Features

Real Trouble

A federal judge's behavior could move the line between judicial freedom and misconduct

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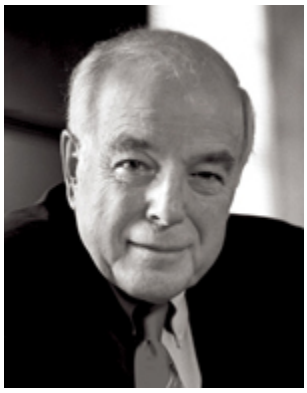
By Terry Carter



Judge Real
Photo by Virginia Lee Hunter

Gary Dubin spent 19½ months in a California federal prison and returned to Hawaii in October 1996 to practice law. The state's Office of Disciplinary Counsel, in an extremely unusual decision concerning a matter of moral turpitude, determined that a finding of professional misconduct was "not warranted." Later, even the U.S. Internal Revenue Service reversed itself, saying he didn't owe the $1.5 million that was the basis of his three misdemeanor convictions for failure to file tax returns.

In fact, the agency gave him nearly $100,000, including interest, from payment in an earlier tax year. The IRS had found that he indeed had substantial business losses and deductions for the years in question, and that they could be carried back.

He can't recoup the time behind bars; the same goes, thus far, for the $131,000 the judge fined him. In 2006, the IRS looked into the possibility of crediting the fine to his next tax liability, but found it couldn't because the money went to the court.

Dubin still seeks redress beyond his vindication from the bar and the IRS. He has filed complaint after complaint in venue after venue against the man who sentenced him—including a 2006 mandamus petition to the U.S. Supreme Court, where cert was denied.

Dubin had been Hawaii's example in "Project Esquire," a nationwide dragnet by the IRS to snare lawyers for failure to file tax returns. Dubin's case had been scheduled for a bench trial with a magistrate there.

But on short notice, it found its way to the docket of U.S. District Judge Manuel L. Real—a jurist known for a heavy hand with errant lawyers in the Central District of California—who was visiting on the bench from Los Angeles.

Dubin claims Real, now 84, railroaded him 14 years ago. It is a rare federal judge who hasn't attracted such complaints. But there have been many similar complaints about Real (the judge pronounces it "reel") over four decades by plaintiffs, defendants and lawyers alike, as well as appellate decisions occasionally attacking the judge's handling of cases. Three times this year, cases have been summarily removed from Real's docket.

In one decision by the San Francisco-based 9th U.S. Circuit Court of Appeals in March, *U.S. v. Hall*, the court

Gary Dubin
Photo by Chris McDonough

remanded the case of two men convicted of securities fraud and ordered that it be given to a different judge.

The opinion noted "the catalog of inappropriate behavior by the trial court is long, so we merely summarize it here." One example: "Sua sponte interposing adverse evidentiary rulings with such frequency that the government was effectively relieved of its responsibility to make objections."

"That's what he did to me, among other things," says Dubin. In May he reworked his detailed, document-rich petition and filed it with the Judicial Conference of the United States, which recently expressed serious concerns about the judge's actions in scores of cases going back to the mid-1980s.

Since his conviction was upheld on appeal (though the 9th Circuit accepted on its face a crucial finding of fact that seems indisputably erroneous), Dubin knows he is seen by some—especially since serving as his own lawyer—as a kook wearing a tinfoil hat.

"I have to pursue it," the 69-year-old Dubin still says. "It was wrong."

JUDICIAL REVIEW

The Judicial Conduct and Disability Committee of the U.S. Judicial Conference asked (PDF) the 9th Circuit Judicial Council in January to review 89 of Real's cases in which the appeals court found problems. (The number reportedly has been cut somewhat. And the review would not include Dubin's conviction, because it was upheld on appeal.)

Judge Real did not respond to requests for an interview. He has granted them a number of times over the years with various publications. But he lately has hunkered down and lawyered up to battle investigations into whether he has a "pattern and practice" of not giving reasons for his decisions when required and whether it is "willful."

"The most interesting and far-reaching question is what are the limits? Where do you draw the line between judicial freedom to make mistakes—wrong decisions—which is protected, and judicial misconduct, which isn't?" says Arthur Hellman, a professor at the University of Pittsburgh School of Law and a leading authority on federal judicial ethics.

"Does there come a point where a willful pattern and practice becomes misconduct?" Hellman continues. "This touches closely on the substance of judicial decision-making, which is off-limits from disciplinary proceedings. It could be a major test case of where that line is."

David Oswalt, a senior counsel in the Los Angeles office of Arnold & Porter, heads Real's team of lawyers, which draws from other firms as well as academia, but says he cannot comment given the nature of the proceedings.

After congressional rumblings in recent years about replacing the judiciary's self-regulation with an inspector general, the U.S. Judicial Conference is pushing harder for circuits to deal more forcefully with errant judges. Real became a prominent example in this effort. He was called to appear at a 2006 hearing of the U.S. House Judiciary Committee, which was considering his possible impeachment.

"If the Democrats had not taken back control of the Congress shortly after that, he might have been impeached," says Henry Weinstein, who for many years covered the 9th Circuit for the *Los Angeles Times* before recently leaving.

On the heels of such criticism, the U.S. Judicial Conference implemented in April the first-ever nationwide rules and procedures for all circuits' handling of judicial misconduct complaints. It's a step away from the decentralization that has given the circuits wide latitude in dealing with their own.

And one element in the new disciplinary procedures was clearly tailored to address the kinds of issues that have come up with respect to Real.

The changes resulted from recommendations by a committee headed by Supreme Court Justice Stephen G. Breyer. In 2004, partly responding to complaints from Congress, then-Chief Justice William H. Rehnquist created the committee to study whether the 1980 Judicial Conduct and Disability Act had been effective in dealing with

complaints against judges.

The Breyer committee found that while for the most part the law was effective, there were significant shortcomings in high-profile matters. The report detailed several instances without naming names, but one could be clearly identified as Real. The report said that actions by the chief judge and circuit council in dealing with a complaint against him were "inconsistent with the law."

The rules declare that a "chief judge shall not undertake to make findings of fact about any matter that is reasonably in dispute." Still, the complaint against Real was twice dismissed by Chief Judge Mary Schroeder based on her own findings—and upheld by the 9th Circuit council.

Likewise, the Judicial Conference's conduct committee found its hands tied when considering an appeal by the complainant: It could review only matters in which a chief judge named a special investigative committee, which Judge Schroeder had not done.

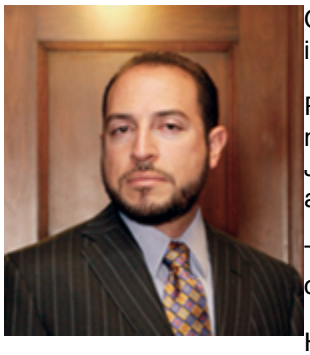
Under the new rules suggested by the Breyer committee, the conduct committee now can request that a circuit appoint one.

Compared to federal rules for judges, state canons for judicial ethics are more specific as to what judges can and cannot do. And it has been a long-held belief in the federal circuits that they could, and should, effectively police their own—often with a quiet, personal touch.

In the early 1990s, Charles Geyh, a professor at the Indiana University School of Law, interviewed more than 30 current and former chief judges in the circuits to study how they handled complaints against judges. He found that informal measures for dealing with abusive or troubled judges seemed to work.

"But as I've gotten farther down the road and also studied judicial discipline at the state level, I've begun to appreciate that even if federal judges take keeping a clean shop seriously, there still are two problems: The public doesn't know that they're doing so, so they suspect nothing is happening; and federal judges take pride in collegiality, making it very hard for them to deal with their own dirty laundry."

REAL'S MODEL



Gregory Ellis
Photo by Thomas Broening

Over the years, Manuel Real has told a story about a case he had as a young prosecutor in the early 1950s in front of a judge who became his judicial role model.

Real was prosecuting two men charged with sending pornography through the mail—nothing more than bare breasts; it was the early 1950s. One pleaded guilty before Judge Peirson Hall, who promptly acquitted the other in a bench trial. The first man then asked to withdraw his plea and go to trial with Hall. The judge agreed.

That piqued Real, who demanded a jury trial. The judge obliged, telling his courtroom clerk to call a jury for 10 p.m. Real said he couldn't prepare that soon.

Hall's reply: Case dismissed for lack of prosecution.

The story brings smiles to most who hear it. But if adopted generally, such an approach in the courtroom could free the guilty or send the innocent to prison.

Los Angeles criminal defense lawyer Stanley Greenberg believes one of his clients spent more than a year behind bars, fully innocent, before the case, *U.S. v. Mayans*, was remanded and later dropped.

On appeal, the 9th Circuit found Real made four reversible rulings concerning testimony and evidence. But the circuit was particularly rankled about what it viewed as the unconstitutional denial of an interpreter for the defendant, who had come from Cuba and struggled with English.

The remand opinion noted that "we find ourselves in the peculiar situation of being unable to review the district court's determination that appellant did not need an interpreter. The trial judge never conclusively made that determination, but rather urged appellant over and over to try testifying in English—to 'try it.' "

Otherwise, Real had said from the bench, the testimony "takes twice as long."

Although Greenberg, who was a federal prosecutor in L.A. in the early 1970s, is reluctant to criticize Real, others familiar with the case say he's still dismayed nearly 16 years later. At trial, instead of asking whether the prosecution had any more questions for a witness, an exasperated Greenberg is said to have asked if Real had anything further to add.

"He's a complex person and there is another side to him," Greenberg says now. "I've seen him do extraordinarily compassionate things from time to time, taking great interest in probationers and actually reading whatever I submitted—which you don't always expect with other judges.

"But given a choice, it's not a courtroom I'd ever choose. It's very unpleasant because he makes it very unpleasant."

Off the bench, Real is described by most who know him—including some who try to avoid his courtroom—as a caring gentleman and a charming, pleasant figure at social and professional gatherings.

Manny Real, as many call him, grew up in San Pedro, Calif., where he lives today. His parents emigrated from Spain and his father was a grocer.

For decades, he has insisted his law clerks live near enough to him that they can ride together for the 35- to 45-minute drives to and from the courthouse.

"It was our alone time with the judge," says Gregory Ellis, who clerked with the judge from 1999 to 2000. "We would listen to NPR and discuss the news, or we could talk to him about pending cases, what he thought of them, any motions we had heard; and if he had them, he'd ask us questions."

Real takes an interest in staff throughout the courthouse, Ellis says: "He tries to create a family atmosphere for everybody."

After finishing at Loyola Law School of Los Angeles in 1951, Real spent four years as an assistant U.S. attorney there and then 10 years in private practice with his brother in San Pedro.

In 1964, a close friend who was an influential Democrat recommended him to be U.S. attorney in Los Angeles. Just two years into the job, Real was appointed to the federal bench by President Lyndon Johnson.

Probably Real's most significant judicial decision came early in his career. In 1970, he ordered busing to desegregate the Pasadena public schools. It was the first such order outside the South. A Perris, Calif., elementary school was later named for him.

His most notorious decision was in 1985, after *Hustler* magazine publisher Larry Flynt appeared before him on a contempt charge from another judge in *U.S. v. Flynt*.

At sentencing, Flynt repeatedly taunted Real: "Motherf-----, is that the best you can do?"

Not to be outdone, Real upped the ante each time: from six months to 12 months to 15 months. The scene was in the 1996 movie *The People vs. Larry Flynt*.

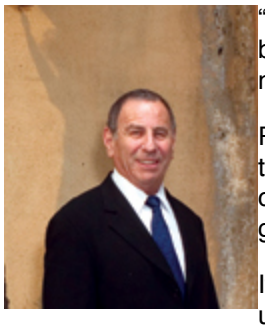
In real life, Real was reversed; the 9th Circuit ruled Real did not take into account Flynt's mental competency.

PERSONAL TOUCH

With more normal defendants, Real is often known for his compassion, and—sentencing guidelines be damned—if he thinks a person is salvageable, he crafts unique remedies, often with thousands of hours of community service in lieu of doing time. He monitors each of these probationers personally.

In a case in 2000, he went too far to help one of his probationers. On his own motion, Real seized her personal bankruptcy case and, based on ex parte communication with her, stopped her landlord (former in-laws) from evicting her or even collecting rent.

It is the matter that found its way into the Breyer committee's report for having been mishandled by the 9th Circuit.



Victor Sherman
Photo by Thomas Broening

"Because he cares so much and gets personally involved in cases, I think that sometimes backfires on him," says Laurie Levenson, a former federal prosecutor in Los Angeles and now a professor at Loyola Law School there.

Real received a public reprimand (PDF) in January for his handling of the bankruptcy matter, though it took five years after the initial complaint was filed in 2003. Interestingly, the complaint came from Stephen Yagman, a lawyer with no interest in the case—other than a grudge against Real.

It is a grudge Yagman has carried since 1984, when Real fined him $250,000 for unprofessional conduct in a civil suit. Yagman was a prominent civil rights lawyer with a specialty in police misconduct.

Yagman said at the time that Real "is a tyrant who is a disgrace to democracy—he is a modern-day Torquemada. He suffers from boredom and indulges himself in infantile and harsh behavior to create situations to alleviate his boredom."

The 9th Circuit reversed the ruling and remanded the case for another judge. Real refused to let it go and instead sat on it—he was waiting for a ruling in another case in which he asked the appellate court to vacate an order taking that matter from him.

Real then did the unthinkable.

He filed personal petitions for certiorari with the Supreme Court, in 1986 and 1987, asking that the two cases be returned to him. Cert was denied on both *In re Real* and *Real v. Yagman*.

Earlier this year, Yagman went to prison, convicted of tax fraud. And there is no word on the source of a more recent and more significant complaint about the judge. But Yagman's case drew so much scrutiny that other complaints were bound to gain traction.

When the Judicial Conference's conduct committee upheld a public reprimand of Real in the probationer's bankruptcy matter, it also issued another opinion concerning Real that was a bombshell: It asked the 9th Circuit council to review scores of cases for a willful pattern and practice of not giving reasons for decisions.

The matter had not previously been disclosed.

Real has found himself, in effect, on the receiving end of advice he is famous for giving lawyers in his court: "This isn't Burger King. We don't do it your way here."

Pittsburgh's Hellman says, "There has been evidence of problems with Judge Real for a long time, and the fact they are acting now in this way may be tied to the higher level of congressional interest and the raising of doubts whether the judiciary successfully policed misconduct in its ranks."

Yagman was just one on a long list of lawyers who Real has jailed or tried to jail over the years.

"Everybody has a horror story about a trial they had with Judge Real," says Maria Stratton, laughing because she thinks well of him. She was the public defender for the Central District of California from 1993 to 2006 and is now a judge in Los Angeles Superior Court.

Real once insisted she be in his courtroom at 9 a.m. rather than first appearing at the 9th Circuit, nearby. Protocol defers to the higher court.

"He threatened to hold me in contempt," says Stratton, who said she rushed and was only a few minutes late to Real's courtroom. "Then that night at a bar function, after I'd gotten an acquittal in his court and he seemed upset about it, he couldn't have been nicer."

JEKYLL OR HYDE?

Others say they never see Dr. Jekyll, only Mr. Hyde, when dealing with Real.

Gary Lincenberg
Photo by Thomas Broening

In 1971, Santa Monica criminal defense lawyer Victor Sherman was ordered to jail for four days over a routine evidentiary question.

"But it was really because he found out from a marshal that I gave him the finger as he stepped from the bench in another case shortly before that," says Sherman, who had been exasperated by the judge's refusal to allow him to examine a witness on a particular point.

The 9th Circuit knocked down the jail term. "And I got him reversed on the evidentiary matter," Sherman says. "At one point, I got him reversed six times in a row.

"Lots of lawyers have these kinds of stories about Judge Real, but not many of them will talk about it publicly," he adds.

Indeed, a dozen Los Angeles lawyers contacted for this story, some of them well-known, were eager to talk about bitter experiences in Real's court, but not for the record. One who has spoken out in the past, and is known for his collection of negative information and court decisions about the judge, declined to go on the record now because he has a client awaiting sentencing before Real.

Real's defenders, and he has plenty (though some of them, too, declined either to be interviewed or to speak on the record), say his motives are not malevolent.

The president of the Los Angeles chapter of the Federal Bar Association, Gary Lincenberg, does speak out and disagrees with the mounting criticism of Real. The jurist has long been on the association's board and, while others occasionally miss meetings, he is always there, says Lincenberg. The judge is particularly interested in helping younger lawyers, he adds.

"Given the controversy he is in the middle of, I think that other judges might be bitter, but he stays very focused on the big picture," says Lincenberg. "It's fine if somebody wants to criticize his decisions—that's what law is all about.

I don't think criticism of his good faith is warranted."

Says former clerk Ellis, now a Los Angeles litigator: "He's very good at sniffing out people who are unprepared and sniffing out witnesses not telling the truth. The accuracy of his BS detector was off the charts. Typically, if lawyers were prepared and knew the papers, they did OK in his courtroom, even if he didn't agree with them."

The celebrity lawyer Howard Weitzman says he always came prepared and still had difficulties peculiar to Real. In the 1970s he defended a lawyer in a criminal case who was convicted in a trial before Real. The case was remanded and tried again before Real. On the second remand, the case was heard before another judge. The lawyer was acquitted.

Weitzman has tried a half-dozen or more jury trials in front of Real, observed a number of others and found the judge's behavior problematic in all of them.

"I've seen him make it clear to jurors he doesn't agree with the direction of your questioning or doesn't believe your client," Weitzman says. "And I saw him take over questioning of witnesses if the side he prefers wasn't doing well. He continually demeans and puts down lawyers in front of juries in such a way that I think it averts a fair trial."

It was this sort of courtroom in which Dubin says he found himself in 1994.

His story in brief: Just before his trial, a psychiatrist was having Dubin admitted to a psychiatric hospital for depression over both the slow death of his son two years earlier from AIDS and the whirlwind of events that led to his case being moved suddenly to a bench trial by Real.

Dubin, a respected litigator and appellate attorney, had been scrambling, with the help of others, to get a top-notch lawyer—specifically, Richard Ben-Veniste of Washington, D.C.—to represent him. Real denied a continuance.

Real sent U.S. marshals to bring him to court for trial, just as he was being admitted to the hospital. Dubin was forced to defend himself for the next day and a half while sluggish with newly prescribed anti-depression and anti-anxiety medications, and without the letters and tax records he needed to make his case—including proof of extensive deductions and business losses, and a letter from the IRS saying he did not have to file yet for some of

the years in question because he was already being audited before the dragnet.

When Dubin—who Real kept in lockup when he wasn't in court—complained that the evidence was at his home, the judge dispatched an acquaintance of Dubin's to obtain the files.

"The room at Dubin's home was wall-to-wall boxes of documents," says James Clement, the now-retired tax lawyer who ran the errand. "I came across some that looked right, but when I took them to the courthouse they turned out to be copies of the prosecution's exhibits.

"It is my understanding that everyone knew at the time that he didn't have the records he needed for trial, and that the judge just wouldn't be bothered with it," says Clement.

Despite this, in his finding of fact No. 11, Real said the defendant had his records "brought to him ... by a friend, also a lawyer, and those records were available to Dubin throughout the trial."

Real even tacked on four months extra under the sentencing guidelines he often openly eschews, for obstruction of justice—because Dubin was at the hospital instead of court.

Clement later wrote in a signed declaration: "I know of my own personal knowledge that finding of fact No. 11 is absolutely false."

At the appellate level, there is a presumption that findings of fact are just that—fact. And in the 9th Circuit, Real's findings went unchallenged.

"What is disturbing about [Dubin's complaint] is that quite a bit of evidence seems to have been available to the judiciary—long before the impeachment proceeding or misconduct proceedings that resulted in reprimands—that suggested the judge is really a danger on the bench," says Hellman, who has not studied the Dubin case.

The judiciary is now taking what many believe is a long-overdue, in-depth look at whether Real's decision-making runs so far afoul of law and procedure that he is engaging in misconduct.

As Hellman says, the result could draw a new line of demarcation between independence and discipline—one of the touchiest areas for the judicial branch.

Considering the 9th Circuit council's call for a private reprimand for Judge Real, the Judicial Conference's conduct committee in January said, in effect, no.

"If the council finds willfulness, it should consider a more severe sanction, such as a public censure or reprimand and an order that no further cases be assigned to the judge for a particular period of time," the conduct committee wrote.

Short of impeachment, that would be the worst fate imaginable for a jurist who twice petitioned the Supreme Court personally in an effort to hold on to cases that had been reassigned.

Like his nemesis Dubin, Real is a man who fully believes he is right and has been wronged. And he presses every challenge as far as he can.

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