

JUDICIAL COUNCIL OF THE THIRD CIRCUIT

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J.C. No. 03-16-90059

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IN RE: COMPLAINT OF JUDICIAL MISCONDUCT  
OR DISABILITY

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ORIGINAL PROCEEDINGS UNDER 28 U.S.C. § 351

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MEMORANDUM OPINION

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(Filed: November 28, 2016)

PRESENT: SMITH, *Chief Judge*.

This is a complaint filed under the Judicial Conduct and Disability Act, 28 U.S.C. §§ 351-64, against a United States District Judge (the “Subject Judge”). For the reasons discussed below, the complaint will be dismissed.

The Judicial Conduct and Disability Act provides a remedy if a federal judge “has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts.” 28 U.S.C. § 351(a). A chief judge may dismiss a complaint if, after review, he or she finds it is not cognizable under the statute, is directly related to the merits of a decision or procedural ruling, or is frivolous or lacks sufficient evidence to raise an inference of misconduct. 28 U.S.C. §§ 352(b)(1)(A)(i)-(iii).

Complainant was a defendant in a criminal proceeding before the Subject Judge. Although counsel was appointed, Complainant moved to proceed pro se. After a hearing, the Subject Judge granted the motion and appointed a private attorney as standby counsel.

Shortly before trial, Complainant entered a guilty plea. During the plea colloquy, Complainant stated that he no longer wished to proceed pro se and requested that standby counsel be appointed to act as counsel. The Subject Judge orally granted the request and then formalized the order in writing.

Shortly thereafter, the Subject Judge vacated the appointment order, stating that Complainant had advised the Court that he wished to privately retain the attorney. Later, the Subject Judge stated in a written opinion that the attorney had informed the District Court in correspondence that the decision to privately retain counsel was part of an effort to reduce Complainant's burden on the judicial system and demonstrate his intention to cooperate in support of a request for a lower sentence.

After a hearing, the Subject Judge sentenced Complainant to life imprisonment. Complainant filed a pro se notice of appeal. The same court-appointed attorney was appointed for purposes of the appeal. Complainant moved for new counsel. The motion was granted and the Court of Appeals appointed substitute counsel. The Court of Appeals affirmed the sentence.

While the direct appeal was pending, Complainant filed a series of pro se motions in District Court, including a motion for the Subject Judge's recusal. The Subject Judge dismissed the motion for lack of jurisdiction due to the pending appeal, but noted that he would have denied the motion if he were to consider it on the merits. Complainant appealed that order and the Court of Appeals summarily affirmed it.

Beginning while his direct appeal was still pending, Complainant started filing petitions for a writ of mandamus in the Court of Appeals. Over the course of about a year and a half, Complainant filed six petitions. In them, he repeatedly attempts to collaterally challenge his sentence by claiming, among other things, that his conviction was the result of fraud and a conspiracy involving the Subject Judge and prosecution and that the Subject Judge had an inappropriate personal relationship with Complainant's court-appointed attorney. The Court denied the first five such petitions and advised Complainant that he cannot challenge his criminal sentence via mandamus. Complainant's sixth petition, filed earlier this month, remains pending.

This is Complainant's second complaint of judicial misconduct naming this Subject Judge. *See* J.C. No. 03-15-90019. In this complaint, Complainant alleges that the Subject Judge "became aware that the court appointed attorney violated the CJA plan" when the attorney advised the Subject Judge that Complainant had decided to privately retain him.<sup>1</sup> According to Complainant, this demonstrates that the Subject Judge acquired reliable evidence that counsel had violated the rules of professional conduct and the Subject Judge failed to take appropriate action in response as required by Canon 3(B)(5) of the Code of Conduct for United States Judges. In an addendum to the complaint, Complainant further alleges that the Subject Judge's actions violated both the Criminal Justice Act and Complainant's constitutional rights. Complainant argues that the Subject Judge's

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<sup>1</sup> Complainant clarifies that, although actions of the court-appointed attorney are described in the complaint of misconduct, this is solely for the purpose of supporting Complainant's claim that the Subject Judge engaged in misconduct and "the complaint should not be construed as against the attorney himself."

approval of the court-appointed attorney's request to proceed as retained counsel constitutes conduct prejudicial to the effective and expeditious administration of the business of the courts. Also in support of the complaint, Complainant provides a partial copy of a letter from the state attorney disciplinary board, which reflects that Complainant's disciplinary complaint against the court-appointed attorney was dismissed. Among other things, the letter concludes that the attorney did not engage in fraud or deceit because he expressly advised the Subject Judge that he was declining the CJA appointment so that Complainant could privately retain him.

First, it is apparent that these allegations are in many respects similar to claims presented in several of the petitions for a writ of mandamus that Complainant filed in the Court of Appeals. To the extent Complainant is merely attempting to relitigate claims presented to, and denied by, the Court of Appeals, such allegations are merits-related. Rule 3(h)(3)(A), *Rules for Judicial-Conduct and Judicial-Disability Proceedings* ("An allegation that calls into question the correctness of a judge's ruling, . . . without more, is merits-related."). Merits-related allegations are beyond the scope of a judicial misconduct proceeding and are therefore subject to dismissal. 28 U.S.C. § 352(b)(1)(A)(ii); Rules 3(h)(3)(A), 11(c)(1)(B), *Rules for Judicial-Conduct and Judicial-Disability Proceedings*.

Second, to the extent Complainant's allegations are not merits-related, they are baseless and unsubstantiated. Canon 3(B)(5) of the Code of Conduct for United States Judges provides that "[a] judge should take appropriate action upon learning of reliable evidence indicating the likelihood that . . . a lawyer violated applicable rules of

professional conduct.”<sup>2</sup> Complainant’s conclusory allegations notwithstanding, the record does not demonstrate that the Subject Judge had reliable evidence indicating that the court-appointed attorney violated the rules of professional conduct.

Indeed, as the state attorney disciplinary board correctly observed, the court-appointed attorney informed the Subject Judge that he was declining the CJA appointment because Complainant wanted to privately retain him. The attorney provided the Subject Judge a rational explanation for that decision – namely, to justify Complainant’s request for a lower sentence. In light of this record, there is no factual basis for concluding that the Subject Judge violated Canon 3 of the Code of Conduct for United States Judges or otherwise engaged in judicial misconduct. Complainant’s allegations are therefore subject to dismissal as frivolous and unsupported by evidence that would raise an inference that misconduct has occurred. 28 U.S.C. § 352(b)(1)(A)(iii); Rule 11(c)(1)(C), (D), *Rules for Judicial-Conduct and Judicial-Disability Proceedings*.

Based on the foregoing, the complaint is dismissed pursuant to 28 U.S.C. §§ 352(b)(1)(A)(ii) and (iii). As previously discussed, this is Complainant’s second complaint naming the Subject Judge. *See* J.C. No. 03-15-90019. Like the current complaint, the prior complaint was dismissed as merits-related, frivolous, and unsupported by evidence of misconduct. Accordingly, Complainant’s attention is directed to Rule

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<sup>2</sup> The Code of Conduct for United States Judges is designed to provide guidance to judges, but is not a set of disciplinary rules. “Ultimately, the responsibility for determining what constitutes misconduct under the statute is the province of the judicial council of the circuit subject to such review and limitations as are ordained by the statute and by these Rules.” Commentary on Rule 3, *Rules for Judicial-Conduct and Judicial-Disability Proceedings*.

10(a), *Rules for Judicial-Conduct and Judicial-Disability Proceedings*.<sup>3</sup> Future abuse of the judicial misconduct complaint procedure may result in the imposition of restrictions under this provision.

s/ D. Brooks Smith  
Chief Judge

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<sup>3</sup> Rule 10(a) of the *Rules of Judicial-Conduct and Judicial-Disability Proceedings* provides:

Abusive Complaints. A complainant who has filed repetitive, harassing, or frivolous complaints, or has otherwise abused the complaint procedure, may be restricted from filing further complaints. After giving the complainant an opportunity to show cause in writing why his or her right to file further complaints should not be limited, the judicial council may prohibit, restrict, or impose conditions on the complainant's use of the complaint procedure. Upon written request of the complainant, the judicial council may revise or withdraw any prohibition, restriction, or condition previously imposed.

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ORDER

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(Filed: November 28, 2016)

PRESENT: SMITH, *Chief Judge*.

On the basis of the foregoing opinion entered on this date, it is ORDERED AND ADJUDGED that the written complaint brought pursuant to 28 U.S.C. § 351 is hereby dismissed under 28 U.S.C. § 352(b)(1)(A)(ii) and (iii).

This order constitutes a final order under 28 U.S.C. § 352(c). Complainant is notified in accordance with Rules 11(g)(3) and 18, *Rules for Judicial-Conduct and Judicial-Disability Proceedings*, of the right to appeal this decision by the following procedure:

Rule 18(a) Petition. A complainant or subject judge may petition the Judicial Council of the Third Circuit for review.

Rule 18(b) Time. A petition for review must be filed in the Office of the Circuit Executive within **42 days** after the date of the chief judge's order.

18(b) Form. The petition should be in letter form, addressed to the Circuit Executive, and in an envelope marked "Misconduct Petition" or "Disability

Petition.” The name of the subject judge must not be shown on the envelope. The letter should be typewritten or otherwise legible. It should begin with “I hereby petition the judicial council for review of . . .” and state the reasons why the petition should be granted. It must be signed. There is no need to enclose a copy of the original complaint.

The full text of the *Rules for Judicial-Conduct and Judicial-Disability*

*Proceedings* is available from the Office of the Circuit Executive and on the Court of

Appeals’ internet site, [www.ca3.uscourts.gov](http://www.ca3.uscourts.gov).

s/ D. Brooks Smith

Chief Judge

Dated: November 28, 2016