 (Summer 1999). (http://alex.kozinski.com/articles/The_Toyota_Principle.pdf)

104. When the Written Word and Reality Diverge, Forward, February 14, 2000, at 17. (http://alex.kozinski.com/articles/When_Written_Word_and_Reality_Diverge.pdf)

105. Please Don't Cite This!, Calif. Lawyer, June 2000, at 43 (with Stephen Reinhardt), reprinted in 18 Appellate Practice Journal 6 (Summer 2000). (http://alex.kozinski.com/articles/Please_Don't_Cite_This.pdf)

106. Who Gives A Hoot About Legal Scholarship?, 37 Houston L. Rev. 295 (2000). (http://alex.kozinski.com/articles/Who_Gives_A_Hoot_About_Legal_Scholarship.pdf)

107. Pull Down The Blinds, N.Y. Times Book Rev., July 2, 2000, at 10 (reviewing Jeffrey Rosen, The Unwanted Gaze (2000)). (http://alex.kozinski.com/articles/Pull_Down_the_Blinds.pdf)

108. They Call It Paper Love, E-Filing Rep., June 2001, at 7. (http://alex.kozinski.com/articles/They_Call_It_Paper_Love.pdf)

109. How I Narrowly Escaped Insanity, 48 UCLA L. Rev. 1293 (2001). (http://alex.kozinski.com/articles/How_I_Narrowly_Escaped_Insanity.pdf)

110. Expert Testimony After Daubert, J. Acct., July 2001, at 59. (http://alex.kozinski.com/articles/Expert_Testimony_After_Daubert.pdf)

111. Privacy on Trial, Wall St. J., Sept. 4, 2001, at A22. (http://alex.kozinski.com/articles/Privacy_on_Trial.pdf)

112. Fooled by Randomness, Wilson Q., Spring 2002, at 117 (book review). (http://alex.kozinski.com/articles/Fooled_By_Randomness.pdf)

113. Gore Wars, 100 Mich. L. Rev. 1742 (2002) (reviewing Bjørn Lomborg, The Skeptical

Environmentalist: Measuring the Real State of the World (2001)).
(http://**alex.kozinski.com**/articles/Gore_Wars.pdf)

114. Congressional Testimony, Oversight Hearing on Unpublished Judicial Opinions, Before the House Subcomm. on Courts, the Internet, and Intellectual Property of the House Comm. on the Judiciary, June 27, 2002. (http://**alex.kozinski.com**/articles/Oversight_Hearing_Unpublished_full.pdf)

115. Recapturing Madison's Constitution: Federalism Without the Blank Check in James Madison and the Future of Limited Government 13 (John Samples ed., 2002) (with Steven A. Engel). (http://**alex.kozinski.com**/articles/Recapturing_Madisons_Constitution.pdf)

116. Pulling the Plug: My Stand Against Electronic Invasions of Workplace Privacy, 2002 U. Ill. J.L. Tech. & Pol'y 407. (http://**alex.kozinski.com**/articles/Pulling_the_Plug.pdf)

117. Foreword in Academic Legal Writing: Law Review Articles, Student Notes and Seminar Papers (Eugene Volokh, Foundation Press 2003). (http://**alex.kozinski.com**/articles/Foreword_in_Academic_Legal_Writing.pdf)

118. The Judgment: X-Treme Advocacy Contest Winner, California Lawyer, September 2003, at 31. (http://**alex.kozinski.com**/articles/Xtreme_Advocacy_Contest_Winner.pdf)

119. Honoring the Court's Past, 71 Geo. Wash. L. Rev. 529 (2003). (http://**alex.kozinski.com**/articles/Honoring_the_Courts_Past.pdf)

120. Foreword in A Criminal Waste of Time (William W. Bedsworth, American Lawyer Media 2003). (http://**alex.kozinski.com**/articles/Criminal_Waste_of_Time.pdf)

121. In Opposition to Proposed Federal Rule of Appellate Procedure 32.1, 51(5) The Federal Lawyer 36 (June 2004). (http://**alex.kozinski.com**/articles/In_Opposition_To_Proposed_Rule.pdf)

122. The Real Issues of Judicial Ethics, 32 Hofstra L. Rev. 1095 (2004), reprinted as The Appearance of Propriety, Legal Affairs, Jan./Feb. 2005.
(http://**alex.kozinski.com**/articles/Real_Issues_of_JudicialEthics.pdf)
(http://**alex.kozinski.com**/articles/The_Appearance_of_Propriety.pdf)

123. Don't Split the Ninth Circuit!, Wall St. J., November 10, 2004, at A16 (with Sidney R. Thomas). (http://**alex.kozinski.com**/articles/Dont_Split_the_Ninth_Circuit.pdf)

124. The Appeal, 103 Mich. L. Rev. 1391 (2005) (with Alexander Volokh). (http://**alex.kozinski.com**/articles/The_Appeal.pdf)

125. Kozinski Strikes Back, San Francisco Recorder, Sept. 23, 2005 (http://**alex.kozinski.com**/articles/Kozinski_Strikes_Back.pdf)

126. Reply to Buchanan, Cato Unbound, December 9, 2005, available at http://www.cato-unbound.org/2005/12/09/**alex**-kozinski/reply-to-buchanan-2/
(http://**alex.kozinski.com**/articles/Reply_to_Buchanan.pdf)
Call Me a Panglossian, Cato Unbound, December 18, 2005, available at http://www.cato-unbound.org/2005/12/18/**alex**-kozinski/call-me-a-panglossian/

(http://**alex.kozinski.com**/articles/Call_Me_a_Panglossian.pdf)
Responding to:
James M. Buchanan, Three Amendments: Responsibility, Generality and Natural Liberty, Cato Unbound, December 5, 2005, available at
http://www.cato-unbound.org/2005/12/05/james-m-buchanan/three-amendments/
(http://**alex.kozinski.com**/articles/Three_Amendments.pdf); and
James M. Buchanan, Response to Comments, Cato Unbound, December 14, 2005, available at
http://www.cato-unbound.org/2005/12/14/james-m-buchanan/response/
(http://**alex.kozinski.com**/articles/Response_to_Comments.pdf)

127. A Court United: A Statement of a Number of Ninth Circuit Judges, Engage, April 2006, at 63 (with thirty-two other judges)
(http://**alex.kozinski.com**/articles/A_Court_United.pdf)

(March 30, 2006)

EXHIBIT 7

Index of /stuff

Name	Last modified	Size	Description
Parent Directory	09-Dec-2007 23:05	-	
$20 .doc	06-Jun-2002 14:40	68k	
(MONTY~1.MP3	06-Jun-2002 13:00	108k	
(MontyPython)Radio.mp3	06-Jun-2002 13:00	108k	
100movies.wmv	20-May-2007 16:40	19.0M	
10SixteenTons.mp3	15-Nov-2005 21:16	2.6M	
3rdWorldBombSquad.wmv	23-Jul-2005 02:54	1.7M	
5jews.gif	30-Apr-2005 16:40	41k	
AIRPORT.doc	13-May-2002 23:46	526k	
ATM THEFTS.pps	17-Dec-2006 09:32	558k	
ATT-History.wmv	15-Mar-2007 18:49	2.6M	
Ain tGoin Down1.mp3	31-Jul-2007 18:19	2.6M	
Apr 6 RushLimbaugh.wmv	25-Apr-2006 01:57	1.3M	
Arkie Quarter.jpg	13-May-2002 23:46	45k	
ArnoldBobblehead.bmp	19-Jun-2005 14:44	41k	
ArrestedTexasStyle.wmv	07-Nov-2005 00:18	543k	
BADDAY S.MPG	06-Jun-2002 13:03	408k	
BBCCopsUndies.wmv	30-Sep-2005 07:04	3.5M	
BEERTEND.EXE	06-Jun-2002 13:03	252k	
BLENDER.EXE	06-Jun-2002 13:04	655k	
BUSTED.WAV	06-Jun-2002 13:04	1.3M	
BadDayAtTheRodeo 1.WMV	23-May-2005 00:04	1.7M	
BanningJo.wmv	27-Feb-2006 16:14	4.4M	
BestWomanDriver.wmv	08-Mar-2007 23:06	2.4M	
Bethlehem Steel Resp..>	17-Dec-2003 00:47	61k	
Bob.MP3	15-Mar-2007 18:38	3.4M	
BritishAmbassadorLet..>	21-Nov-2007 19:18	91k	
Brokeback2.jpg	15-Apr-2006 02:22	67k	
Bush Blair11.mpeg	27-Feb-2003 21:21	3.8M	
CAUGHT.WAV	01-Dec-2003 17:46	1.3M	

CHOCOLAT.pps	13-May-2002 23:18	486k
CHOCOL~1.EXE	06-Jun-2002 13:04	798k
COKEGIFT.EXE	06-Jun-2002 13:04	263k
COMPUTERENHANCEMENTS..>	13-May-2002 23:46	211k
COMPUTERENHANCEMENTS..>	06-Jun-2002 13:05	5.1M
Canadian currency/	06-Apr-2006 21:28	-
CaughtOnFilm 21.wmv	25-Apr-2006 01:57	1.1M
CaveOfWeed.pdf	15-Apr-2007 02:21	673k
Christmas Applicatio..>	29-Dec-2002 22:22	45k
Colo-rectalSurgeon.wav	17-Jun-2003 11:23	271k
CowD.jpg	15-Jan-2004 21:28	80k
D-TOYS~2.EXE	06-Jun-2002 13:05	952k
DISCO.EXE	06-Jun-2002 13:05	192k
DUI-TEST-SCOTTISH.wmv	23-Jan-2005 18:51	901k
DaddyCutTheBigOne.wav	04-Jan-2006 21:27	282k
Dilbert.powerpoint.bmp	03-Sep-2006 00:11	855k
Disappointment.wmv	08-Jun-2007 23:51	1.5M
Don't.Eat.Worms.mp3	10-Jan-2007 21:06	2.6M
Don'tTouchMe.mp3	13-May-2002 23:46	3.2M
DoninoPoolFinal.wmv	05-Nov-2006 22:37	1.8M
Douchenzondernattevo..>	19-Feb-2006 13:04	2.4M
ESHEEP.EXE	06-Jun-2002 13:06	310k
Elektronik Supersoni..>	01-Jun-2004 18:42	1.3M
FART.EXE	06-Jun-2002 13:06	604k
Far side.jpg	13-May-2002 23:46	131k
Father.mp3	17-Dec-2002 17:21	729k
Fire.html.htm	12-Jan-2004 01:18	1k
Fire.html_files/	06-Jun-2005 00:19	-
Flowchartofgettingso..>	25-May-2004 21:52	90k
Fridays.wmv	29-Oct-2006 22:05	3.3M
Fucking/	07-Nov-2006 02:28	-
GarageDoorOpener.wmv	28-Oct-2005 22:21	2.1M
Gas Prices.pps	28-Oct-2005 22:05	1.1M
GermanPope.jpg	12-May-2005 20:35	67k

GirlsEvil.jpg	13-May-2002 23:46	24k
Good Morning America..>	06-Jun-2002 13:08	2.0M
GoodMorningAmerica.avi	24-Oct-2002 17:54	2.0M
GoodMorningAmerica.mov	13-May-2002 23:47	2.0M
GoodMorningAmerica.mpg	06-Jun-2002 13:08	2.0M
GreatestMovieLine.wmv	19-Aug-2005 08:28	1.1M
HALLOWEE.JPG	12-Oct-2002 10:56	42k
HAMPSTER.WAV	06-Jun-2002 13:08	105k
HITLER.WAV	06-Jun-2002 13:08	2.2M
HOLZFELR.MP3	06-Jun-2002 13:09	298k
Haircutformeetings.jpg	12-Dec-2005 00:07	25k
Halliburton.mp3	05-Nov-2004 21:27	224k
Halloween Costume.jpg	01-Dec-2002 23:35	27k
Hand Paint/	25-May-2004 21:44	-
Handrolled.mpg	19-Dec-2004 03:08	2.3M
Hats 1 .doc	06-Jun-2002 13:08	22k
HavaNaqila.mpg	04-Dec-2002 22:06	1.8M
HawaiiWeather.wvx	16-Dec-2005 01:45	1k
Health.doc	03-May-2005 11:36	22k
HomerLookAlike.jpg	15-Jan-2004 18:33	28k
HorseRace.mp3	04-Oct-2005 21:21	1.1M
How.not.to.kick.mpg	13-May-2002 23:47	2.0M
Howtoputonabra.wmv	10-Nov-2006 14:50	2.1M
I knew there was a b..>	15-Dec-2004 11:56	33k
I veBeentoMooseJaw.wma	30-Dec-2004 21:59	681k
JOHNNY~1.MP3	06-Jun-2002 13:10	3.4M
JUMP.AVI	06-Jun-2002 13:10	562k
JayLeno_1.wmv	27-Feb-2003 21:21	1.7M
JohnnyCash-ABoyNamed..>	06-Jun-2002 13:09	3.4M
Judge So.mp3	01-Apr-2003 15:35	2.6M
Krylaholiday.pps	13-May-2002 23:47	515k
Larry Craig/	11-Sep-2007 17:22	-
MONTYP~1.MP3	06-Jun-2002 13:12	3.1M
MasterCard.jpg	13-May-2002 23:47	49k

MedicalAlert11.doc	25-Jun-2003 01:19	23k
Memo.roma.pdf	03-Jan-2006 13:42	36k
MensRules.pps	19-Nov-2005 22:47	134k
MercuryMotor.pps	28-Feb-2006 20:11	756k
MonkeyJoke.wmv	06-Jan-2004 01:25	1.5M
Monthly Man.wmv	05-Jul-2006 18:49	2.9M
Monty.Python-Lumberj..>	06-Jun-2002 13:11	3.1M
MovieQuiz21.xls	17-Nov-2002 23:50	298k
Muscle Tricks.mpg	10-Apr-2006 19:02	2.7M
NOTMYJOB.GIF	06-Jun-2002 13:12	125k
NYC.exe	13-May-2002 23:47	402k
Netscape Wallpaper.bmp	06-Jun-2002 13:12	157k
Notgood.pps	08-Mar-2006 21:24	2.0M
Notice of Appeal -- ..>	03-Aug-2006 21:29	57k
Notmyjob.jpg	15-Oct-2002 10:54	54k
PARACHUT.AVI	13-May-2002 23:47	4.2M
PLAYBALL.AVI	06-Jun-2002 13:13	3.0M
ParkingExpert1.wmv	28-Jul-2005 00:03	457k
ParkingExpert2.mpg	28-Jul-2005 00:03	634k
ParkingExpert4.mpg	28-Jul-2005 00:03	548k
Playboy's playmates ..>	25-May-2004 21:44	245k
PoolLifeGuard.wmv	09-Jan-2005 04:19	1.1M
Queen and Scots sold..>	30-Dec-2004 21:58	49k
Radiocallgonewrong 1..>	21-May-2003 14:20	633k
Retainer.Letter.pdf	08-Nov-2006 07:53	47k
S&W342.jpg	15-Jan-2004 18:34	10k
SARS Mask Shortage.jpg	16-Jun-2003 02:20	59k
SNAKE.JPG	13-May-2002 23:47	17k
SNL-DeNiro.wmv	29-Jun-2004 17:10	2.3M
SNL-SuspectedbertDeN..>	12-Jul-2004 18:54	2.3M
SNOWMAN.EXE	06-Jun-2002 13:13	1.4M
STUXMASP.EXE	06-Jun-2002 13:13	231k
SWClinton.exe	13-May-2002 23:47	777k
SamGross/	18-May-2005 17:18	-

Seat29EC3.pdf	10-Jul-2005 19:14	111k
She's Mine.mp3	13-May-2002 23:47	3.6M
Sheep_guy.jpg	01-Dec-2002 23:35	38k
SofitelLoo2.jpg	29-Oct-2005 13:35	924k
Solution to the Mid-..>	13-May-2002 23:19	606k
St.Marteen1.pps	19-Jun-2005 14:39	1.3M
Stress Reliever.exe	13-May-2002 23:47	1.2M
THEORY.GIF	13-May-2002 23:47	22k
TOOTHBRU.JPG	13-May-2002 23:47	14k
Thats My Boy.mpg	21-Jun-2003 01:02	1.4M
TheBillingSong.mp3	25-Dec-2005 17:08	700k
TheMansong.pps	17-Apr-2007 00:29	535k
The real meaning of ..>	01-Apr-2006 00:11	112k
TheformulaofSex.pps	15-Mar-2007 18:37	72k
Thumbs.db	06-Jun-2002 13:14	84k
Toilet.wmv	14-May-2003 19:00	1.8M
Tom Lehrer - (Hannuk..>	13-May-2002 23:47	1.7M
Tom Lehrer - (Hannuk..>	06-Jun-2002 13:14	1.7M
TurkishGillette.wmv	17-May-2007 20:15	2.3M
VibratorRecall.mp3	27-Jul-2005 00:09	726k
WHICHBAB.JPG	13-May-2002 23:47	60k
WHIPTH~1.EXE	06-Jun-2002 13:15	698k
Whatdoyousee_1.pps	04-Jan-2006 22:11	140k
Where the sun don t ..>	10-Jan-2007 19:06	4.1M
Why Women Live Longer/	04-Feb-2005 00:46	-
XMAS.EXE	06-Jun-2002 13:16	688k
XmasKangaroo.wmv	09-Jan-2006 19:14	5.3M
Youthinkyou reunluck..>	19-Jun-2005 14:43	32k
ZSSSLOTS.EXE	06-Jun-2002 13:16	181k
a.day.without.jews.wmv	18-May-2006 23:56	6.4M
aimhighhh[1].mpeg	13-May-2002 23:46	1.5M
aliensong.mpg	13-May-2002 23:46	3.1M
angel2.wmv	01-Sep-2006 01:08	4.8M
aussie.oops.mpg	29-Mar-2006 23:52	3.0M

bambi.flv	01-Mar-2007 01:14	3.6M
beerbythepoolbounce...>	06-Apr-2006 21:32	3.7M
bending.jpg	13-May-2002 23:46	39k
big_jump.mpeg	20-May-2004 22:36	676k
borislp.exe	13-May-2002 23:46	287k
bouncy_bouncy.wmv	24-Nov-2003 22:29	1.3M
brazilian-hair-cut.pps	09-Jan-2005 04:26	482k
bungeepoo.jpg	13-May-2002 23:46	20k
bush-for-president.jpg	06-Jun-2002 13:04	80k
cameltoe.htm	18-Dec-2003 22:59	18k
cameltoe/	22-Apr-2006 02:53	-
captain_.wmv	15-Jan-2004 01:19	2.5M
charade.jpg	11-Aug-2005 22:32	90k
cheeseshop.mp3	28-Jul-2002 23:52	3.7M
chinesemassproductio..>	15-Mar-2007 16:04	2.6M
chocolatebunny.exe	13-May-2002 23:46	798k
collegehumor.248334.mov	25-Sep-2005 12:24	15.3M
commercials/	17-Nov-2007 23:03	-
computerdate.jpg	19-Dec-2004 21:58	57k
consent.htm	27-Oct-2006 19:12	6k
consent_files/	07-Nov-2006 02:36	-
crazy.fish.wmv	23-Jan-2006 17:16	2.7M
dancingbush.exe	13-May-2002 23:46	725k
datinggame.rm	22-Aug-2006 18:17	1.7M
dd.bmp	16-Jun-2003 02:20	1.0M
deaf.ultimate.karako..>	24-Nov-2007 15:06	8.2M
deafkaraoke.wmv	30-Sep-2005 07:05	3.2M
didn't start the fire/	11-Sep-2007 17:22	-
divorce.doc1.pdf	31-Mar-2006 00:30	310k
dl.mpg	06-Jun-2002 13:06	2.6M
donkey.mpg	06-Jun-2002 13:06	2.6M
dumbestdogyoullevers..>	22-Jan-2006 08:56	1k
edwards.pretty.wmv	31-Jul-2007 18:17	4.1M
eggroll.wmv	27-Apr-2006 19:29	1.1M

fastshooter.wmv	09-Mar-2005 20:55	740k
father.rm	13-May-2002 23:46	382k
flying_grandma.wmv	01-Jun-2004 18:42	1.2M
freakinbrothers.wmv	10-Jul-2003 16:21	2.0M
funny-cats-2.wmv	06-Apr-2006 21:31	2.3M
galaxy.swf	11-Nov-2006 01:26	1.0M
garyhart.mp3	04-Apr-2005 17:02	4.3M
georgewwhathe.wmv	21-Jan-2006 19:18	1.8M
gerbil.exe	13-May-2002 23:46	709k
gerbilgeno.exe	13-May-2002 23:46	1.7M
hangonstevens.mp3	05-Jul-2006 18:43	7.7M
harmonic.motion.eml	09-Jan-2004 00:12	106k
harrasment_1.wmv	05-Jul-2006 18:45	3.8M
headache-cure-56.wmv	25-May-2004 21:44	657k
helmutportrait.jpg	16-Oct-2003 17:05	21k
honda.commercial.html	06-Sep-2005 22:21	2k
how.offensive.gif	08-Feb-2006 18:01	58k
howmanypeople.gif	12-Nov-2003 00:07	69k
image0011.gif	03-Sep-2007 02:50	69k
isitmanisitwoman.pps	27-Apr-2006 23:20	1.4M
jackwebb.wav	24-Jan-2005 23:09	926k
jaguar.dent.gif	04-Oct-2005 20:22	80k
japanese.wmv	13-Jun-2004 22:49	1.6M
jaylobj.wmv	17-Nov-2002 23:28	1007k
jesus.mov	04-Jan-2006 22:27	3.5M
jesus.wmv	05-Jul-2006 18:47	2.4M
jewsdontcamp.mp3	21-Jan-2006 18:58	2.3M
joancrawford.jpg	14-Jan-2004 19:32	7k
joefish.exe	13-May-2002 23:47	1.1M
john.mccain.sings.wmv	05-Jul-2006 18:48	4.4M
jump.avi	13-May-2002 23:19	562k
kerrywins!.jpg	12-Dec-2005 00:08	35k
kooljuggle.gif	12-Dec-2003 23:21	574k
languages.jpg	17-Jun-2003 13:55	196k

lawyer&dog.gif	01-Jun-2004 07:54	8k
lehrer.rtf	06-Jun-2002 13:10	16k
levant ezra060213.rm	19-Feb-2006 14:41	1k
lights.wmv	28-Nov-2005 22:45	4.8M
mars.jpg	17-Jan-2004 12:44	120k
megaflics(1).jpg	06-Jun-2002 13:10	108k
menciaMountain.wmv	15-Apr-2006 01:29	3.5M
mens room.asf	17-May-2003 00:00	810k
mexicanviagra.gif	17-Nov-2002 23:28	65k
monica.jpg	21-May-2003 14:27	15k
moscow.DOC	13-Mar-2005 20:09	95k
mousedart.exe	13-May-2002 23:47	1.1M
music/	18-May-2005 17:18	-
news report from Ira..>	18-May-2005 17:22	1.3M
nomorebush.jpg	09-Jan-2004 19:18	39k
not bond.wmv	23-Dec-2005 18:50	4.3M
notre.dame.avi	12-Oct-2006 10:58	4.6M
nutcracker.mpg	11-Oct-2004 01:53	3.0M
opinionpoll.pps	11-Mar-2006 00:32	92k
optical.exe	13-May-2002 23:47	22k
optical.pps	13-Mar-2006 23:30	859k
optical/	27-Feb-2006 22:55	-
orgasm.wav	06-Jun-2002 13:12	800k
osama.gif	19-Feb-2006 12:47	106k
passcontrol.wmv	27-Jul-2005 01:44	1.2M
pepper & salt you wo..>	13-May-2002 23:47	33k
pingpong.wmv	14-Jul-2003 14:32	3.4M
piss diver.wmv	11-Feb-2006 01:47	390k
pork.jpg	03-Apr-2006 01:27	47k
porrspel.exe	13-May-2002 23:47	223k
profreading.wmv	17-Nov-2007 22:59	6.7M
riddle.jpg	21-May-2005 23:20	17k
ringmybell3555.wmv	08-Aug-2005 16:14	1.5M
santa 1.wmv	23-Dec-2005 18:49	1.1M

santafart.mp3	08-May-2003 16:04	2.1M
sextetris.exe	13-Oct-2002 13:29	1.7M
sfo.mp4	07-Nov-2005 18:23	250k
shark.mpeg	01-Aug-2004 17:57	1.6M
siquemiteta.swf	15-Jan-2004 01:14	41k
singingrabbi.wmv	21-May-2005 09:41	3.2M
slingshot.wmv	11-Feb-2007 21:26	1.2M
so where did you guy..>	22-Dec-2006 14:26	1.4M
sonicboom.jpg	13-May-2002 23:47	49k
stainglass.jpg	12-Oct-2002 10:56	136k
sundaydriver.mpe	16-Jun-2003 02:20	6.9M
testicle.interview.wmv	22-Dec-2006 13:46	2.8M
texas.shootout/	17-Feb-2007 21:35	-
theartoffoolingmen.pps	11-Oct-2004 01:57	139k
torreador_f.gif	13-May-2002 23:47	61k
toystory.jpg	13-May-2002 23:47	40k
truck-art/	04-Jan-2006 23:39	-
union.wmv	18-Jan-2003 19:46	4.4M
upside.down.wmv	19-Feb-2006 12:25	788k
videodelmese_Yoga.wmv	28-Jul-2005 00:01	2.0M
vince cdnnot[1].mp3	06-Jun-2002 13:14	588k
vwgolf85.jpg	13-May-2002 23:47	153k
w_zales_ad1.wmv	05-Jul-2006 18:49	846k
wall-mart-greeter.gif	27-Jun-2004 20:28	485k
wedding.jpg	06-Jun-2002 13:14	611k
weird_al/	31-Jul-2007 18:56	-
whatsahol.wmv	11-Jul-2005 23:38	1.4M
whiptheworker.exe	13-May-2002 23:47	698k
whymomscan_tdoyoga.wmv	07-Jun-2007 23:02	2.0M
wife_joke_breaking_n..>	16-Dec-2005 01:59	73k
women's%20bathroom.jpg	04-May-2006 00:11	36k
workcycl.avi	06-Jun-2002 13:16	299k
worlds_shortest_vaca..>	13-May-2002 23:47	338k
wtc-photo2.gif	13-May-2002 23:47	2.1M





yale.foreign.culture..>	12-Dec-2005 00:32	78.9M
yaser.wmv	30-Nov-2004 15:42	1.4M
yoga/	04-Jan-2006 23:40	-
yourepitiful.mp3	10-Nov-2006 15:02	4.5M
zzzz.gif	06-Jun-2002 13:16	30k

Apache/1.3.37 Server at alex.kozinski.com Port 80

EXHIBIT 8

STATE BAR COURT OF CALIFORNIA HEARING DEPARTMENT 845 S. Figueroa Street, 3rd Floor Los Angeles, CA 90017-2515	FOR CLERK'S USE ONLY: FILED FEB -6 2015 STATE BAR COURT CLERK'S OFFICE LOS ANGELES
In the Matter of: **CYRUS M. SANAI,** **Member No. 150387,** A Member of the State Bar	Case Nos: 10-O-09221, 12-O-10457-DFM **ORDERS RE RESPONDENT'S MOTIONS TO DISMISS**

On October 17, 2014, in anticipation of the conclusion of the State Bar's case-in-chief during the trial of this matter, Respondent filed motions to dismiss all nine of the counts currently pending against him. (Rules Proc. State Bar, rules 5.110 and 5.124(E).)

On October 24, 2014, the State Bar filed an "omnibus" opposition to the motions.

Rule 5.110 provides:

> (A) Motion on Failure to Meet Burden of Proof. During a trial, after the party with the burden of proof has rested and before the proceeding is submitted to the Court, the opposing party may make a motion for a determination that the party with the burden of proof has failed to meet its burden, or the Court may make the motion itself and give the parties an opportunity to argue the issue. If the allegations are severable, the Court may dismiss some but not all of them. The Court must consider and weigh all the evidence introduced and determine credibility.
>
> (B) Denial of Motion. If the motion is denied, the moving party may offer evidence to the same extent as if the motion had not been made.
>
> (C) Grant of Motion. If the motion is granted, the Court's decision must include findings of fact and conclusions of law.

Rule 5.124(E) provides:

> (E) Motion to Dismiss for Failure to State a Disciplinable Offense. A motion to dismiss for failure of the initial pleading to state a disciplinable offense may be made at any time before the Court finds culpability.

Having considered the arguments of counsel, the voluminous evidentiary record, and the allegations of the Notice of Disciplinary Charges in this matter, the court concludes as follows:

There is no contention made by Respondent in his motion that the State Bar's evidence does not show that he failed to timely report the sanctions that were ordered at that time. Instead, Respondent argues that this count must be dismissed because "It is OCTC's burden of proof to show that the disciplinary proceedings were initiated in a timely fashion."

For all of the same reasons discussed with regard to Count 2, above, this motion to dismiss Count 3 is DENIED.

Count 6:

In this count the State Bar alleges that between October 2008 and September 2010, Respondent "filed and maintained formal judicial complaints with the Ninth Circuit Judicial Council against approximately 19 federal judges, when such complaint were frivolous and made for improper reasons . . . ." It alleges that the filing of these complaints constituted acts of moral turpitude.

In his motion, Respondent argues that the evidence received by this court is insufficient to establish clear and convincing evidence to support this count.

The State Bar did not put in evidence the complaints actually filed by Respondent against the federal judges. In response to this court's inquiry, it was informed by the State Bar that it was unable to do so due to the Ninth Circuit's refusal to provide those complaints to the State Bar.

Being unable even to read the complaints filed by Respondent, this court cannot conclude that any of those complaints were filed frivolously or constituted an act of moral turpitude. To the extent that this court is aware of the content of one of those complaints, the record shows that it was apparently justified and resulted in a formal apology by the judge and a self-administered recusal by him from the pending matter involving Respondent.

This count is DISMISSED WITH PREJUDICE.

Count 7:

In this count, the State Bar alleges that Respondent failed to timely report a sanctions order of the U.S. District Court issued, on or about September 6, 2007.

There is no contention made by Respondent in his motion that the State Bar's evidence does not show that he failed to timely report the sanctions that were ordered at that time. Instead, Respondent argues that this count must be dismissed because "It is OCTC's burden of proof to show that the disciplinary proceedings were initiated in a timely fashion." For all of the same reasons discussed with regard to Count 2, above, that contention is rejected.

Respondent also argues that he had no duty to report the court's order because it was not an award of "sanctions" for which reporting is required by Business and Professions Code section 6068, subdivision (o)(3). This court disagrees.

The scope of the reporting obligation under section 6068, subdivision (o)(3), is not limited to orders issued under authority of statutes or rules having the precise word "sanction" contained

therein. Instead, the duty includes order issued pursuant to statutes and rules (and possibly other sources of authority) which are used for the purpose of punishing bad faith conduct.

This interpretation of the scope of section 6068, subdivision (o)(3), is consistent with the treatment by the California courts of orders issued under other statutes (see, e.g., *Young v. Rosenthal* (1989) 212 Cal. App. 3d 96, 130-138 [order issued under Code of Civil Procedure section 907[2] characterized and treated as "sanction"]), and it is supported by prior decisions of this court. (See *In the Matter of Respondent Y* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 862, 866 [interpreting section 6068, subdivision (o)(3), to require report to be made within 30 days after order issued, even though order is not final and is being appealed].[3]

The order issued by the trial judge here was issued pursuant to 15 U.S.C. 1681n, which provides in pertinent part: "Upon a finding by the Court that an unsuccessful pleading, motion, or other paper filed in connection with an action under this section was filed in bad faith or for the purpose of harassment, the Court shall award to the prevailing party attorney's fees reasonable in relation to the work expended in responding to the pleading, motion or other paper." In that court's decision, the court noted that the statute reflected "the legitimate substantive federal statutory policy of punishing bad faith conduct made in connection with actions under Section 1681." (Ex. 48, p. 3.) The court then awarded attorneys pursuant to that statute based on its finding that Respondent's prosecution of the action had been "malicious" and "in bad faith and with the purpose of harassment." (*Id.* at pp. 3-4.)

Respondent's motion to dismiss Count 7 is DENIED.

Count 8:

In this count the State Bar alleges that Respondent encouraged the continuance of an action from a corrupt motive of passion or interest by filing an Abstract of Judgment in the amount of $143,469.95, with the Los Angeles County Recorder's Office, when he knew he had no basis to do so and did so with a corrupt motive of passion or interest and to inflict harm on the defendants in that proceeding, in willful violation of Business and Professions Code section 6068, subdivision (g).

The evidence received by this court is sufficient to sustain a finding that Respondent's actions in filing the Abstract of Judgment constituted a willful violation of section 6068, subdivision (g). This conduct by Respondent was an unjustified continuation of his previously efforts to obtain $137,000 in attorney's fees. Those actions began with his filing of a memorandum of costs on April 17, 2006, discussed more fully below, prior to any judgment having been entered by the court and without having sought any court order awarding him attorney's fees. After the court entered and then vacated its order of May 11, 2006, disapproving

---

[2] Similar to 15 U.S.C. 1681n, section 907 of the Code of Civil Procedure provides, "When it appears to the reviewing court that the appeal was frivolous or taken solely for delay, it may add to the costs on appeal such damages as may be just."

[3] "We hold that the purpose of section 6068, subdivision (o)(3) is to inform the State Bar promptly of events which could warrant disciplinary investigation. Depending on the facts, any such investigation might not even focus primarily on the sanction itself, but on the conduct preceding or surrounding a sanctions order."

and striking that memorandum of costs, the defendants filed a written motion to have the memorandum of costs stricken, resulting in the court entering an order on July 31, 2006, striking the memorandum of costs. In that order, the court was explicit in stating that Respondent was not entitled to any award of attorney's fees because he had not first sought them through a noticed motion. (Ex. 22.)

Despite that court's written order on July 31, 2006, Respondent proceeded on October 18, 2006 to secure from the court clerk an abstract of judgment and then file that abstract of judgment with the Recorder's Office on October 20, 2006, purporting to show that he held a judgment against The Irvine Company and the other defendants in the amount of $143,469.95 (which was based almost entirely on his previously-disapproved claimed entitlement to $137,000 of attorney's fees). (Ex. 23.) This recorded instrument then created for months an obstacle to those defendants closing various business transactions while the purported "judgment" remained outstanding and unsatisfied.

To remove this impediment to their businesses, the defendants were required by Respondent to file a motion to have the recorded abstract invalidated. The resolution on that motion was delayed by Respondent's unsuccessful challenges to the judge and was not heard until March 2007, at which time the court granted relief from the recorded abstract.

Respondent alleges that the count should be dismissed because the evidence does not provide clear and convincing evidence of the continuation by him of "an action or proceeding from any corrupt motive of passion or interest." More specifically, he argues that a violation of section 6068, subdivision (g), requires "the filing and continuance of a meritless 'action', that is to say 'lawsuit,' and not the filing a specific document therein which is divorced from the merits of the action." (Motion, p. 4.)

This contention lacks merit. Section 6068, subdivision (g), enjoins the "commencement or the continuance of an action or proceeding from any corrupt motive of passion or interest." The use of the disjunctive "or" in that prohibition makes clear that the commencement of an improper action is not a prerequisite to this court finding a violation of the statute based on subsequent conduct, resulting from corrupt motive of passion or interest, seeking to continue the action.

Respondent's motion to dismiss Count 8 is DENIED.

Count 9:

In this count the State Bar alleges, "On or about April 17, 2006, Respondent filed a Memorandum of Costs in *Sanai v. Saltz*, et al., Los Angeles County Superior Court case no. BC235671, listing names of individuals upon an accompanying service list whom Respondent claimed were agents of process for corporate defendants who had been served when he knew, or was grossly negligent in not knowing, that such individuals in fact had not been served on behalf of the corporate defendants, and thereby Respondent committed an act or acts involving moral turpitude, dishonesty or corruption in willful violation of Business and Professions Code, section 6106." [sic]

Respondent contends in is motion that the State Bar has failed to present clear and convincing evidence supporting this count. This court agrees.

There is no evidence that, when the Memorandum of Costs was filed on April 17, 2006, it included a service list "listing names of individuals upon an accompanying service list whom Respondent claimed were agents of process for corporate defendants who had been served." Instead, the evidence is uncontradicted that the proof of service filed by Respondent with the Memorandum of Costs on April 17, 2006, stated that the memorandum had been addressed and mailed only to the corporate defendants' offices, with no designation of any individual at those offices to which the mail was to be delivered.[4]

The evidence offered by the State Bar in support of the above allegation relates to a contention by Respondent's opposing counsel in 2006 that Respondent, after the Memorandum of Costs had been filed, had made a notation on the previously-filed service list regarding the identity of the designated agents of those corporate defendants for service of process. However, it is undisputed that this notation was made by Respondent with the knowledge and consent of the court's clerk, in her presence, and at her request. This clerk was aware that Respondent, a party to the action, was not (and could not be) the person who had signed the proof of service under penalty of perjury, and there is no evidence that Respondent was claiming to modify the proof of service or that the clerk believed that Respondent's subsequent notation in any way modified the original proof of service.

The disputed issue at that time was whether the clerk had merely requested that Respondent write down the identity of the designated agents for service of process or whether she had asked Respondent to write down the names of the individuals who had actually been served. At an ex parte hearing on May 11, 2006, this clerk was called to testify regarding that issue. Prior to her being summoned to testify in 2006, comments by both the presiding judge and opposing counsel made clear that each had discussed with her the substance of her anticipated testimony. (Ex. 29, pp. 5-6; cf. p. 11, line 26.)[5] During her testimony, her answers were equivocal, including acknowledging on cross-examination that her memory of the event (which had happened less than three days before) was poor and that she did not remember exactly the reason she had given Respondent for asking him to write down the names of the designated agents for service of process. (Ex. 29, pp. 25-26, 44.)

This same clerk was called as a witness by the State Bar during the trial of this matter. Although she had been provided with a copy of her prior testimony, and had affirmed its content as correct for the State Bar in January 2014, when she was called as a witness in this proceeding in August 2014, she testified that she could not identify Respondent, has no recollection of the disputed memorandum of costs, and has absolutely no recollection of discussing the matter with

---

[4] This failure to address the letter to individuals authorized to accept service of process on behalf of the corporation greatly reduces the likelihood that the effort at service will be successful, but is not necessarily fatal. (See *Dill v. Berquist Construction Co.* (1994) 24 Cal. App. 4th 1426, 1437 [service is effective, even if the mailing is not addressed to an authorized agent, if it is actually received by such an agent].)

[5] Respondent contends that the clerk's testimony at that time was improperly influenced by the presiding judge for improper reasons, and he seeks in this proceeding to subpoena and question that judge as an adverse witness in this proceeding regarding his contact with the clerk prior to her testimony.

Respondent.[6] This purported lack of any memory by the witness was not credible, had the effect of eliminating any meaningful cross-examination by Respondent, and makes her prior testimony during the May 11, 2006 ex parte hearing even less convincing.

Also weakening the weight to be given the record of the May 11, 2006 hearing is the fact that it took place without Respondent having been given proper prior notice. Opposing counsel had given Respondent only telephonic notice of his intent to make an ex parte application for an order shortening time for a contemplated written motion seeking to strike the memorandum of costs. Opposing counsel had previously indicated to Respondent that this attack would be based on the absence of a judgment entered by the court prior to the filing of the memorandum of costs. Then, on May 11, 2006, when the court heard the ex parte matter, opposing counsel indicated that he had previously given notice, via a telephone message left on Respondent's phone, of his intent to seek on May 11 the actual order striking the memorandum of costs. Although Respondent objected at the hearing to this lack of notice, the court went forward to issue an order striking the memorandum of cost, based in part on the clerk's testimony. The court was then required to vacate that order on the following day, when Respondent was able to return to court and make a formal record of a copy of the recorded phone message, which was explicit in stating that the only stated purpose of the May 11 ex parte appearance was to seek an order shortening time.

Finally, the contention that Respondent was attempting to mislead the court or opposing counsel into believing that the designated agents for service of process had been served with the memorandum of costs is belied by Respondent's having filed and served a declaration, dated May 10, 2006, in which he provided the court and opposing counsel with a copy of the original proof of service; documentation that the memorandum of costs was served only by sending it by certified mail, addressed only to the corporation and not to any specific individual; and documentation that the individuals signing for the certified mail at the two corporate offices were both individuals other than the designated agents for service of process.

The evidence failing to present clear and convincing proof of the act of moral turpitude alleged in Count 9, that count is DISMISSED WITH PREJUDICE.

IT IS SO ORDERED.

Dated: February 6, 2015

DONALD F. MILES
Judge of the State Bar Court

[6] The clerk also denied any memory of her contact with the trial court prior to her testifying in 2006, despite her review of the court's statement in the transcript that he had talked with her.

N132

CERTIFICATE OF SERVICE

[Rules Proc. of State Bar; Rule 5.27(B); Code Civ. Proc., § 1013a(4)]

I am a Case Administrator of the State Bar Court of California. I am over the age of eighteen and not a party to the within proceeding. Pursuant to standard court practice, in the City and County of Los Angeles, on February 6, 2015, I deposited a true copy of the following document(s):

ORDERS RE RESPONDENT'S MOTIONS TO DISMISS

in a sealed envelope for collection and mailing on that date as follows:

☒ by first-class mail, with postage thereon fully prepaid, through the United States Postal Service at Los Angeles, California, addressed as follows:

CYRUS M. SANAI
SANAIS
433 N CAMDEN DR STE 600
BEVERLY HILLS, CA 90210

☒ by interoffice mail through a facility regularly maintained by the State Bar of California addressed as follows:

BROOKE SCHAFER, Enforcement, Los Angeles
KEVIN BUCHER, Enforcement, Los Angeles

I hereby certify that the foregoing is true and correct. Executed in Los Angeles, California, on February 6, 2015.

T Cleaver

Tammy Cleaver
Case Administrator
State Bar Court

EXHIBIT 9

FILED

MAR 20 2015

STATE BAR COURT
CLERK'S OFFICE
LOS ANGELES

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT – LOS ANGELES

In the Matter of **CYRUS MARK SANAI,** **Member No. 150387,** A Member of the State Bar.	Case Nos.: **10-O-09221; 12-O-10457-DFM** **ORDER GRANTING MOTIONS TO RECONSIDER DENIAL OF RESPONDENT'S MOTION TO DISMISS AND STATE BAR'S MOTION TO QUASH; DISMISSING COUNTS 1-5 AND 7; GRANTING MOTION TO QUASH SUBPOENAS RE NINTH CIRCUIT EMPLOYEES; AND ABATING RESOLUTION OF COUNT 8 AND RELATED MOTIONS TO QUASH PENDING RESOLUTION OF UNDERLYING CIVIL ACTION**

The Notice of Disciplinary Charges (NDC) in these cases was filed by the Office of the Chief Trial Counsel (State Bar) on January 7, 2014. Counts 1-5 arise out of Respondent's involvement as a party in litigation filed in the State of Washington; Count 6, which has now been dismissed by this court, related to complaints filed by Respondent with the Judicial Council of the Ninth Circuit against various judges of the Ninth Circuit; and Counts 7-9 arise out of Respondent's involvement as a party in litigation still pending in the Los Angeles County Superior Court.[1] In those counts, Respondent is charged with misconduct occurring in April and May 2005 (Count 1), July 2005 (Count 2), March 2005 (Count 3), October 2004 (Count 4),

[1] Count 9 has also now been dismissed by this court.

November 2005 (Count 5), October 2008 through September 2010 (Count 6), September 2007 (Count 7), October 2006 (Count 8), and April 2006 (Count 9).

At the conclusion of the State Bar's case-in-chief against Respondent, Respondent moved to dismiss all of the nine counts pending against him, contending, inter alia, that the counts are barred by the five-year rule of limitations set forth in rule 5.21(A) of the Rules of Procedure of the State Bar of California, which provides: "If a disciplinary proceeding is based solely on a complainant's allegations of a violation of the State Bar Act or Rules of Professional Conduct, the proceeding must begin within five years from the date of the violation." In turn, the State Bar defended its decision to file the charges in 2014, well more than five years after the alleged misconduct, by invoking the provisions of rule 5.21(G), which provides: "The five-year limit does not apply to disciplinary proceedings that were investigated and initiated by the State Bar based on information received from an independent source other than a complainant."

In response to Respondent's motion to dismiss, this court dismissed Counts 6 and 9 based on the absence of clear and convincing evidence of the misconduct alleged in those counts.[2] The court, however, denied Respondent's motion to dismiss the remaining counts based on the five-year rule of limitations of rule 5.21(A). The court's decision to defer resolution of that issue was based on *In the Matter of Wolff* (Review Dept. 2006) 5 Cal. State Bar Ct. Rptr. 1, which holds that the respondent has the burden of proving application of the rule of limitations. Since that burden would suggest that the State Bar had no obligation during its case-in-chief to present evidence regarding defenses to the apparent application and/or running of the rule of limitations, but instead presumably could wait to present such evidence until after Respondent had presented his evidence, this court concluded that resolution of the rule of limitations issue should be deferred until after the State Bar had the opportunity and burden of presenting any evidence that

[2] No request has been made by the State Bar to reconsider those dismissals.

the proceedings were "were investigated and initiated by the State Bar based on information received from an independent source other than a complainant" or that there had been some tolling of the running of the rule of limitations. Respondent has now filed a motion for reconsideration of this court's denial of that request for dismissal.

Related to the resolution of this rule of limitations issue is whether the State Bar may prevent discovery and/or disclosure of evidence regarding the nature and source of the information the State Bar received and relied on in filing the various counts against Respondent. Respondent has sought, during both pretrial discovery and trial, to require the State Bar to produce a substantial number of documents in its files regarding the history of the State Bar's receipt and handling of complaints and information regarding the events giving rise to the remaining counts, and he has subpoenaed as witnesses at trial the two State Bar employees, attorneys Joseph Carlucci and Brooke Schaeffer, who have been identified as the individuals most knowledgeable about the reasons for the State Bar's investigation and initiation of the pending charges. In response to those efforts by Respondent, the State Bar has refused to produce the requested documents and witnesses, and it has filed a motion to quash the trial subpoenas.

On October 16, 2014, this court issued an order denying the State Bar's motion to quash Respondent's subpoenas requiring the production of State Bar documents and the appearance as witnesses of attorney Schaeffer.[3] In that order this court concluded:

> In its motions to quash, the State Bar argues that the requested documents are confidential and protected attorney work product. It is well-established that the party asserting such a privilege has the burden of establishing that privilege. (*Fellows v. Superior Court* (1980) 108 Cal.App.3d 55, 67; Brown and Weil, *Civil Procedure*

[3] In that order the court indicated that it was reserving the issue of whether to quash the subpoena requiring the attendance of Joseph Carlucci as a witness at trial until after the testimony of a designated State Bar witness regarding the procedural history of the matters was heard. That testimony was received on October 21, 2014.

Before Trial, ¶ 8:192.) In addition, rule 5.65(I) provides that "When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or otherwise protected, the party must make the claim expressly and must describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileges, will enable the other party to assess the applicability of the privilege or protection."[4] The State Bar has done neither. The motions and their supporting declarations do not contain express claims of privilege or other protection; nor do they describe the nature of the documents, communications or things not produced or disclosed "in a manner that, without revealing information itself privileged or protected, will enable the other party to assess the applicability of the privilege or protection." (Rule 5.65(I)(2).) The motions do not attempt to provide a privilege log that complies with rule 5.65(I)(2). The supporting declarations are vague and general[5] and based on "information and belief" about the contents of the files and the genesis of the investigations. In sum, there is no factual basis for this court to make a preliminary finding that any of the documents are protected by the attorney work product rule.

The State Bar also asserts that all of its files are confidential pursuant to rule 2301, which states that, except as otherwise provided by law or the Rules of Procedure, its files and records are confidential. This broad rule is applicable to the State Bar's files prior to its filing of charges against a member. However, where charges have been filed, due process and the provisions of the Rules of Procedure, including rule 5.65(I), make clear that the member is entitled to have access to documents that are exculpatory. This is especially true where the State Bar has called one of its own employees to testify regarding its lack of prior knowledge of certain facts from the member.

The list of documents attached to each subpoena sets forth items that may shed light on the genesis of the initial and any subsequent complaints against Respondent; their nature, scope and resolution, if any; and the timing of those events. These documents may be relevant in assessing whether any of the pending charges are time-barred. There is no other way for Respondent to obtain this information and defend on this basis.

---

[4] Rule 5.65(I) also provides in pertinent part that "Statements of any witness interviewed by the deputy trial counsel, ... are not protected as work product." [Footnote in original order]

[5] For example, "Also, many communications between members of State Bar staff have been withheld as privileged. To the best of my information and belief, none of these contain otherwise discoverable witness interviews." (Bucher declarations, page 6, paragraph 9.) [Footnote in original order]

While that order required the State Bar to produce documents on October 20, 2014, the State Bar filed a motion for reconsideration of the above order, and compliance was subsequently stayed by this court pending its receipt of the scheduled State Bar testimony, resolution of Respondent's motions to dismiss, and resolution of the State Bar's motion for reconsideration.

On October 27, 2014, Respondent filed an opposition to the motion for reconsideration. On October 28, 2014, the State Bar filed a reply to the opposition. On October 29, 2014, Respondent filed a request to strike the State Bar's reply or, in the alternative, a sur-reply to the reply.[6]

On October 21, 2014, the State Bar called a State Bar investigator to testify regarding the history of the complaints and investigations leading up to the filing of the NDC in 2014. However, this investigator was not assigned to work on these matters until 2011. His only knowledge of the history of the State Bar's first awareness of the matters giving rise to the alleged misconduct being pursued in the pending NDC is based on his review of the State Bar's files, including documents that are the subject of the pending subpoenas. Although he was requested during the morning of his testimony to bring the files he had reviewed to court during his continued testimony that afternoon, he did not do so.

Documents previously provided by the State Bar to Respondent, coupled with the investigator's testimony at trial, make clear that the State Bar was made aware in August 2005 of complaints regarding Respondent's alleged misconduct in the Washington litigation, when Respondent's opposing counsel in that Washington litigation, William Gibb, forwarded information regarding that alleged misconduct to Frederick Bennett (Bennett), court counsel for the Los Angeles County Superior Court, for the stated purpose of having Bennett report that

[6] The court exercises its discretion to receive both the reply and the sur-reply. The request to strike the reply is denied.

information to the State Bar. Bennett then forwarded that information to the State Bar. In the course of Bennett's complaining to the State Bar, he indicated that he was then acting as "counsel of record for Judge Grimes" - to whom Respondent had apparently written a letter after Judge Grimes had been removed by the appellate court from presiding further over the matter in which Respondent was a party. Bennett complained to the State Bar that Respondent's letter to his client violated various rules of professional conduct. (See Exs. 60, 1045.) Respondent now argues in this proceeding that Bennett's real motivation for his complaints to the State Bar was retaliation for Respondent testifying in opposition to the elevation of Judge Grimes to the appellate bench.

The information provided to the State Bar by Bennett was initially handled in case No. 05-O-3430 (the *'05* case). Thereafter, an additional complaint regarding Respondent's activities in the Washington litigation was received by the State Bar in April 2006 from an employee of the Washington State Bar. This individual provided the State Bar with copies of the sanction orders underlying counts 2, 4, and 5 of the pending NDC as well as information underlying counts 1 and 3. (Ex. 64.) The State Bar then opened case No. 06-O-12214 (the *'06* case) and contacted Respondent in October 2006 regarding the sanction orders and his other actions in the Washington proceeding. (Ex. 65.) At that time, Respondent confirmed the prior issuance of the orders underlying counts 2-5. At some time thereafter, both the *'05* and *'06* cases were closed. The State Bar's witness during the trial of the instant matter was not able to identify who made the decision to close the cases or precisely when they were closed.

At some point in 2008, a new case, case No. 08-O-13372 (the *'08* case), was opened. The State Bar witness testified that this new case was based on the *'05* case and was opened within a few months after the *'05* case was closed at the recommendation of the attorney who had closed the *'05* case. The witness, however, did not identify who that attorney was. What

prompted the matter to be re-opened, albeit under a different case number, was not explained. Respondent was then contacted in 2009 about the conduct underlying counts 7 and 9, and the *'08* case was then closed. The State Bar's witness stated that a number of attorneys worked on the *'08* investigation, but he could not identify the specific individual who had closed the file.

In 2010, a complaint was made to the State Bar by the Judicial Council of the Ninth Circuit regarding Respondent's purportedly frivolous complaints to it about a number of federal judges. This complaint by the Judicial Council of the Ninth Circuit subsequently formed the basis for Count 6 of the pending NDC. When the complaint was received, the State Bar opened case No. 10-O-09221 (the *'10* case) and contacted Respondent about the matter. Then, after learning that the Judicial Council of the Ninth Circuit would not release to the State Bar the actual complaints filed by Respondent against the federal judges, the State Bar decided to issue a warning letter to Respondent in November 2011, and closed the case.[7] (Ex. 1040.) That decision was explained, both orally and in writing, by the State Bar to Cathy Catterson, a representative of the Judicial Council of the Ninth Circuit, on November 8, 2011. (Ex. 1041). Thereafter, she complained of the State Bar's decision in a letter, dated January 19, 2012, directed to the then Acting Chief Trial Counsel of the State Bar.

[7] The State Bar had previously notified the Judicial Council of the Ninth Circuit in May 2011 that it would be difficult to pursue any complaint that Respondent's complaints against various federal appellate justices were frivolous without having access to the actual underlying complaints. As stated by the State Bar at that time: "As you may be aware, to prevail in State Bar disciplinary proceedings, our office must prove by clear and convincing evidence that an attorney committed willful misconduct. Although the Judicial Council's order of September 30, 2010, will certainly be a useful piece of evidence to establish that Mr. Sanai engaged in misconduct by filing frivolous misconduct complaints, it would be insufficient standing alone to prove by clear and convincing evidence that Mr. Sanai engaged in misconduct warranting discipline, especially since the order does not include any specific findings of fact but rather includes only the conclusion that Mr. Sanai abused the misconduct complaint procedure." (Ex. 1039, p. 2.)

In May 2012, Respondent was notified that the *'10* case had been re-opened by the State Bar, resulting in the subsequent filing of count 6 in the pending NDC.[8] (Ex. 1043.) When asked during cross-examination why the *'10* case was re-opened at that time, the State Bar's witness stated that he did not know. When asked who made the decision to prosecute the re-opened *'10* case, the witness identified attorney Schaeffer.

All counts in the NDC, other than count 6 [regarding Respondent's complaints about the federal judges], are now encompassed within case No. 12-O-10457 (the *'12* case). No explanation was given by the State Bar's witness at trial regarding why the *'12* case was opened other than to say that it was based on information learned while investigating the *'10* case. The State Bar's witness, however, was unable to provide any specifics as to what that information was or whether there was any information with regard to the Washington matters that was not already in the State Bar's files for the earlier cases. The witness also could not identify any person who had provided information to the State Bar who was not a "complainant." Finally, no reason has been given as to why the matter was opened under the new *'12* number, rather than by re-opening the *'05*, *'06*, or *'08* case.

The alleged misconduct which forms the basis for the remaining counts took place in 2004 (Count 4), 2005 (Counts 1, 2, 3, and 5), 2006 (Counts 8), and 2007 (Count 7). The NDC in this matter was filed in 2014. The State Bar had received complaints and documentation regarding all of the misconduct alleged in those counts well more than five years prior to the filing of the NDC. Hence, the five-year rule of limitations of rule 5.21(A) has expired for each of those counts unless that rule is inapplicable or the running of the five-year period was tolled.

[8] Given the State Bar's inability to provide this court with a copy of the actual complaints filed by Respondent against the federal judges, this court - as accurately predicted by the State Bar in May 2011 - eventually dismissed that count at trial due to the State Bar's failure to provide clear and convincing evidence that those complaints were frivolous. The evidence was not sufficient even to enable this court to identify all of the judges against whom complaints had been filed.

In the State Bar's motion seeking reconsideration of this court's order denying its motions to quash Respondent's subpoenas, the State Bar argues that it referred in the original motions to quash to an earlier privilege log that had previously been provided to this court in conjunction with the State Bar's effort to avoid having to disclose documents during discovery. It argues that this reference relieved it of any obligation to provide that privilege log to this court in conjunction with its motions to quash. It also contends that the privilege log, not signed or affirmed as true by any individual, substantiates its claims of privilege. A review of this privilege log reveals that the State Bar has asserted that every disputed document is subject to a claim of "Attorney Work Product Privilege."

While this court is inclined to disagree with the State Bar's arguments,[9] a review of the privilege log, when combined with the testimony of the State Bar's prior witness, makes clear that Respondent is correct that this court should reconsider its prior decision to defer consideration of the rule 5.21 issue. The testimony of the State Bar's witness did not show that any of the remaining counts "were investigated and initiated by the State Bar based on information received from an independent source other than a complainant." Instead, that testimony merely reaffirmed that all of the alleged misconduct, as well as documentation of that

[9] As previously explained by this court in its original order, the State Bar, with or without the privilege log, has generally fallen far short of establishing that the bulk of these documents are protected by the attorney work product rule. Moreover, even documents protected by that rule are subject to disclosure on a finding that denial of discovery "will unfairly prejudice the party seeking discovery in preparing that party's claim or defense or will result in an injustice." (Code Civ. Proc., § 2018.030, subd. (b).) This court finds that such is the case here. That conclusion is buttressed by the State Bar's use of its files to provide the basis for the testimony offered at trial by its own witness, who is the author of some of the disputed documents.

However, the good cause disclosure rule, quoted above, is expressly limited by subdivision (a) of section 2018.030, which states that "an attorney's impressions, conclusion, opinions, or legal research or theories is not discoverable under any circumstances." In reviewing the privilege log, the court notes that the State Bar only sought to describe a few of the documents in dispute as falling within the absolute privilege of subdivision (a). Those documents are numbered in the privilege log as follows: Documents 11, 13, 60, 61, 62, 85, 99, 115, 116, 126, 127, 138, 160, 161, 192, 212, 213, 217-247, 258, and 259.

conduct, had been received by the State Bar from complainants well prior to five years before the filing of the NDC. The witness did not identify any new evidence that the State Bar had received from any source independent of a complainant at any time prior to five years before the filing of the NDC.

The privilege log provided by the State Bar makes clear that the State Bar has asserted an "Attorney Work Product Privilege" against any further disclosure of evidence, including any testimony from the most knowledgeable State Bar employees, regarding the basis for the filing of the remaining charges against Respondent. Having relied on claims of privilege to avoid such disclosure, both during discovery and trial, the State Bar cannot now reverse its position and offer any of such evidence in rebuttal to Respondent's rule 5.21(A) defense. Accordingly, under the circumstances of this case, it is not inappropriate for this court to decide the rule of limitations issue at this time.

This court finds that counts 1-5 and 7 are barred by the five-year rule of limitations set forth in rule 5.21(A). The State Bar's contention that those counts are subject to rule 5.21(G) is unpersuasive and unsupported by the evidence. Further, its contention that the running of the rule of limitations with regard to counts 2-5 and 7 is subject to tolling because of Respondent's ongoing obligation to report the sanction orders is contrary to both law and fact. Instead, the evidence is clear and convincing that Respondent reported the sanctions orders to the State Bar in 2006, when he was contacted at that time by the State Bar about those orders. After he had done so, the pending cases were then closed. As previously noted, why those matters were subsequently re-opened in 2012 under a different case number could not be explained by the State Bar's witness. There is no evidence that the matters were reopened based on any new evidence regarding Respondent's prior failure to timely report the orders.

Because the dismissal of counts 1-5 and 7 makes the disputed production of documents by the State Bar and the requested testimony of Brooke Schaeffer and Joseph Carlucci irrelevant to the remaining issues in this matter, their motions to quash are granted. That determination, however, is without prejudice to Respondent's ability to renew his request to subpoena such individuals as witnesses with documents in the event that any of the dismissed counts are reversed on appeal.

On the issue of the alleged tolling of rule 5.21(A), this court reaches a different decision with regard to Count 8. While the alleged misconduct in that matter occurred in October 2006, the issue of whether that conduct was inappropriate is tied to the issue of whether Respondent's filing of the Abstract of Judgment was wrongful. It has become clear to this court during the trial and subsequent discussions with counsel that the Los Angeles litigation is still ongoing and that there remains the possibility that Respondent's conduct can and might ultimately be determined in that matter to have been legally correct. There has been no final determination in that civil matter in that regard. Under such circumstances, the running of the five-year limitations period is tolled pursuant to rule 5.21(C)(3).

This court previously notified the parties of its concern that resolution of Count 8 should be abated until the pending Los Angeles litigation has been resolved, and it then provided them with an opportunity to be heard on that issue. Good cause appearing, this court now orders that resolution of Count 8 is abated pursuant to rule 5.50(B) until the pending Los Angeles litigation has been resolved.

In three related matters, motions to quash have been filed on behalf of various individuals who also received trial subpoenas from Respondent, including Michael Salz; Frederick Bennett, Leslie Green, Sheri Carter, and Judges Terry Green and Kevin Brazile of the Los Angeles County Superior Court; and Cathy Catterson and Molly Dwyer of the Ninth Circuit.

Michael Salz is Respondent's opposing attorney in the Los Angeles litigation and has already appeared as a witness for the State Bar in this matter with regard to Count 8. Respondent wishes to re-call him as a witness during Respondent's case-in-chief, which Respondent is clearly entitled to do. However, Respondent has also served Salz with a subpoena requiring Salz to produce documents. While Salz argues in his motion to quash that many of the requested documents are irrelevant to the proceeding, resolution of that motion is best deferred until the Los Angeles litigation has been resolved.

A motion to quash was also filed on behalf of Frederick Bennett, Leslie Green, Sheri Carter, and Judges Terry Green and Kevin Brazile of the Los Angeles County Superior Court. Frederick Bennett is court counsel for the Los Angeles County Superior Court and, as previously noted, was the individual who complained about Respondent's misconduct in the Washington litigation at the request of Respondent's opposing counsel in that matter. Bennett previously acted as counsel for Judge Elizabeth Grimes in several private matters involving Respondent, and Respondent contends that Bennett's testimony and documents are relevant to showing that there has been an inappropriate conspiracy between various individuals and judges such that the decisions of the federal and state courts, offered into evidence by the State Bar in this proceeding, lack validity or, in the alternative, should not be given the weight normally afforded such determinations. Because Bennett was the original complainant in 2005 with regard to the Washington litigation (Counts 1-5), if those counts had not been dismissed, Respondent would have been entitled to call him as a witness at trial, especially as his contacts with the State Bar relate to the rule of limitations issue. Those counts, however, have now been dismissed. With regard to testimony by Bennett and the other witnesses from the Los Angeles County Superior Court possibly relevant to the remaining Count 8, resolution their motion to quash should also be deferred until after the Los Angeles litigation is resolved.

Finally, motions to quash have been filed by Cathy Catterson and Molly Dwyer, both employees of the Ninth Circuit.[10] As previously noted, Catterson was in communication with the State Bar regarding the Ninth Circuit's complaint that Respondent had filed complaints against various federal judges (Count 6). Had that count not been dismissed, Catterson's testimony, and possibly Dwyer's, would have been relevant. That count, however, has now been dismissed. Because the dismissal of that count makes their testimony and production of documents irrelevant to the issues in this matter, their motions to quash are granted. That determination, however, is without prejudice to Respondent's ability to renew his request to subpoena such individuals as witnesses with documents in the event that any of the dismissed counts are reversed on appeal.

For the reasons stated above, Counts 1-5 and 7 are dismissed with prejudice. Resolution of the remaining count, Count 8, is abated pending final resolution of the pending Los Angeles litigation. This abatement extends to the motions to quash of Michael Salz, Frederick Bennett, Leslie Green, Sheri Carter, and Judges Terry Green and Kevin Brazile.

The motions to quash of Cathy Catterson, Molly Dwyer, Joseph Carlucci and Brooke Schaeffer are granted, without prejudice to Respondent's ability to renew his request to subpoena such individuals as witnesses with documents in the event that any of the dismissed counts are reversed on appeal.

IT IS SO ORDERED.

Dated: March 20, 2015

DONALD F. MILES
Judge of the State Bar Court

[10] The court exercises its discretion to receive both the replies and the sur-replies of the parties regarding these motions. Respondent's requests to strike the replies are denied.

CERTIFICATE OF SERVICE

[Rules Proc. of State Bar; Rule 5.27(B); Code Civ. Proc., § 1013a(4)]

I am a Case Administrator of the State Bar Court of California. I am over the age of eighteen and not a party to the within proceeding. Pursuant to standard court practice, in the City and County of Los Angeles, on March 20, 2015, I deposited a true copy of the following document(s):

ORDER GRANTING MOTIONS TO RECONSIDER DENIAL OF RESPONDENT'S MOTION TO DISMISS AND STATE BAR'S MOTION TO QUASH; DISMISSING COUNTS 1-5 AND 7; GRANTING MOTION TO QUASH SUBPOENAS RE NINTH CIRCUIT EMPLOYEES; AND ABATING RESOLUTION OF COUNT 8 AND RELATED MOTIONS TO QUASH PENDING RESOLUTION OF UNDERLYING CIVIL ACTION

in a sealed envelope for collection and mailing on that date as follows:

☒ by first-class mail, with postage thereon fully prepaid, through the United States Postal Service at Los Angeles, California, addressed as follows:

CYRUS M. SANAI
SANAIS
433 N CAMDEN DR STE 600
BEVERLY HILLS, CA 90210

☒ by interoffice mail through a facility regularly maintained by the State Bar of California addressed as follows:

BROOKE SCHAFER, Enforcement, Los Angeles
KEVIN BUCHER, Enforcement, Los Angeles

I hereby certify that the foregoing is true and correct. Executed in Los Angeles, California, on March 20, 2015.

Tammy Cleaver
Case Administrator
State Bar Court

APPENDIX O

UNITED STATES COURT OF APPEALS
For the Ninth Circuit

No. 19-55429

CYRUS SANAI, an individual

Plaintiff, and Appellant

vs.

MARK BORENSTEIN, an individual, and DOES 1 through 10, inclusive,

Defendants-Appellees;

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
HONORABLE ROBERT GARY KLAUSNER
DISTRICT COURT CASE NO. CV 18-5663-RGK-E

REQUEST FOR JUDICIAL NOTICE

Cyrus M. Sanai, SB#150387
SANAIS
433 North Camden Drive
Suite 600
Beverly Hills, California, 90210
Telephone: (310) 717-9840
cyrus@sanaislaw.com

REQUEST FOR JUDICIAL NOTICE

Appellant Cyrus Sanai hereby requests judicial notice of the complaint, attached hereto as the Exhibit, filed in the Northern District of California, in the case of Sanai v. Kozinski, docket number 19-CV-08162-YGR.

Appellant request judicial notice of the filing of the complaint, but not the truth of any allegations therein, under Fed. R. Evid. 201. This request is in support of the Petition for Rehearing and Rehearing en banc filed herewith.

May 27, 2020.

SANAIS

By:/s Cyrus Sanai
Appellant

CERTIFICATE OF COMPLIANCE

I certify that the foregoing notice is double spaced (except for quotations in excess of 49 words from legal authorities and the record) and utilizes a proportionately spaced 14-point typeface. The motion (excluding the Declaration, Cover, and Certificate of Compliance) comprises a total of one page excluding the cover amd attachment.

Dated: May 27, 2020

By:/s Cyrus Sanai
Appellant

DECLARATION OF CYRUS SANAI

1. I am an attorney admitted in California and to this Court. I am the Appellant in this lawsuit. The following matters are from personal knowledge.

2. I filed a lawsuit in the Northern District of California, *Sanai v. Kozinski,* 19-cv-08162-YGR, a true and correct copy of which is attached hereto as the Exhibit.

I declare, under penalty of perjury of the law of the United States that the foregoing statements of fact are true and correct.

Dated this May 27, 2020 in Beverly Hills, California

s/ Cyrus Sanai

EXHIBIT
COMPLAINT IN *SANAI V. KOZINSKI*

Cyrus M. Sanai, SB#150387
SANAIS
433 North Camden Drive
Suite 600
Beverly Hills, California, 90210
Telephone: (310) 717-9840
cyrus@sanaislaw.com

Pro Se

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

CYRUS SANAI, an individual,

Plaintiff,

vs.

ALEX KOZINSKI, in his personal capacity; CATHY CATTERSON, in her personal capacity; THE JUDICIAL COUNCIL OF THE NINTH CIRCUIT, an administrative agency of the United States; MOLLY DWYER, in her official capacity; SIDNEY THOMAS, in his official and personal capacities; PROCTOR HUG JR., in his personal capacity; M. MARGARET MCKEOWN, in her personal capacity; RONALD M. GOULD, in his personal capacity; JOHNNIE B. RAWLINSON, in her personal capacity; AUDREY B. COLLINS, in her personal capacity; IRMA E. GONZALEZ, in her personal capacity; ROGER L. HUNT, in his personal capacity; TERRY J. HATTER JR., in his personal capacity; ROBERT H. WHALEY, in his personal capacity; THE JUDICIAL COUNCIL OF CALIFORNIA, an administrative agency of the State of California; and DOES 1-10, individuals and entities whose identities and capacities are unknown;

Defendants.

Case No.:

COMPLAINT FOR:

(1) INJUNCTIVE RELIEF FOR VIOLATION OF CONSTITUTIONAL RIGHTS ;
(2) MANDAMUS;
(3) DECLARATORY JUDGMENT;
(4) ABUSE OF PROCESS (FEDERAL LAW);
(5) MALICIOUS PROSECUTION (FEDERAL LAW);
(6) WRONGFUL USE OF ADMINISTRATIVE PROCEEDINGS (CALIFORNIA LAW);
(7) *BIVENS* CLAIM FOR DAMAGES
(8) RELIEF UNDER CALIFORNIA PUBLIC RECORDS ACT;
(9) INJUNCTIVE RELIEF TO REMEDY FUTURE VIOLATION OF CONSTITUTIONAL RIGHTS.

JURY DEMAND

Plaintiff Cyrus Sanai hereby alleges as follows:

JURISDICTION

1. This Court has jurisdiction pursuant to 28 USC §1331, 28 USC §1361, and 28 USC §1367. Venue is proper in this district because the Judicial Council of the Ninth Circuit and the Judicial Council of the State of California are headquartered in this District, in the City of San Francisco, and certain of the individual Defendants have their places of work in this District, in the City of San Francisco.

THE PARTIES

2. Plaintiff, CYRUS SANAI ("Sanai"), is an attorney admitted to practice in California and various federal courts who resides in the County of Los Angeles, State of California.

3. Defendant, ALEX KOZINSKI ("Kozinski "), is a former Judge of the Ninth Circuit Court of Appeals until December, 2017, when he resigned while judicial misconduct charges were pending against him. He is sued in his personal capacities for actions taken when he was ostensibly recused from any matters involving Sanai, and not for any judicial act. Kozinski is currently a California attorney practicing before the Ninth Circuit Court of Appeals.

4. Defendant, CATHY CATTERSON ("Catterson"), was appointed as the clerk of the Ninth Circuit Court of Appeals and Circuit Executive of the Ninth Circuit. She was removed from her position as Circuit Executive after Kozinski ceased to be Chief Judge. She is a resident in the Northern District. She is sued in

her personal capacity, for actions taken under color of her position as Circuit Executive, but which were outside her duties as either Clerk or Circuit Executive.

5. Defendant, the JUDICIAL COUNCIL OF THE NINTH CIRCUIT ("the JC") is an administrative agency of the United States that oversees the operation of federal courts within the Ninth Circuit. Its headquarters are in San Francisco, within the Northern District. To the extent that injunctive and declaratory relief against the JC requires an individual defendant, Defendant SIDNEY THOMAS ("Thomas"), the current Chairman of the JC, is sued in his official capacity to obtain injunctive and declaratory relief.

6. Defendants, Thomas, M. MARGARET MCKEOWN ("McKeown"), RONALD M. GOULD ("Gould"), and JOHNNIE B. RAWLINSON ("Rawlinson") are judges of the Ninth Circuit Court of Appeals. Defendant PROCTOR HUG, JR. is a former judge of the Ninth Circuit Court of Appeals. They are sued in their PERSONAL CAPACITIES, in respect of actions taken as members of the JC, an administrative agency of the United States in regards to a matter that had been ordered transferred to the Judicial Council of the Third Circuit, but for which it refused to transfer. For this and other reasons all actions for which liability is sought to be imposed hereunder was outside the jurisdiction of the JC and these defendants. They are not sued for any actions taken as a judge or for any judicial act.

7. Defendant, AUDREY B. COLLINS ("Collins"), is a former judge of the United States District Court for the Southern District of California, and was at the relevant time, 2009-2010, a member of defendant the JC. She is sued in her PERSONAL CAPACITY, in respect of actions taken as member of an administrative agency of the United States in regard to a matter that had been ordered transferred to the Judicial Council of the Third Circuit, but for which it refused to transfer. Accordingly, all actions for which liability is sought to be

imposed hereunder was outside the jurisdiction of the JC and Collins. She is not sued for any actions taken as a district court judge or for any judicial act.

8. IRMA E. GONZALEZ ("Gonzalez"); ROGER L. HUNT ("Hunt"), TERRY J. HATTER, JR. ("Hatter") and ROBERT H. WHALEY ("Whaley") are United States District Court judges. Together with McKeown, Gould, Rawlinson, and Thomas they are the identified as the "Current JC Judges" The Current JC Judges and Hug and Collins are the "2010 JC Defendants." They are sued in their PERSONAL CAPACITIES, in respect of actions taken as members of the JC, an administrative agency of the United States, in regard to a matter that had been ordered transferred to the Judicial Council of the Third Circuit, but for which it refused to transfer. For this and other reasons all actions for which liability is sought to be imposed hereunder was outside the jurisdiction of the JC and the 2010 JC Defendants. They are not sued for any actions taken as a judge or for any judicial act.

9. Defendant, MOLLY DWYER, ("the Clerk"), is sued in her official capacity as Clerk of the Ninth Circuit Court of Appeals. The only relief requested of her is the public release of documents in her control.

10. Defendant, the JUDICIAL COUNCIL OF CALIFORNIA, is an administrative agency of the State of California. Its headquarters are in San Francisco, CA. It is sued in its official capacity under the California Public Record Act.

11. Defendants, DOES 1-10, are individuals in the state or federal judiciary and who possess documents necessary and/or useful for Sanai to employ in his defense or knowledge required to be obtained by testimony, and/or who are proxies or catspaws for Kozinski.

INTRODUCTION

12. For more than two decades, former Chief Judge of the Ninth Circuit Kozinski sexually harassed and hazed his clerks, colleagues and third parties within his judicial chambers, the courthouses, and in public view. A significant minority of the district court judges and the federal circuit court judges in the Ninth Circuit knew this while it was ongoing, including all of the judges who served on the Ninth Circuit Judicial Council from 1998 to 2017, and all of the circuit court judges with chambers in Pasadena. *See, e.g.* J. Donohue, "I Was a Federal Judge. My Former Colleagues Must Stop Attending Federalist Society Events," *Slate.com*, November 12, 2019 ("A distinct minority of judges behaving outside the norms with the silent acquiescence of the judiciary is reminiscent of the recent judicial sexual harassment scandal. Then, as here, some judges were aware of a minority of colleagues in their midst engaged in offending conduct—yet said and did nothing. Because of their silence, sexual harassers harmed more victims, and the judiciary's reputation was stained when the scandal finally exploded.") One of Kozinski's most potent tools for sexual harassment was pornographic videos he streamed directly from pornographic websites on the Internet, and when that proved too risky, from a server he set up in his home and which he accessed with his computers in his chambers.

13. From no later than 1998 the members of the JC had become aware of Kozinski's improper use of the Internet and Kozinski's abuse of his clerks. However, rather than rein Kozinski in, at every step of the way the JC sought both the enable his access to pornography while concealing its knowledge of what Kozinski was using it for. By 2001 the issue had burst out in the open, thanks to Kozinski's shutting down a firewall blocking Internet access, and his picking a public fight with L. Ralph Mecham ("Mecham"), then the head of the Administrative Office of the United States Courts. The matter even spilled into a Congressional hearing.

14. Kozinski won the battle over unfettered access to pornography, in that the Judicial Conference agreed to stop tracking the identity of the large video files that were downloaded over the Ninth Circuit's Internet system, but Kozinski came to understand that there was no way to conceal or block system administrators from accessing his history of the pornography sites he visited from the Ninth Circuit's internal network. Around 2002, Kozinski set up a server at his home on which he placed his carefully curated pornography that he accessed via his computer in his chambers. At this point, the primary purpose of accessing the porn was to haze and sexually harass his female clerks. In 2005 Sanai discovered a different misuse by Kozinski of this server, and filed a judicial misconduct complaint against Kozinski. A year later, Judge Kozinski's predecessor as Chief Judge, Marie Schroeder, issued an order dismissing the complaint based on the fake finding of fact that Kozinski apologized for his misconduct; she also found that there was no evidence of the existence of this server or the documents on it. Sanai eventually discovered that the reason for Schroeder's denial of its existence was, as Schroeder and the members of the JC knew, that Kozinski was using it to stream pornography into his chambers, and the JC (on which Kozinski served) intended to enable this conduct.

15. Realizing that the JC would never take action, Sanai blew the whistle on Kozinski through the *Los Angeles Times*. Even though a pending misconduct complaint filed by Sanai addressed the existence of the server, Kozinski filed a misconduct complaint against himself. However, in a surprise move, Justice Roberts ordered that the complaint, and any other complaint covering the same subject matter, be transferred to the Third Circuit Judicial Council. The JC refused to transfer the pending complaint because it stated it was unrelated, but then stayed it because it found that it was in fact related to the transferred complaint.

16. Both Sanai and Mecham filed misconduct complaints against Kozinski for his pornographic misconduct. The Third Circuit stated that the complaints had to be filed with the JC, and then transferred. When the complaints were filed with

the JC, the JC violated Justice Roberts' order and refused to transfer Sanai's complaint because it found, that as to Sanai only, "exceptional circumstances did not exist", even though it covered the same subject matter as Kozinski's complaint against himself. Sanai contacted the Supreme Court, and the Clerk stated that Justice Roberts' order transferred jurisdiction of any complaint involving Judge Kozinski's pornography to the Third Circuit Judicial Council.

17. Because Sanai was excluded from participating in the Third Circuit proceedings, the result was a whitewash. In particular, based on Kozinski's testimony under penalty of perjury that he had never shown the contents of his porn server to anyone else, the Third Circuit Judicial Council found "credible" that Kozinski had not shown his pornography collection to any else; in fact, the members of the JC knew this to be false, and Sanai directly alleged otherwise and could have shown how it would be proved. Kozinski's false testimony constituted criminal perjury and judicial misconduct warranting impeachment and removal. It would also constitute grounds for him to be disbarred as California attorney.

18. With Kozinski and the JC having successfully quashed any investigation into Kozinski's accessing pornography to torment his clerks, Kozinski and the JC decided to use the full power and force of the prestige of their position to disbar Sanai. Sanai's misconduct complaints were assigned to Kozinski's best friend on the Court, and fellow pornography aficionado, Stephen Reinhardt. Judge Reinhardt found that claims against Kozinski were fully disposed of by the Third Circuit, and that the other claims which related to Kozinski's misconduct were merits related, even though the allegations explicitly demonstrated that they were not. Reinhardt stated that sanctions should be imposed on Sanai for filing a completely truthful and valid misconduct complaint.

19. The 2010 JC Defendants issued a published censure of Sanai as retaliation for filing his valid misconduct complaint and instructed that it be put to the California Bar Association.

20. Though Kozinski was not supposed to be handling this matter, he took over prosecution and gave instructions to Catterson. When the Office of Chief Trial Counsel of the California Bar Association ("OCTC") initially refused to take any public action, Catterson began a campaign of putting personal and legal pressure on it to file charges against Sanai. When the OCTC requested supporting documentation, Catterson explained that none would be provided, not even the misconduct complaints Sanai filed.

21. Catterson was informed, in writing, that without evidence or witnesses, it would be impossible to successfully prosecute Sanai. However, when a new, politically ambitious Chief Trial Counsel, Jayne Kim, was hired, Catterson improperly convinced her to file a complaint based not only the misconduct complaint case, but other ligation in which Kozinski had been interfering with both publicly and behind the scenes.

22. By 2014 the OCTC had created a strategy of bringing claims that were barred by the limitation rule and the evidence-less claim of the JC to trial. Sanai, defending himself, obtained dismissal of all but one charge when the OCTC rested in 2015. One charge was abated however.

23. Two years later, Kozinski's sexual harassment misconduct was laid bare by *The Washington Post*. Even though Kozinski's sexual misconduct was an open secret in the legal press—in part because Kozinksi sexually harassed comely female legal writers as often as his own clerks—his status as both a named and anonymous source, and gatekeeper for admission to lucrative speaking and networking opportunities, gave him protection from exposure by most legal beat reporters and legal columnists.[1] However, the reporter for *The Washington Post* was

[1] Three notable exceptions in 2005 were Cynthia Cotts of Bloomberg, Terry Carter of *The ABA Journal*, and in the face of repeated roadblocks by his editor, John Roemer of *The Daily Journal*. None of them currently hold these jobs. In contrast, the legal reporters and editors of *Slate, The New York Times* and *Wall Street Journal*

on the national security beat and had no relationship with Kozinski, and after interviewing persons with knowledge, including Sanai, he authored two devastating articles that forced Kozinski's resignation.

24. But even after Kozinski resigned, he still possesses sufficient sway with his friends in the Ninth Circuit to enact retaliation. Most notably, after Kozinski resigned, through the machination of Circuit Judges Ikuta and Reinhardt, he got his former daughter-in-law Leslie Hakala fired from her partnership position at K&L Gates in retaliation for her legal tactics in divorcing Kozinski's son, Yale Kozinski, as she sought information about Kozinski's sexual harassment history. Kozinski continues to wield power in the legal press thanks to his still vibrant relationships as an anonymous and background source for many reporters. Though all of the Current JC Judges and 2010 JC Defendants know that Kozinski committed perjury before the Third Circuit Judicial Council, they have refused to take any action to have discipline imposed on Kozinski as an attorney.

25. Kozinski's role as a litigator is a threat to due process. Kozinski is impervious to any kind of restriction or restraint in the Ninth Circuit Court of Appeals or the District Courts. He has the power to contact judges ex parte and to violate other rules and restrictions with impunity, because the JC and Court of Appeals has demonstrated it will not rein him in. Indeed, Kozinski can prevent any kind of punishment or discipline by threatening, directly or by implication, to reveal past Ninth Circuit judicial misconduct, including, most notably, the enablement by the 2010 JC Defendants of his sexual harassment. Kozinski's position as a lawyer who has a permanent judicial indulgence granting him impunity is a direct threat to the integrity of any legal proceedings in which he formally or informally participates. Who is going to stop him from calling his former clerk, Circuit Judge

---

were completely captured by Kozinski due to his acting as a source and his arrangement for speaking opportunities for reporters at high-profile legal functions.

Sandra Ikuta, about a case? After decades of protecting Kozinski from his misconduct, will Judge Schroeder report him to the bar for secretly asking her to grant some discretionary relief for one of his clients? The answers are "No one" and "No." These risks are exacerbated by the fact that the Ninth Circuit, unlike every other Circuit to have considered the issue, does not recognize or enforce an obligation on judges to disclose past or existing relationships with the parties in a case, their lawyers, law firms, or witnesses who will or have provided testimony or declarations.

26. Sanai has filed this lawsuit to obtain the following redress:

A. Vacatur of the censure order imposed against him by the Judicial Council, and its replacement with declaratory findings of fact setting out, with specificity, Judge Kozinski's sexual misconduct; identification of the person who enabled it and their roles and responsibilities; and full disclosure of how the JC quashed objections and complaints against Kozinski and retaliated against Sanai, Mecham and others;

B. disclosure of all documents relating to Sanai and the litigation addressed in his misconduct complaints, and Sanai in general;

C. an award of damages in favor of Sanai as against Kozinski, Catterson and the 2010 JC Defendants who acted outside their jurisdiction by imposing censure on Sanai, barring him from filing misconduct complaint in this matter, and seeking his disbarment while refusing to provide any evidence or testimony in support thereof;

D. Injunctive relief permanently enjoining the JC from imposing any sanctions for filing of misconduct complaints on any person;

E. Injunctive relief barring the Current JC Defendants and Collins from participating in any legal proceeding in which Sanai is a party, attorney or witness;

F. A declaratory judgment that there is probable cause to find that Kozinski committed perjury and referral the Ninth Circuit and California Bar Association to impose discipline, up to and including disbarment;

G. An injunction ordering the JC to promulgate effective rules and procedures requiring judges in the Ninth Circuit to **fully** disclose past and current relationships between the judges in which the case is proceeding and lawyers, law firms, identified witnesses, and parties in the case as and when disclosed to the judge; and

H. Relief under the California Public Records Act and the United States and California Constitutions to obtain documents from the Judicial Council of California.

COMMON ALLEGATIONS

The JC and Judicial Misconduct

27. The JC is a federal administrative agency. One of its responsibilities is to administrate the Judicial Conduct and Disability Act of 1980, 28 U.S.C. §§351-364 in the territory of the Ninth Circuit (the "JCDA"), under the quasi-appellate jurisdiction of the Judicial Conference of the United States. The JCDA was created as a supplement and aid for the power to remove judges established by the Constitution in Congress. Just as Congress' power of impeachment is outside the domain of due process, the JCDA created a system of investigation and judicial wrist-slapping that has no connection to due process. It is fundamentally inquisitorial and does not resemble "ordinary litigation".

> First, the need for finality has less relevance to the present circumstances than it does to litigation generally. In ordinary litigation, there is not only a strong interest in reaching a correct conclusion, but also an interest in achieving finality so that the parties may obtain repose and their dispute be finally settled. The need for finality arises both from the nature of an adversary system, which requires parties to pursue their own claims as they see fit, and from

the negative consequences of allowing a dispute to continue after a decision has been rendered in an initial, full adjudication. Parties to litigation are thus generally not allowed to revive fully adjudicated claims by serially advancing new legal theories not raised in earlier proceedings but involving the same underlying transactions.

By contrast, misconduct proceedings under the Judicial Conduct and Disability Act are adversarial only to the extent that they may be initiated by complaint and usually allow interested parties some opportunity to present their respective view of the events in question. **Fundamentally, however, misconduct proceedings are inquisitorial and administrative.** Chief circuit judges need not passively await the filing of complaints and then referee a contest between a complainant and a judge, bounded by the four corners of the complaint. Instead, chief circuit judges may "identify" and review complaints themselves. See 28 U.S.C. §§ 351(a)-(b), 352(a). **In addition, a complainant who has initiated a complaint does not have the full rights accorded a party to litigation. See 28 U.S.C. § 358(b). Indeed, the Act provides no mechanism for a complainant to withdraw a complaint. Thus, the Illustrative Rules "treat [ ] the complaint proceeding, once begun, as a matter of public business rather than as the property of the complainant. The complainant is denied the unrestricted power to terminate the proceeding by withdrawing the complaint."** Commentaiy to Illustrative Rule 19. Furthermore, Illustrative Rule 10(a) allows special committees, on which chief judges sit ex officio, the right to "expand the scope of the investigation to encompass" misconduct that is "beyond the scope of the complaint."

The inquisitorial nature of a misconduct proceeding is the direct result of the Act's adoption of a self-regulatory system in recognition of the need to maintain judicial independence, as opposed to a system in which misconduct complaints are adjudicated by an external tribunal. Under this self-regulatory regime, the responsibility of chief judges, special committees, judicial councils, and the Judicial Conference, must be to vindicate the process rather than adjudicate the rights of parties. Moreover, there cannot be public confidence in a self-regulatory misconduct procedure that, after the discovery of new evidence or a failure to investigate properly or completely serious allegations of misconduct, allows misconduct to go unremedied in the name of preserving the "finality" of an earlier, perhaps misfired, proceeding.

In re Manuel Real 517 F.3d 563, 567-68 (2008 Judicial Conf. of U.S.)(bold emphasis added).

28. Under this system, there is no separate investigation, no independent prosecution, and no impartial tribunal. The investigation, prosecution and adjudication are all combined. The JCDA was created to move the first line of judicial misconduct investigations and response from the House of Representatives to the judiciary itself. However, the implementation of this legislation by most of the Circuits has evolved into a mechanism for covering up and enabling judicial misconduct. This evolution arose in part from three features in the statute. Section 28 U.S.C. §352(b)(1) authorizes dismissal of a complaint if it "directly related to the merits of a decision or procedural ruling." This was interpreted to mean that the handling of a misconduct complaint itself could never be judicial misconduct, even though the JCDA is not a court. The second feature is that Congress implemented a requirement of confidentiality (though not privilege) that means complaints and orders dismissing them are stripped of any content allowing identification of the relevant judges. 28 U.S.C. §360. The third feature is that the Act allows dismissals for guilty judges if they apologize and promise to do better, often without public identification. Thus in one recent case, a Kansas District Court Judge who engaged in years of sexual harassing conduct and spurned his duties to appear in court sessions was let off with a warning, instead of being referred to the House for impeachment and removal, while the specific details of his misconduct have been kept secret from the public and Congress.

29. The federal courts have arrogated a new power. The JCDA's statutory language does not grant the Judicial Councils any power to impose sanctions or penalties on non-judges or complainants. Indeed, the JCDA identifies the kinds of disposition and actions a Judicial Council may take, and none of them include punishing whistleblowers. *See* 28 U.S.C. §§352, 354. Section 358 authorizes judicial councils to adopt "rules for the conduct of proceedings" under the Act. In

1986, a special committee of the chief judges of the courts of appeals formulated Illustrative Rules Governing Complaints of Judicial Conduct and Disability for circuit councils to consider adopting, which were revised in 2000. These rules do no provide for the imposition of sanctions or punishment on a complainant either. The Ninth Circuit's own local rules also do not provide for censure, punishment, or retaliation against a complainant. Thus there is no legal basis of any kind to take these actions, yet the JC does so as a means of retaliation.

30. The JC was the most zealous of all the Judicial Councils in utilizing the JCDA to enable judicial misconduct. It limited the number of pages of misconduct complaints, then dismissed most for failure to plead specific facts. When judicial misconduct was made public, misconduct complaints were pre-emptively filed by members of the JC and sham investigations held. A sterling example of this involved Nevada District Court James Mahan. In 2006 the *Los Angeles Times* published an expose of the Nevada court system, which included detailed allegations that Judge Mahan repeatedly appointed George Swartz, a business partner and political supporter, to lucrative positions as a receiver. Defendant Hatter filed a misconduct complaint against Mahan, and Mahan was cleared by the JC. The JC resolved the complaint, in the face of detailed allegations of wrongdoing, with the following: "Based on the investigation and report of the special committee, the Judicial Council concludes that many of the alleged personal connections were not of the nature or extent alleged. The Judicial Council further concludes the connection that did exist did not reasonably call into question the district judge's impartiality or ability to preside over the federal cases at issue...."

31. The policy of the JC from the 1990's onward, under the Chief Judgeships of Defendant Hug, Judge Mary Schroeder, Defendant Kozinski, and Defendant Thomas, was to utilize the JCDA system to protect Article III judges from misconduct complaints and if public questions arose, to issue orders clearing

them without conducting meaningful or good faith investigation.

32. This practice was, however, exposed by Kozinski. Manuel Real, a United States District Court judge who was appointed by Lyndon Johnson and only died last summer, realized during his service as Chief Judge of the Southern District of California that the JCDA system, combined with ordinary judicial immunity, insulated him from any repercussions from deciding cases according to his own private sense of right and wrong. Real began openly flouting both the law and Ninth Circuit resolutions of litigation, and as Chief Judge began transferring cases to himself that he wanted to be involved in. Even after Real lost the formal power to transfer cases to himself as Chief Judge, he used his power to deem cases "related" to effectuate transfer, and then decide the cases as he saw fit.

33. At some point in the 1990's Kozinski was personally offended by Real's repeated judicial thumbing of his nose at the Court of Appeals, and he began a campaign behind the scenes to force Real's retirement or removal.

34. Kozinski got his opportunity in *In re Canter,* 299 F.3d 1150 (9th Cir. 2002), where Real took control over the bankruptcy proceeding of a white collar felon whose probation he personally supervised to impose a permanent automatic stay on removing her from her home.

35. A judicial misconduct complaint was filed against Real, and as usual it was dismissed by Schroeder based on "corrective action".[2] In what can only be called a rhetorical and logical masterwork, Kozinski demolished the conclusions of his colleagues Chief Circuit Judge Schroeder, Circuit Judges Alarcon, Kleinfeld, William Fletcher and Defendant McKeown, who along with four district court judges ruled that that the complaint against Judge Real should be dismissed. Judge Kozinski wrote the following prescient analysis:

---

[2] *See In Re Complaint of Judicial Misconduct (Real),* 425 F.3d 1179 (9th Cir. 2005).

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.

In re Complaint of Judicial Misconduct (Real), 425 F.3d 1179, 1183 (9th Cir. 2005)(Kozinski, C.J., dissenting).

36. By writing a brutally incisive dissent to the efforts of Judge Schroeder and eight other members of the JC to "see no evil" in regards to Judge Real, Kozinski broke the code of silence that ensured that judicial misconduct and corruption went unpunished in the Ninth Circuit. Judge Kozinski's dissent forced Schroeder to reopen the investigation, and Judge Real was found guilty. He took the matter to the Judicial Conference. To address Judge Real's misconduct, the Judicial Conference crafted a new rule that persistent rejection of judicial precedent was misconduct, but then found that Judge Real was not YET guilty of that. *See In re Manuel Real,* 517 F.3d 563, 567-68 (2008 Judicial Conf. of U.S.)

37. The investigation of Judge Real was the sole exception to the JC's policy of using the judicial misconduct mechanism to enable and facilitate judicial misconduct, rather than quash it—and it only acted because Kozinski forced it to do so.

Alex Kozinski and Pornography in Court

38. The Ninth Circuit was aware no later than 1998 that it had a significant and ever growing problem involving employees of the federal judiciary using government-owned computers to download pornography. The heaviest user of pornography for browsing purposes was Kozinski. Kozinski utilized pornography for three purposes. First, his sexual titillation. Second, he enjoyed using it as a tool to harass women. Third it was a way of testing women's limits to his sexual approaches. When Mecham and the former Ninth Circuit executive Greg Walters proposed firewalls and tracking and blocking software, Kozinski opposed it. The Judicial Conference took responsibility for this program and implemented a monitoring system that showed significant and increasing downloading of music and

video files, some of which the late Judge Edwin Nelson believed included child pornography. The system also identified to system administrators the streaming or downloading of large files. Judge Kozinski's computers in his chambers were identified as downloading or viewing pornography.

39. In 2001, the monitoring system and firewall was disabled unilaterally in San Francisco. Who did this is a matter of dispute. Mecham publicly accused Judge Kozinski of taking this action personally and suggests that this constituted criminal activity. The late Judge Nelson ascribed it to the Ninth Circuit's executive committee acting unilaterally. Defendant Thomas claimed that the entire JC unanimously approved the action. Whatever the case, Kozinski was the moving force behind this action, and his motivation was to continue to obtain access to pornography in his chambers. It is undisputed that the 11th Circuit and 10th Circuit, which shared the firewall, had no idea this was being done; more important, if the motivation of the action was to allow de facto unfettered access to pornography by crippling the monitoring system, then the action was wrongful no matter how many judges approved it.

40. This action triggered infighting that gained the attention of Congress and a Congressional hearing. Kozinski was losing the war, and directly attacked Mecham in print in the Wall Street Journal. *See* A. Kozinski, Privacy on Trial, *Wall Street Journal,* September 21, 2001. In that article, Judge Kozinski represented to the world the following:

> The policy Judge Nelson seeks to defend as benign and innocuous would radically transform how the federal courts operate. At the heart of the policy is a warning–very much like that given to federal prisoners–that every employee must surrender privacy as a condition of using common office equipment. Like prisoners, judicial employees must acknowledge that, by using this equipment, their "consent to monitoring and recording is implied with or without cause." Judicial opinions, memoranda to colleagues, phone calls to your proctologist, faxes to your bank, e-mails to your law clerks,

prescriptions you fill online–you must agree that bureaucrats are entitled to monitor and record them all.

This is not how the federal judiciary conducts its business. For us, confidentiality is inviolable. No one else–not even a higher court–has access to internal case communications, drafts or votes. Like most judges, I had assumed that keeping case deliberations confidential was a bedrock principle of our judicial system. But under the proposed policy, every federal judge will have to agree that court communications can be monitored and recorded, if some court administrator thinks he has a good enough reason for doing so.

Another one of our bedrock principles has been trust in our employees. I take pride in saying that we have the finest work force of any organization in the country; our employees show loyalty and dedication seldom seen in private enterprise, much less in a government agency. It is with their help–and only because of their help–that we are able to keep abreast of crushing caseloads that at times threaten to overwhelm us. But loyalty and dedication wilt in the face of mistrust. The proposed policy tells our 30,000 dedicated employees that we trust them so little that we must monitor all their communications just to make sure they are not wasting their work day cruising the Internet.

How did we get to the point of even considering such a draconian policy? Is there evidence that judicial employees massively abuse Internet access? Judge Nelson's memo suggests there is, but if you read the fine print you will see that this is not the case.

Even accepting the dubious worst-case statistics, only about 3% to 7% of Internet traffic is non-work related.

41. Kozinski's published statements were misleading, and the members of the JC in 2001 knew it. The Judicial Conference only identified and surveilled large files, which were almost entirely video files. The problem that the Ninth Circuit was facing was not pornography viewed by employees on their own, it was Kozinski's own bizarre sexual fetishes. However, none of the members of the JC at the time stepped forward to correct Judge Kozinski's false statements.

42. The members of the JC who were appellate judges from 1998 onwards were also aware that Kozinski was accessing the pornography as part of his hazing

and sexual harassment of clerks. Some of the judges were forwarded the material by Kozinski, but most heard of it second hand, through their clerks, who either witnessed it directly or heard gossip from other clerks. In particular, Defendant Thomas heard regular comments on this topic from staff.

43. Kozinski succeeded in keeping open access to pornography, and the Judicial Conference agreed to stop its review of large video files he downloaded or streamed. However, as part of this settlement of the dispute, Kozinski was informed that there was no way to stop internal tracking of his access to pornography **websites**, even if the files themselves were not identified. Kozinski was in particular worried that Greg Walters, the Circuit Executive who had been following the instructions of Mecham and the Administrative Office of the Courts, would formally blow the whistle on both his consumption of pornography and mistreatment of court personnel.

44. From at least 1998, the JC was aware, from information provided by monitoring, that Kozinski was the heaviest user of pornography based on identification of "high-volume files", e.g. porn videos, downloaded by Kozinski. In addition, his close friends on the bench, in particular Judges Reinhardt and Ikuta, were aware of it and had watched it with him. Virtually all of Judge Kozinski's clerks had been made to watch pornography, and Kozinski had invited, or in some cases, as a "joke", compelled, other clerks from other chambers in Pasadena to watch pornography. All of the Circuit Judges who had chambers in Pasadena were aware from being informed by their clerks of Judge Kozinski's behavior in this regard by 2007. In addition, beginning in that time period, professors at elite law schools began receiving feedback from clerks and externs about Kozinski's predilections.

45. After 2001, Judge Kozinski, realizing that his access to pornography websites would be tracked by system administrators, decided on a new mechanism

for viewing and distributing pornography. He set up a home server and placed his favorite, curated pornography and other materials on it, along with his public writings and other material he wanted to distribute outside the Court email system. This server, set up around 2002, made it impossible for the Court's internet service monitoring system to determine what it was that Kozinski was accessing, since all that would be reported would be accesses to Kozinski's website and server, and the Administrative Office of the Courts was barred from looking at the contents of the videos streamed or downloaded by Kozinski.

46. In 2005 Sanai submitted an opinion piece to *The Recorder* of San Francisco concerning the ongoing controversy over citation of unpublished opinions.[3] He addressed a matter of great public interest that was about to be decided by the Judicial Conference, then-proposed (and now adopted) Federal Rule of Appellate Procedure 32.1. Kozinski's testimony to Congress on this subject was cited by Sanai as representing the view of those opposing citation of unpublished opinions, and Howard Bashman's commentary was quoted as representative of the side favoring citation. Sanai also urged the Court to grant more rehearings en banc to settle perceived or actual conflicts in Ninth Circuit authority, starting with the conflicts surrounding the Court's *Rooker-Feldman* precedent.

47. It was while researching Kozinski's views on the subject of citation of unpublished appellate dispositions that Sanai first came across alex.kozinski.com, specifically the directory alex.kozinski.com/articles/. There were numerous links discoverable by Google to articles in this directory, some of which had clearly been supplied by Judge Kozinski himself.

48. Four days after Sanai's article was published, the Judicial Conference decided the issue in favor of permitting citations. Judge Kozinski was quoted

[3] C. Sanai, *Taking the Kozinski Challenge,* The Recorder, September 16, 2005

condemning this move by the Judicial Conference, and expressing his hope that the Supreme Court would reject it.[4]

49. Two days later, Judge Kozinski published his response to Sanai's article in *The Recorder*.[5] Judge Kozinski laid out a response to the arguments in the pending petition and a novel analysis of the Ninth Circuit's past precedent concerning the *Rooker-Feldman* doctrine.

50. Kozinski's article did not address the primary subject of Sanai's article, which is the citation policy of the Ninth Circuit. It ignored Sanai's discussion of the debate between the majority and dissent over what constitutes binding precedent in the Ninth Circuit.[6] Kozinski focused the first part of his article solely on trying to rebut Sanai's contentions that there is a severe conflict in the Ninth Circuit's authority concerning the *Rooker-Feldman* doctrine, a fact so obvious that District Court judges have commented on it.[7] He began the second part of his article as follows:

---

[4] Tony Mauro, *Cites to Unpublished Opinions Ok'd,* Legal Times, September 21, 2005

[5] Alex Kozinski, *Kozinski Strikes Back,* The Recorder, September 23, 2005.

[6] *See Barapind v. Enomoto,* 400 F.3d 740, 751 fn. 8 (9th Cir. 2005)(en banc).

[7] The specific legal issue that was addressed in *Taking the Kozinski Challenge* was whether the Ninth Circuit was following its own precedent that the *Rooker-Feldman* doctrine does not apply to non-final interlocutory orders challenged while the case was in litigation in state court. Sanai stated that the Court was not following its own precedent; Kozinski contended that Sanai was not telling the truth. Kozinski's contentions were completely dishonest, as discussed in a subsequent order by a Ninth Circuit District Court Judge:

> With respect to the Injunctive Orders, they appear to be non-final, interlocutory orders. In 2001, the Ninth Circuit held that *Rooker-Feldman* applies to interlocutory orders. *See Doe & Assocs. Law Offices v. Napolitano,* 252 F.3d 1026, 1030 (9th Cir. 2001) (approving of *Richardson v. D.C. Ct. of App.,* 83 F.3d 1513, 1515 (D.C. Cir.

> Despite his colorful language, Mr. Sanai's article raises no legitimate question about whether the Ninth Circuit has been derelict in following circuit or Supreme Court precedent. But the article does raise serious issues of a different sort. Mr. Sanai's article urges us to "grant en banc rehearing of the next decision, published or unpublished, which asks the court to resolve the split among *H.C., Napolitano* and *Mothershed*." A petition for en banc rehearing raising this very issue crossed my desk just as Mr. Sanai's article appeared in print. The name of the case? *Sanai v. Sanai.* A mere coincidence of names? Not hardly. The petition, signed by Mr. Sanai, cites the same cases and makes the same arguments as his article — including the reference to "Catch-22."

Kozinski Strikes Back, supra.

51. Judge Kozinski placed case-related documents on his personal website, www.alex.kozinski.com, and had the web version of his article link to the .pdf file of the selection of these documents on his website. Subsequently, Judge Kozinski's wife revealed that Judge Kozinski's actions was motivated not just by the litigation

---

> 1996)). In 2005, relying on *Exxon Mobil Corp. v. Saudi Basic Indust. Corp.,* 544 U.S. 280 (2005), the Ninth Circuit stated that *Rooker-Feldman* only applies after state court proceedings have ended, i.e. "when the state courts finally resolve the issue that the federal court plaintiff seeks to relitigate in a federal forum. . . ." *Mothershed,* 410 F.3d at 607 n.3 (amended opinion). After 2005, however, the Ninth Circuit in several unpublished cases cited *Doe & Assocs.* for the proposition that *Rooker-Feldman* applied to interlocutory orders. *See, e.g., Hanson v. Firmat,* 272 Fed. Appx. 571, 572 (9th Cir. 2008); *Melek v. Kayashima,* 262 Fed. Appx. 784, 785 (9th Cir. 2007); *Bugoni v. Thomas,* 259 Fed. Appx. 11, 11-12 (9th Cir. 2007); *see also Ismail v. County of Orange,* 2012 U.S. Dist. LEXIS 65793, *25-*26 (C.D. Cal. Mar. 21, 2012); *cf. Marciano*, 431 Fed. Appx. at 613 (discussing only *Mothershed*).
>
> The Court is not convinced that the parties have adequately addressed *Rooker-Feldman*. The parties have not discussed or even cited *Mothershed* or *Doe & Assocs*.

CMLS Management, Inc. v. Fresno County Superior Court, No. 11-cv-1756-A WI-SKO, 2012 WL 2931407 (E.D. Cal. July 18, 2012) at *10.

Kozinski addressed in the article, but also by Sanai accomplishing the exceptionally rare removal for misconduct of a well-connected Los Angeles County Superior Court Judge (and Kozinski friend), Elizabeth Grimes, from a completely separate case, *Sanai v. Saltz*.[8]

52. Sanai filed a judicial misconduct complaint against Judge Kozinski in October of 2005. The order concerning the complaint was issued on December 19, 2006, more than 14 months later.[9] It terminated the complaint on the grounds (a) that corrective action had been taken as to Judge Kozinski's publication in the *Recorder,* and (b) there was no evidence of any website controlled by Judge Kozinski which held such materials.

53. A key fact in the complaint was that Judge Kozinski had scanned in documents from the record of a case not before his Court, and linked the documents to the on-line versions of his article at the website "law.com". Various .pdf scans were placed on alex.kozinski.com.[10]

54. The *Recorder* and law.com site made its web-based articles available for a period of one year, then erases them. Accordingly, the Kozinski article and the link to the .pdf files he had published are no longer accessible on the site.

---

[8] *See* Letter from Judge Kozinski's wife, Marci Tiffany, patterico.com/2008/06/16/alex-kozinskis-wife-speaks-out.

[9] *In Re Complaint of Judicial Misconduct (Kozinski),* No. 05-89098 (2006)

[10] Though the evidence of Judge Kozinski's publication of case-related materials is no longer on the law.com site, it was available on the well-known blog *How Appealing,* which is financed by the law.com site but run separately by Howard Bashman. Amazingly enough, after almost twenty years, the online version of the article captured by Mr. Bashman is still found at http://pda-appellateblog.blogspot.com/2005_09_01_pda-appellateblog_archive.html. The on-line version of the article has a link, "read the pdf". This link points to the link /alex.kozinski.com/judge.thibodeau.pdf. The site alex.kozinski.com itself has been rendered inaccessible; the "How Appealing" link is a proxy server snapshot that is holding an image of the original link.

55. Judge Schroeder wrote that her limited inquiry "found no posting of complainant's case-related information on any website maintained by the judge", a finding she could only have made without fear of immediate contradiction after the article was erased on the law.com site. She was not aware, however, that Bashman would continue the host a copy of the on-line version, including its link to Judge Kozinski's website, to this day. *See* footnote 9, *supra.*

56. Schroeder's delay of more than one year caused the loss of the evidence about contents of the .pdf that Kozinski put on the internet, but not the link itself, thanks to Mr. Bashman. As the chief circuit judge at the time, Judge Schroeder was charged under the Judicial Discipline Rules then in effect with evaluating a complaint and dismissing it or finding it is moot and concluding the proceeding pursuant to Section 352(b) of Title 28, or appointing a special committee to investigate the charges pursuant to Section 353 thereof. In particular Section 352(a) of Title 28 of the JCDA states that the "chief shall expeditiously review any complaint...." This standard has been determined to mean 60 days from filing.

57. Schroeder made the explicit factual finding of "no posting of complainant's case-related information on any website maintained by the judge." This finding of fact is contrary to the truth. The online version of Judge Kozinski's article on the Recorder's website, "law.com" included a link to the site alex.kozinski.com The link was active when Sanai filed the complaint, and at least a month thereafter. Schroeder's delay resulted in the elimination of that article from the law.com site proper, but not from the related but separately-managed "How Appealing" site.

58. Schroeder and the appellate members of the JC at the time were aware that Kozinski had shifted his pornography viewing to his server, and was using this pornography for his continued hazing and sexual harassment of his clerks. Judge Schroeder took these actions to give Kozinski time to take his website off-line and

scrub the contents. Schroeder was aware from her communications with Kozinski about Sanai's complaint that Kozinski needed time for most of the evidence to disappear, which she willingly gave him.

59. Sanai filed a petition to review Judge Schroeder's order, which was denied by the JC with its form order. Sometime in 2007, Judge Kozinski concluded that it was safe to reactivate the alex.kozinski.com website, which he needed in order to resume watching pornography in his chambers and to force his clerks to watch it. He therefore brought the site back on-line and began distributing links to the portion of the site which includes his articles, including a .pdf scan of the paper version of the "Kozinski Strikes Back" article. (The paper version differs from the on-line version in one important respect—the online version included a hyperlink to case materials posted by Judge Kozinski on alex.kozinski.com/judgethibodeau, which materials have either been moved or removed, while the paper version obviously had no such link).

60. Sanai filed a second judicial misconduct complaint in November of 2007 regarding Judge Kozinski's redistribution of "Kozinski Strikes Back". Judge Kozinski, now Chief Judge, assigned the matter to Judge Schroeder, who, true to form, sat on it. Kozinski also fired Greg Walters and appointed Catterson, a Kozinski acolyte, as Circuit Executive in retaliation for Walters' efforts to halt pornography in the Ninth Circuit and to ensure that there was no administrator independent of Kozinski who would act to stop his sexual harassment of clerks and other persons.

61. The more Sanai thought about the treatment of Kozinski's alex.kozinski.com site, the more puzzled he became. Why did Judge Schroeder pretend the site did not exist? Why did Kozinski take the site down, then put it back up? On the night before Christmas Eve, after putting his children to sleep with tales of the excitement of the next day, Sanai decided to find out what Kozinski

might be distributing via alex.kozinski.com website, so he entered "alex.kozinski.com" into the Google search engine.

62. Sanai found the reason Judge Kozinski and the JC refused to acknowledge the existence of the alex.kozinski.com site: reams of pornography that Kozinski was distributing. Sanai passed the information to John Roemer of *The Daily Journal.* His editors killed the story, but Terry Carter of *The ABA Journal* began working on it. At this time, Kozinski had muscled his way into presiding over the trial of Ira Isaacs, a distributor of the "Two Girls One Cup" scatological video. Around mid-October 2007, video-sharing sites including YouTube were flooded with videos of the reactions of first-time viewers of the video. *See, e.g.,* Agger, Michael (January 31, 2008). "2 Girls 1 Cup 0 Shame". *Slate.com.* Kozinski obtained great pleasure from harassing his own clerks by forcing them to watch pornography, so to him, "Two Girls One Cup" was the "Citizen Kane" of the Internet. Kozinski knew that if he presided over the Ira Isaacs trial, he would have an excuse to force his own clerks to watch "Two Girls One Cup" with the pretext of asking them whether they found it obscene. When Sanai read the article about Judge Kozinski presiding over the trial, he tipped of the *Los Angeles Times. Los Angeles Times* reporter Scott Glover independently accessed the site and apparently found files and documents that had been placed in the directory after Sanai had done his downloading and thus saw documents that Sanai never saw. Kozinski recused himself from the Ira Isaacs trial.

63. When the *Los Angeles Times* broke the story, Kozinski filed a misconduct complaint against himself. Justice Roberts issues an order transferring that complaint, and any future complaints related to the same events, to the Third Circuit.

64. Sanai filed a third complaint with the Ninth Circuit, but because Sanai had alleged additional facts pointing out what Judge Kozinski did with the

pornography—distributing it across the internet—the JC violated Justice Roberts' order and stayed his complaints by order signed, *inter alia,* by defendants Thomas, McKeown, Gonzalez, and Hatter.

65. As the world now knows, the investigation of Kozinski by the Third Circuit was a complete whitewash, as the only witness interviewed or called was Kozinski. Kozinski testified that he never showed anyone the pornography on his server, which was, on its face preposterous—why put it on a server connected to the Internet with Apache Internet server software installed and operative if not to be accessed by the Internet? Even while Kozinski was (theoretically) under investigation he was using his website to distribute pornography in his chambers, terrorizing his clerk Heidi Bond. *See* http://www.courtneymilan.com/metoo/kozinski.html. Though Kozinski's behavior was an open secret, the only witness called by the Third Circuit was Kozinski himself. Sanai's submission to the investigative committee of the Third Circuit explaining how to find the access Kozinski made via his chambers computers was ignored, and the committee never spoke to Sanai.

66. But once Kozinski had been "cleared" the JC began its campaign of retaliation. First it assigned investigation of Sanai's complaint to Kozinski's best friend on the Court, Stephen Reinhardt. It then censured Sanai and, through Catterson, began a campaign of written and verbal pressure to disbar Sanai.

67. The 2010 JC Defendants issued a published censure of Sanai as retaliation for filing his valid misconduct complaint and instructed that it be put to the California Bar Association (the "Censure Order"). The JC lacked jurisdiction to issue the Censure Order on two grounds. First, the misconduct complaints had been required by order of Justice Roberts to be transferred to the Third Circuit Judicial Council. Second, Congress never granted any Judicial Council or the Judicial Conference the power to censure or sanction anyone; indeed, had it done so, the

JCDA would be unconstitutional, as it does not afford complainants minimum due process rights to prove the validity of their complaints.

68. Though Kozinski was not supposed to be handling this matter, he took over prosecution and gave instructions to Catterson. When the OCTC initially refused to take any public action, Catterson began a campaign of putting personal and legal pressure on the OCTC to file charges against Sanai. When the then-Chief Trial Counsel of the OCTC wrote back asking for supporting documentation, Catterson explained that none would be provided, not even the misconduct complaints Sanai filed.

69. Catterson was informed, in writing, that without evidence or witnesses, it would be impossible to successfully prosecute Sanai. However, when a new, politically ambitious Chief Trial Counsel, Jayne Kim, was hired, Catterson convinced her not to hold any independent investigation, as this would have required issuing a subpoena to the JC, reviewing the documents, and discovering that the characterization of the contents of Sanai's complaints in the Censure Order was false. Because both Catterson and the OCTC knew a charge based solely on the Censure Order would fail, Catterson, on behalf of Kozinski and the 2010 JC Defendants, assembled other meritless charges that had been previously asserted against Sanai years ago and dismissed, relating to ligation in which Kozinski had been interfering in both publicly and behind the scenes.

70. By 2014 the OCTC finalized a strategy of bringing claims that were barred by the limitation rule and the evidence-less claim of the JC to trial. Defending himself, Sanai obtained dismissal of all but one charge. The State Bar Court judge wrote about the charge relating to the reporting of judicial misconduct that:

> In this count the State Bar alleges that between October 2008 and September 2010, Respondent "filed and maintained formal judicial complaints with the Ninth Circuit Judicial

Council against approximately 19 federal judges, when such complaint were frivolous and made for improper reasons . . . . " It alleges that the filing of these complaints constituted acts of moral turpitude.

In his motion, Respondent argues that the evidence received by this court is insufficient to establish clear and convincing evidence to support this count.

The State Bar did not put in evidence the complaints actually filed by Respondent against the federal judges. **In response to this court's inquiry, it was informed by the State Bar that it was unable to do so due to the Ninth Circuit's refusal to provide those complaints to the State Bar.** Being unable even to read the complaints filed by Respondent, this court cannot conclude that any of those complaints were filed frivolously or constituted an act of moral turpitude. **To the extent that this court is aware of the content of one of those complaints, the record shows that it was apparently justified and resulted in a formal apology by the judge and a self-administered recusal by him from the pending matter involving Respondent.**

71. In a subsequent order dismissing more charges, the State Bar Court judge wrote as follows:

In 2010, a complaint was made to the State Bar by the Judicial Council of the Ninth Circuit regarding Respondent's purportedly frivolous complaints to it about a number of federal judges. This complaint by the Judicial Council of the Ninth Circuit subsequently formed the basis for Count 6 of the pending NDC. When the complaint was received, the State Bar opened case No. 10-0-09221 (the '10 case) and contacted Respondent about the matter. **Then, after learning that the Judicial Council of the Ninth Circuit would not release to the State Bar the actual complaints filed by Respondent against the federal judges, the State Bar decided to issue a warning letter to Respondent in November 2011, and closed the case.[7] (Ex. 1040.) That decision was explained, both orally and in writing, by the State Bar to Cathy Catterson, a representative of the Judicial Council of the Ninth Circuit, on November 8, 2011. (Ex. 1041). Thereafter, she**

complained of the State Bar's decision in a letter, dated January 19, 2012, directed to the then Acting Chief Trial Counsel of the State Bar.

[7] The State Bar had previously notified the Judicial Council of the Ninth Circuit in May 2011 that it would be difficult to pursue any complaint that Respondent's complaints against various federal appellate justices were frivolous without having access to the actual underlying complaints. As stated by the State Bar at that time: "As you may be aware, to prevail in State Bar disciplinary proceedings, our office must prove by clear and convincing evidence that an attorney committed willful misconduct. Although the Judicial Council's order of September 30 2010, will certainly be a useful piece of evidence to establish that Mr. Sanai engaged in misconduct by filing frivolous misconduct complaints, it would be insufficient standing alone to prove by clear and convincing evidence that Mr. Sanai engaged in misconduct warranting discipline, especially since the order does not include any specific findings of fact but rather includes only the conclusion that Mr. Sanai abused the misconduct complaint procedure." (Ex. 1039, p. 2.)

[8] Given the State Bar's inability to provide this court with a copy of the actual complaints filed by Respondent against the federal judges, this court – as accurately predicted by the State Bar in May 2011 – eventually dismissed that count at trial due to the State Bar's failure to provide clear and convincing evidence that those complaints were frivolous. The evidence was not sufficient even to enable this court to identify all of the judges against whom complaints had been filed.

72. Defending against the last pending charge requires Sanai to issue or enforce subpoenas to Kozinski, Catterson, Dwyer (as Clerk) and the JC. One of Sanai's defense theories focuses on the documented link between Kozinski's retaliatory conduct and *Sanai v. Saltz*, which was first publicly revealed in a post by Kozinski's then-wife, Marcie Tiffany. Another rests on the prosecutorial misconduct of bringing the charge urged by the JC when the OCTC predicted it would fail without evidence from the JC, and refusing to conduct an independent investigation. The trial is set to resume in February

of 2020. In September of 2019, OCTC stipulated in on the record that the charges that were dismissed will not be subject of an appeal. Accordingly, the dismissals of all but one of the charges are final.

73. The meritoriousness of Sanai's misconduct complaints was confirmed a decade after Sanai discovered Kozinski's pornography when a *Washington Post* national security reporter, having heard rumors about Kozinski, contacted Sanai and others and published a blockbuster pair of articles showing that Kozinski had been openly sexually harassing his clerks and third parties for years, with this pornography-laded server exposed by Sanai 13 years previously a major tool. This exposure had many consequences.

74. Facing a misconduct complaint that was transferred to the Second Circuit, Judge Kozinski resigned in disgrace, and started practice law before the Ninth Circuit Court of Appeal, appearing for the first time last week. His appearance was met with anger and consternation in the legal community.

75. Judge Kozinski's former clerk and daughter in law, Leslie Hakala, was the subject of direct retaliation by Kozinski after he resigned through Circuit Judges Reinhardt and Ikuta. Ms. Hakala was married to Judge Kozinski's eldest son Yale, and she was a long-time employee of the SEC in Los Angeles. Approximately four years ago she obtained a coveted partnership at K&L Gates; approximately three years ago her marriage fell apart, and she filed for divorce from Yale Kozinski. The divorce was extremely bitter, as Ms. Hakala was the breadwinner. When *The Washington Post* articles came out in December of 2017, her counsel sought to subpoena Judge Kozinski to obtain information about his treatment of Ms. Hakala in the context of the legal battles. The younger Kozinski then acceded to Ms.

Hakala's demands and the divorce was settled. After Hakala played the #metoo card and the divorce was finalized, several judges with personal relationship with attorneys at K&L Gates, including Judge Kozinski's close friend, the late Stephen Reinhardt, and Kozinski's former clerk, Circuit Judge Sandra Ikuta, independently communicated, directly and/or indirectly, to K&L Gates partners that Ms. Hakala's continued presence at the firm would injure its representation of its clients in federal court. Ms. Hakala was then fired.

76. In December of 2017 Sanai filed a motion with the JC to vacate the Censure Order based on the revelations regarding Kozinski and rejection of its complaint by the California Bar. The motion has never been addressed, and is technically still pending.

FIRST COUNT

INJUNCTIVE RELIEF FOR VIOLATION OF CONSTITUTIONAL RIGHTS

(By Sanai as Against the JC, Dwyer, Kozinski, Catterson and the 2010 JC Defendants)

77. Sanai hereby incorporates by this reference paragraphs 1 through 76 as if set forth in full.

78. The imposition of the Censure Order; the refusal to provide any relevant documents to Sanai after a subpoena was issued; and the prosecution of a bar complaint while withholding evidence violated Sanai's right to due process under the law.

79. The Censure Order was unconstitutional, because the JCDA does not give the JC jurisdiction to issue such orders, and the JCDA does not give complainants due process rights to prove their complaints or even an independent, impartial tribunal with notice of evidence used against a complainant. Indeed, after filing a complaint, the evidence uncovered by any investigation is kept secret. Now

that the disposition of Sanai's complaint was proven to be erroneous—as Sanai's accusations of intentional distribution of pornography by Kozinski have been shown to be true—Sanai still has no right to have the Censure Order vacated under the JC's own practices and procedures.

80. The JC and Catterson's filing of a state bar complaint while withholding evidence and refusing to testify was a violation of Sanai's right to a fair trial in State Bar Court. Though the State Bar Court dismissed all but one of the charges, Sanai is entitled, as a matter of due process, to disclosure of all documents which refer, relate or pertain to his misconduct complaint, the litigation referenced therein, and all records of efforts by the 2010 JC Defendants, Catterson, and Kozinski to disbar Sanai or otherwise retaliate against him. These documents are necessary for Sanai to mount his defense that the last charge made by the OCTC should be dismissed due to prosecutorial misconduct and because it arose from illegal judicial retaliation, and to ensure that the State Bar proceedings can serve, at least in part, as a name-clearing hearing. The refusal of Catterson and the JC to provide this information was a violation of due process, and indeed obstruction of justice.

81. Sanai was professionally injured by the Censure Order and suffered humiliation, anger and outrage over the unjust imposition of censure and the false characterization of his misconduct complaint. Sanai has lost income from clients discouraged from hiring him as an attorney based on the false statements about his conduct made by the 2010 JC Defendants. Sanai also has a constitutionally-protected interest in his professional reputation that he may seek to redeem by a name-clearing hearing, both in State Bar Court and in via this proceeding.

82. Now that it has been proven to be incorrectly issued, and Sanai prevailed in the bar proceedings on the complaint filed by Catterson on behalf of the 2010 JC Defendants, he is entitled to injunctive relief to restore his reputation by a name clearing hearing in this Court and to defend against the last charge in his bar

proceedings. First, after a full evidentiary hearing or trial, a mandatory injunction should be entered requiring the JC to vacate the Censure Order and in its place publish the declaratory judgment requested in the Third Count of this Complaint. All Defendants should also be ordered to hand over all documents (including emails and telephonic messages) that:

A. Refer, relate or pertain to Sanai;

B. Refer or relate to any litigation referenced in his misconduct complaints filed with JC;

C. Refer relate or pertain to the interactions between Catterson and OCTC and Catterson and Kozinski;

D. Refer, relate or pertain to Kozinski's battle over the firewall;

E. Refer, relate or pertain to Kozinski's treatment of his clerks.

83. The public interest is strongly in favor of granting relief. Victims of Kozinski, academics, and senators all expressed disappointment and anger that the full story of Kozinski's decades of misconduct would not be exposed and that, after committing serious misconduct, he freely practices before the Ninth Circuit Court of Appeals. While the judicial misconduct process will never expose the true facts regarding Kozinski, the JC, by imposing the Censure Order, has given Sanai standing to reveal by adversarial litigation what the JC sought to conceal. For this reason, should the JC initiate a misconduct proceeding to investigate any of the allegations herein, this Court must enjoin such proceedings until after completion of this lawsuit. Such an injunction is necessary to prevent the judicial misconduct process from being once again used to falsely vindicate the 2010 JC Defendants and other enablers of Kozinski.

84. Because the 2010 JC Defendants acted with malicious intent to injure Sanai in order to protect Kozinski from exposure of how he used pornography to sexually harass his clerks, there is an unconstitutional risk of lack of impartiality if any of the Current JC Judges or Collins is assigned to a case in which Sanai is

counsel or a party. The Court should impose an injunction barring the Current JC Judges and Collins from participating as a judge or justice in any way in a matter involving Sanai, as party or attorney. It is a certainty that Judge Kozinski will use every resource at his command to fight this lawsuit and retaliate against Sanai. Kozinski's modus operandi for retaliation in the past has been through proxies, who included the late Stephen Reinhardt (against both Sanai and Hakala) and Catterson. Kozinski must be enjoined from doing so, and be forced to reveal his machinations.

85. The Court should also impose an injunction barring the JC from imposing any kind of sanction or penalty on any judicial misconduct complainant as such sanctions are not authorized under the JCDA or any rules. The JC should also be ordered to promulgate effective rules and procedures requiring judges in the Ninth Circuit to fully disclose past and current relationships between the judges in which the case is proceeding and lawyers, law firms, identified witnesses, and parties in the case as and when disclosed to the judge.

SECOND COUNT

MANDAMUS

(By Sanai as Against the JC)

86. Sanai hereby incorporates by this reference paragraphs 1 through 76 as if set forth in full.

87. The imposition of the Censure Order and the prosecution of the State Bar complaint was outside the jurisdiction of the JC, in bad faith and irrational.

88. A district court may issue an order compelling a governmental agency to perform a non-discretionary act, or vacate or correct actions outside of its jurisdiction, by way of mandamus. 28 U.S.C. §1361. A district court also has authority to confine another agency to its proper jurisdiction by way of mandamus under the All Writs Act.

89. It is clear that the JC lacks jurisdiction to impose any kind of sanction on complainants. This is because, in addition to the plain language of the JCDA, the JCDA does not give complainants due process rights to prove their complaints or even an independent, impartial tribunal. Indeed, after filing a complaint, the evidence uncovered by any investigation is kept secret. Now that the disposition of Sanai's complaint was proven to be erroneous—as Sanai's accusations of distribution of pornography by Kozinski within the Court have been shown to be true—Sanai the Censure Order should be vacated on the merits and because it is void.

90. The JC and Catterson's filing of a bar complaint while withholding evidence and refusing to testify was a violation of Sanai's right to a fair trial in State Bar Court and outside the jurisdiction of the JC.

91. Sanai was professionally injured by the Censure Order. Now that it has been proven to be incorrectly issued, and Sanai prevailed in the bar proceedings on the complaint filed by Catterson, he is entitled to a judgment of mandamus vacating the Censure Order, and prohibiting the JC from imposing sanctions on any complainants of any kind. Sanai exhausted his administrative remedies by filing a motion to vacate the Censure Order in December of 2017, which the JC refused to act upon.

THIRD COUNT

DECLARATORY JUDGMENT

(By Sanai as Against the JC and Kozinski)

92. Sanai hereby incorporates by this reference paragraphs 1 through 76 as if set forth in full.

93. Sanai accused Kozinski of distributing pornography for improper purposes via his server, and various other federal judges of aiding and abetting it.

Sanai continues to accuse the JC of past misconduct, which is now confirmed by a ruling of an impartial tribunal.

94. The failure of the JC to police Kozinski resulted in the formation of a working group to provide changes to the rules of judicial conduct and the rules for application of the JCDA. Sanai appeared at the public hearing on behalf of himself and Mecham to explain the fatal flaws in the rules as amended, and there was a blizzard of other comments and criticisms, all of which were ignored.

95. One leading presidential candidate, Senator Elizabeth Warren, has made reform of the judicial misconduct rules a platform of her campaign, identifying the handling of judicial misconduct complaints against Kozinski as examples of governmental misconduct that must be corrected.

96. The investigation against Kozinski terminated when he resigned from the bench. However, the Censure Order against Sanai, which injured him personally, and the efforts to disbar him, are a continuing dispute between Sanai and the JC which can be the subject of declaratory relief. Sanai has a constitutionally-protected right to a name-clearing hearing to vindicate his professional reputation.

97. There is an actual controversy between Sanai, on the one hand, and the JC and Kozinski on the other hand, regarding the facts in his misconduct complaint and the facts that would have been revealed if his complaint had been transferred to the Third Circuit Judicial Council. Sanai is entitled to a declaratory judgment which fully sets out the history of Kozinski's sexual harassment, the enablement of it by the JC, Catterson, and other members of the Ninth Circuit Court of Appeals and District Court within the Ninth Circuit, and retaliatory conduct by Kozinski, the JC, Catterson and others that was conducted against Mecham, Walter, Sanai, Hakala and others. This declaratory judgment must also state the facts concerning Kozinski's perjury before the Third Circuit Judicial Council. Sanai is also entitled to a declaratory judgment setting out that the facts alleged in his misconduct complaints are true, or, to the extent they are not accurate, the actual facts. This

declaratory judgment is in the public interest. Once findings of fact setting out the true and complete history have been made, the JC should be ordered to publish and publicize the judgment in place of the Censure Order.

98. Sanai is also entitled to a declaratory judgment that the filing and prosecution of the state bar complaint by the JC, and any administrative decisions of the JC that permit such conduct, are outside the jurisdiction of the JC.

FOURTH COUNT

ABUSE OF PROCESS (FEDERAL COMMON LAW)

(By Sanai as Against Kozinski, Catterson and the 2010 JC Defendants)

99. Sanai hereby incorporates by this reference paragraphs 1 through 76 as if set forth in full.

100. Kozinski, Catterson and the 2010 JC Defendants utilized the judicial misconduct law to impose injury on Sanai (i) where the actual statute did not grant subject matter jurisdiction to impose sanctions or punishment on a complainant by the administrative agency in question, the JC; (ii) where the JC defendants had a non-discretionary duty to transfer the complaints to the Third Circuit Judicial Council; and (iii) where the misconduct proceedings were utilized to protect Kozinski from inquiry about this use of pornography to sexually harass his clerks, which practices of Kozinski were known to the 2010 JC Defendants. The abuse of process continues to this day because Defendant Thomas refused to process the motion to vacate the Censure Order, which is still in limbo. Their conduct constituted abuse of process under federal common law, which applies because the process in question is federal and thus constituted issues involving the rights and obligations of an agency of the United States.

101. The 2010 JC Defendants are not entitled to judicial immunity because the acts they committed did not constitute performance of duties of a judge of any United States District Court or the Ninth Circuit Court of Appeals. "Fundamentally,

however, misconduct proceedings are inquisitorial and administrative." *In re Manuel Real, supra.* Administrative agency personnel are entitled to qualified immunity from constitutional and federal law claims to the extent that their activities arise from performance of their duties within their jurisdiction, and their conduct does not violate clearly established law.

102. By no later than 2008 it was clearly established law that judicial misconduct proceedings were inquisitorial administrative proceedings that have no justiciable constitutional due process protections. Given that federal judges have no justiciable due process rights to retain their positions, this is constitutional AS TO JUDGES. However, it is and was manifestly unconstitutional to use judicial misconduct proceedings to punish complainants, who have no due process rights such as right to an impartial tribunal, right to see evidence obtained in investigations, or even right to review the evidence used against them.

103. In addition, it was clearly established law that the JC had to obey Justice Roberts' transfer order of the judicial misconduct complaints of Sanai and Mecham; by refusing to do so, the 2010 JC Defendants, Kozinski and Catterson lacked subject matter jurisdiction in respect of Sanai's complaint.

104. Sanai is entitled to monetary damages for emotional injury, lost income and opportunities to obtain income, reputational injury and out-of-pocket expenses arising from the abuse of process by Catterson, Kozinski and the 2010 JD Defendants. The actions of Kozinski, Catterson, and the 2010 JC Defendants were taken maliciously and with the explicit intention of violating Sanai's constitutional rights, to oppress him, and to make his disbarment a warning to anyone who sought to blow the whistle on Kozinski or other judges in the Ninth Circuit, so imposition on punitive damages on each is merited.

FIFTH COUNT

MALICIOUS PROSECUTION (FEDERAL COMMON LAW)

(By Sanai as Against Kozinski, Catterson and the 2010 JC Defendants)

105. Sanai hereby incorporates by this reference paragraphs 1 through 76 as if set forth in full.

106. The 2010 JC Defendants utilized the judicial misconduct law to impose injury on Sanai where the actual statute did not grant subject matter jurisdiction to impose sanctions or punishment on a complainant by the administrative agency in question, the JC; where the 2010 JC Defendants had a non-discretionary duty to transfer the complaints to the Third Circuit Judicial Council; and where the misconduct proceedings were utilized to protect Kozinski from inquiry about this use of pornography to sexually harass his clerks, which practices of Kozinski were known to the 2010 JC Defendants. Their conduct constituted malicious prosecution under federal common law, which applies because the JCDA is a federal law.

107. The 2010 JC Defendants and Kozinski are not entitled to judicial immunity because the acts they committed did not constitute performance of duties of a judge of any United States District Court or the Ninth Circuit Court of Appeals. "Fundamentally, however, misconduct proceedings are inquisitorial and administrative." *In re Manuel Real, supra.* Administrative agency personnel are entitled to qualified immunity from claims under the United States constitution or federal law to the extent that their activities arise from performance of their duties within their jurisdiction, and their conduct does not violate clearly established law.

108. By no later than 2008 it was clearly established law that judicial misconduct proceedings were inquisitorial administrative proceedings that, like impeachment and removal by Congress, have no justiciable due process protections. Given that federal judges have no justiciable due process rights to retain their positions, this is constitutional AS TO JUDGES. However, it is and was manifestly unconstitutional to use judicial misconduct proceedings to punish complainants,

who have no due process rights such as right to an impartial tribunal, right to see evidence obtained in investigations, or even right to review the evidence used against them.

109. In addition, it was clearly established law that the JC had to obey Justice Roberts' transfer order of the judicial misconduct complaints of Sanai; by refusing to do so, the 2010 JC Defendants lacked subject matter jurisdiction in respect of Sanai's complaint.

110. Sanai is entitled to monetary damages for emotional injury, lost income and opportunities to obtain income, reputational injury and out-of-pocket expenses arising from the abuse of process by Kozinski, Catterson, and the 2010 JD Defendants. The actions of Kozinski, Catterson, and the 2010 JC Defendants were taken maliciously and with the explicit intention of violating Sanai's constitutional rights, to oppress him, and to make his disbarment a warning to anyone who sought to blow the whistle on Kozinski or other judges in the Ninth Circuit, so imposition on punitive damages on each is merited.

SIXTH COUNT

WRONGFUL USE OF ADMINISTRATIVE PROCEEDINGS (CALIFORNIA LAW)

(By Sanai as Against Kozinski, Catterson, and the 2010 JC Defendants)

111. Sanai hereby incorporates by this reference paragraphs 1 through 76 as if set forth in full.

112. Catterson, and the 2010 JC Defendants, along with the participation of Kozinski, wrongfully initiated a California attorney disciplinary proceeding against Sanai. Catterson, the 2010 JC Defendants, and Kozinski were actively involved in bringing and continuing the bar complaint. The OCTC did not conduct an independent investigation of the complaint brought by Catterson on behalf of the 2010 JC Defendants and Kozinski acting as the JC. This was because Catterson,

Kozinski and the 2010 JC Defendants refused to provide any supporting evidence, and convinced the OCTC that it was incumbent on them, if they wished to have productive legal careers, to bring meritless and harassing charges against Sanai. There was no legal barrier to conducting an independent investigation of the charge—all it required was a subpoena of the relevant records of the JC.

113. No reasonable person in the position of the 2010 JC Defendants, Catterson and Kozinski would have believed that there were reasonable grounds to bring the proceedings or make the complaint against Sanai. They knew Sanai's accusations against Kozinski and other judges were true and valid. The 2010 JC Defendants, Catterson and Kozinski were informed that the proceedings would fail unless evidence was provided; but the 2010 JC Defendants, Catterson and Kozinski knew that the judicial misconduct complaint filed by Sanai was meritorious, and given an opportunity Sanai could prove all of his allegations, so they caused the OCTC to eschew any independent investigation. Kozinski, Catterson, and the 2010 JC Defendants acted primarily with a purpose other than succeeding on the merits of the complaint; their goal was to retaliate against Sanai for blowing the whistle, and to discourage Kozinski's many other victims from doing the same.

114. The bar proceedings would not have occurred but for the actions of the 2010 JC Defendants, Catterson and Kozinski, and thus were a substantial factor in their occurring. Sanai suffered harm because of them.

115. California's statutory litigation privilege and a privilege specific to bar complaints prohibit all liability for making complaints or giving information in judicial, administrative and other official proceedings (including the State Bar) unless the requirements of malicious prosecution are met. *See* Judicial Council of California, California Civil Jury Instructions, CACI 1500 et. seq. (2017), in particular CACI 1502 and cases cited therein. This is the exceptional situation where the OCTC failed to conduct an independent investigation of the charge to obtain the information necessary to prevail; moreover, the barrier to investigation

was the refusal of the complainant to provide the relevant evidence, because such evidence would have exonerated Sanai. Kozinski and the 2010 JC Defendants are not entitled to judicial immunity because the acts they committed did not constitute performance of judicial duties of a judge of any United States District Court or the Ninth Circuit Court of Appeals. "Fundamentally, however, misconduct proceedings are inquisitorial and administrative." *In re Manuel Real, supra.* Administrative agency personnel are entitled to qualified immunity to claims under federal law and the United States Constitution to the extent that their activities arise from performance of their duties within their jurisdiction, and their conduct does not violate clearly established law. This count arises under California law, so qualified immunity does not apply. In addition, the act taken herein, the filing of a complaint with the California Bar Association, is not an act within the administrative jurisdiction of the JC or a matter to which federal law pre-empts state law; anyone can file a bar complaint. Accordingly, there is no immunity, qualified or not, arising under federal law.

116. Even if qualified immunity did apply to state law claims, the immunity does not apply here. It was clearly established law, set out in CACI 1502 and the cases cited therein, that a person may not make a meritless complaint about an attorney to the California bar, then escape liability if the Bar fails to investigate the charge independently. In addition, it was clearly established law that Sanai had the right to compel witnesses and obtain evidence to defend himself in his bar trial. Catterson, on behalf of herself (as Clerk) and Kozinski and the 2010 JC Defendants, refused to comply with Sanai's trial subpoenas on the grounds, *inter alia,* that Sanai could not compel the production of records or testimony of Catterson or any judges under FEDERAL law because their testimony is inadmissible. This position was frivolous; federal judges regularly testify in bar hearings in every state. *See, e.g. Comm'n for Lawyer Discipline v. Cantu,* Tex. Sup. Ct. No. 18-0879 (October 25, 2019) (per curiam)(federal judge who was presiding in case from which misconduct

arose competent to testify). It was also clearly established law that Sanai's due process rights override any evidentiary issues or privilege under FEDERAL law, because the relevant law of privilege and evidence were CALIFORNIA law. Moreover, it was clearly established law that by making the complaint, Catterson, Kozinski and the 2010 JC Defendants necessarily waived all claims of confidentiality as to records in their possession and in possession or control of the JC that could exonerate Sanai.

117. Sanai is entitled to monetary damages for emotional injury, lost income and opportunities to obtain income, reputational injury and out-of-pocket expenses arising from the abuse of process by Kozinski, Catterson, and the 2010 JC Defendants. The actions of Kozinski, Catterson, and the 2010 JC Defendants were taken maliciously and with the explicit intention of violating Sanai's constitutional rights, to oppress him, and to make his disbarment a warning to anyone who sought to blow the whistle on Kozinski or other judges in the Ninth Circuit, so imposition on punitive damages on each is merited.

SEVENTH COUNT

BIVENS COMPLAINT FOR DAMAGES

(By Sanai as Against Kozinski, Catterson, and the 2010 JC Defendants)

118. Sanai hereby incorporates by this reference paragraphs 1 through 76 as if set forth in full.

119. A person carrying out executive or administrative functions of the federal government may be sued for damages for violations of constitutional rights under a *Bivens* claims. In order to assert a new breed of *Bivens* claim, a party must show the following:

A. the plaintiff has a constitutionally protected right under the Fourth, Fifth, or Eighth Amendments;

B. the defendant, a federal official, violated that right;

C. the plaintiff lacks a statutory cause of action, or an available statutory cause of action does not provide monetary compensation against the defendant;

D. no "special factors" suggest that the court should decline to provide the judicial cause of action and remedy, and

E. no appropriate immunity can be raised by the defendant.

120. "When a party seeks to assert an implied cause of action under the Constitution, separation-of-powers principles should be central to the analysis. The question is whether Congress or the courts should decide to authorize a damages suit..... Most often it will be Congress...." *Ziglar v. Abbasi,* 137 S. Ct. 1843, 1848 (2017). Here, the separation of powers problem does not exist. The determination of judicial or executive liability for violation of constitutional rights is completely a creation of the judiciary; what Congress writes in statutes is ignored. Indeed, when Congress created a remedy for damages of violation of rights under color of state law—42 U.S.C. §1983—the federal courts simply over-rode the clear statutory language and held that judges continued to have immunity from damages! Here, Sanai is demanding that a remedy be created by judges to impose liability on judges acting in an executive or administrative role for taking retaliatory measures against private parties who blow the whistle on judges who are committing unquestionable judicial misconduct. Congress never had reason to create a damages remedy in favor of third parties for the simple reason that the JCDA never authorized the Judicial Councils or Judicial Conference to impose sanctions or penalties on complainants in any way, and neither the model rules nor the rules utilized by the JC have such provisions either. Where an administrative agency grossly and intentionally expands its jurisdiction to areas manifestly outside the statutory subject matter jurisdiction, Congress would never create a damages remedy, since there is no reason it would anticipate such conduct, or be able to craft a statutory remedy that would anticipate the expansion.

121. Kozinski, Catterson, and the 2010 JC Defendants utilized the judicial misconduct procedures to impose injury on Sanai where the actual statute did not grant subject matter jurisdiction to impose sanctions or punishment on a complainant by the administrative agency in question, the JC; where the 2010 JC Defendants had a non-discretionary duty to transfer the complaints to the Third Circuit Judicial Council that they breached; and where the misconduct proceedings were utilized to protect Kozinski from inquiry about this use of pornography to sexually harass his clerks, which practices of Kozinski were known to Catterson and the 2010 JC Defendants. The imposition of a Censure Order via a process that lacked the basics of fundamental due process violated Sanai's constitutional rights under the Fifth and Eighth Amendment.

122. In this situation a *Bivens* cause of action, like 42 U.S.C. §1983, is closely analogous to both malicious prosecution and abuse of process. *Wyatt v. Cole,* 504 U. S. 158, 164 (1992).

123. Sanai is entitled to monetary damages for emotional injury, lost income and opportunities to obtain income, reputational injury and out-of-pocket expenses arising from the abuse of process by Kozinski, Catterson, and the 2010 JD Defendants. The actions of Kozinski, Catterson, and the 2010 JC Defendants were taken maliciously and with the explicit intention of violating Sanai's constitutional rights, to oppress him, and to make his disbarment a warning to anyone who sought to blow the whistle on Kozinski or other judges in the Ninth Circuit, so imposition on punitive damages on each is merited.

EIGHTH COUNT

RELIEF UNDER THE CALIFORNIA PUBLIC RECORDS ACT AND INJUNCTIVE RELIEF TO ENSURE

(By Sanai as Against the Judicial Council of California)

124. On March 4, 2019, March 20, 2019, and December 3, 2019, Sanai made public record requests regarding administrative records concerning, inter alia, the Judicial Council of California's letter in 2014 stating that Justice Dennis Perluss would refuse to comply with a subpoena to appear at the bar trial. The Judicial Council of California responded to all three requests with only a partial disclosure of relevant documents and stated that as to certain requests that responsive documents would not be provided. These documents would be used in Sanai's upcoming bar trial, or be useful in identifying other documents that could be obtained by subpeona.

125. Sanai is entitled to an order under the California Public Record Act and California Rule of Court 10.500 to an order releasing all documents requested, which include, without limitation, all documents which refer, relate or pertain to Sanai, and all documents which refer, relate or pertain to litigation or proceedings specified therein. Sanai is further entitled to public disclosure of all documents which are or may be exculpatory or offer a defense to the remaining state bar charges, including documents which would in the mind of a reasonable person show an unconstitutionally unacceptable risk that judges or justices who are or have been members of the Judicial Council of California are biased against Sanai.

NINTH COUNT

INJUNCTIVE RELIEF AGAINST VIOLATION OF CONSTITUTIONAL RIGHTS

(By Sanai as Against Does 1-10)

124. Sanai hereby incorporates by this reference paragraphs 1 through 76 as if set forth in full.

125. Does 1-10 are state and federal judicial officers, employees and organizations which have information and documents relevant to Sanai's defense in his resumed bar trial. Sanai has a constitutional right to obtain their documents and compel their presence at this trial. On information and belief, Sanai alleges that such persons and organizations will frustrate Sanai's right to compel witnesses and testimony because of the embarrassment and the professional injury it will cause them when the truth is revealed. It is also possible that their identity, influence and position in the state and federal judiciary may cause a California Superior Court judge or appellate justice to refuse to enforce a subpoena against them.

126. The need for such discovery was proximately caused by the actions of the 2010 JC Defendants and Catterson. But for their tortious conduct alleged above, no bar proceeding would have been initiated against Sanai. Accordingly, obtaining the judicial assistance of this Court in forcing recalcitrant witnesses to submit to depositions and appear at Sanai's bar trial and to furnish documents is necessary and appropriate relief. It is a certainty that Judge Kozinski will use every resource at his command to fight this lawsuit and retaliate against Sanai. Kozinski's modus operandi for retaliation in the past has been through himself and through proxies, who included the late Stephen Reinhardt, Catterson and even the JC itself. On information and belief, Sanai alleges that such unknown persons are currently conspiring to impair Sanai's rights, and will do so once subpoenas are either issued or sought to be enforced; such persons by virtue of their participation in the conspiracy are included as Does 1-10.

127. The identities of the persons who will seek to frustrate Sanai's constitutional right to a fair trial are not known and will not be known until they take overt action.

128. Once identified and a Doe amendment is made, Sanai will be entitled to injunctive relief to compel the production of documents and presence of Does 1-10 at depositions and his bar trial.

WHEREFORE, Plaintiff Cyrus Sanai respectfully demand the following relief on behalf of himself:

On the First Count

1. A mandatory injunction that all Defendants should provide to Sanai all documents that they possess, own or control (including emails and telephonic messages) that:

A. Refer, relate or pertain to Sanai;

B. Refer or relate to any litigation referenced in his misconduct complaints filed with JC;

C. Refer relate or pertain to the interactions between Catterson and OCTC and Catterson and Kozinski;

D. Refer, relate or pertain to Kozinski's battle over the firewall;

E. Refer, relate or pertain to Kozinski's treatment of his clerks;

F. Refer, relate or pertain to the misconduct complaints made or identified against Kozinski and other judges herein; and

G Refer, relate or pertain to retaliatory conduct instigated by Kozinski, and any of the 2010 JC Defendants against Sanai, Mecham or any other persons acting on behalf of them or the JC.

2. A prohibitory injunction barring the Current JC Judges and Collins from participating as a judge or justice in any way in a matter involving Sanai, as party or attorney.

3. A prohibitory injunction barring the JC from imposing any kind of sanction or penalty on any judicial misconduct complainant.

4. A mandatory injunction on the JC requiring it to promulgate effective rules and procedures requiring judges in the Ninth Circuit to fully disclose past and current relationships between the judges in which the case is proceeding and lawyers, law firms, identified witnesses, and parties in the case as and when the identity of each such lawyers, law firms, identified witnesses, and parties is disclosed to the judge.

5. Reasonable costs incurred in this action.

On the Second Count

1. An injunction vacating the Censure Order and barring the JC from imposing any kind of sanction or penalty on any judicial misconduct complainant.

2. Reasonable costs incurred in this action.

On the Third Count

1. After full discovery and provision of the documents identified above, a trial in which Court will enter a declaratory judgment which fully sets out the history of Kozinski's sexual harassment, the enablement of it by the JC, Catterson, and other members of the Court, and retaliatory conduct by Kozinski, the JC, Catterson and others that was conducted against Mecham, Walter, Sanai, Hakala and others. This declaratory judgment shall also set out the facts alleged in his misconduct complaints as true, or, to the extent they are not accurate, the actual facts.

2. Reasonable costs incurred in this action.

On the Fourth Count

1. Monetary damages for emotional injury, lost income and opportunities to obtain income, reputational injury and out-of-pocket expenses arising from the abuse of process by Kozinski, Catterson and the 2010 JD Defendants in the amount of at least $10,000,000.00, plus punitive damages.

2. Reasonable costs incurred in this action.

On the Fifth Count

1. Monetary damages for emotional injury, lost income and opportunities to obtain income, reputational injury and out-of-pocket expenses arising from the malicious prosecution by Kozinski, Catterson and the 2010 JD Defendants in the amount of at least $10,000,000.00, plus punitive damages.

2. Reasonable costs incurred in this action.

On the Sixth Count

1. Monetary damages for emotional injury, lost income and opportunities to obtain income, reputational injury and out-of-pocket expenses arising from the wrongful use of administrative proceedings by Kozinski, Catterson and the 2010 JD Defendants, in the amount of at least $10,000,000.00, plus punitive damages.

2. Reasonable costs incurred in this action.

On the Seventh Count

1. Monetary damages for emotional injury, lost income and opportunities to obtain income, reputational injury and out-of-pocket expenses arising from the retaliatory misconduct committed by Kozinski, Catterson and the 2010 JD Defendants in the amount of at least $10,000,000.00, plus punitive damages.

2. Reasonable costs incurred in this action.

On the Eighth Count

1. An order disclosing all documents requested by Sanai from the Judicial Council of California; and

2. Reasonable costs and attorneys fees incurred in this action.

On the Ninth Count

1. Injunctive Relief against Does 1-10.

2. Reasonable costs incurred in this action.

Dated: December 16, 2019

By: _/s/__ Cyrus Sanai
CYRUS SANAI
In pro per.

APPENDIX P

RELEVANT STATUTORY AND CONSTITUTIONAL PROVISIONS AND COURT RULES

The Fifth Amendment to the U.S. Constitution provides in relevant part: "[N]or shall any person...be deprived of life, liberty, or property, without due process of law." U.S. Const., Amend. V, § 1.

28 U.S.C. §455 reads in relevant part:

(a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

.....

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

28 U.S.C. §455 reads:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

28 U.S.C. §2201 reads:

(a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined in section 516A(f)(9) of the Tariff Act of 1930), as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other

legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

(b) For limitations on actions brought with respect to drug patents see section 505 or 512 of the Federal Food, Drug, and Cosmetic Act, or section 351 of the Public Health Service Act.