

JUDICIAL COUNCIL OF THE THIRD CIRCUIT

J.C. No. 03-19-90019

IN RE: COMPLAINT OF JUDICIAL MISCONDUCT
OR DISABILITY

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

MEMORANDUM OPINION

(Filed: July 3, 2019)

PRESENT: SMITH, *Chief Judge*.

This complaint is 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 filed a pro se civil action, which primarily concerned the 2014 revocation of his medical license.¹ He named numerous defendants, claiming that they all participated in a conspiracy against him. In 2019, after the complaint had been amended twice and the defendants moved to dismiss, the Subject Judge issued a detailed memorandum opinion and order dismissing the federal claims with prejudice for failure to state a claim and dismissing the state law claims without prejudice for lack of jurisdiction. Several parties, including Complainant, filed for reconsideration. Complainant also sought a transfer, discovery, and the Subject Judge's recusal. Subject Judge decided to recuse.² In addition, Complainant filed an appeal and a petition for a writ of mandamus. Complainant subsequently moved to withdraw the appeal. The mandamus petition remains pending.

In this complaint of judicial misconduct, Complainant alleges that the Subject Judge "improperly obstructed [Complainant's] prosecution of the case by arbitrarily denying him discovery" and by subjecting the matter to "deliberate delay." Complainant also alleges that the Subject Judge engaged in improper ex parte communications with defense counsel. In addition, Complainant alleges that the Subject Judge has a conflict of interest because, more than a decade ago during his career as a private practitioner, the Subject Judge allegedly represented a defendant in Complainant's case "in a state court

¹ Although the complaint initially was filed in another Circuit, it was transferred to a District Court within this Circuit and was assigned to the Subject Judge.

² The Subject Judge decided to recuse to avoid an appearance of impropriety because Complainant has filed a civil complaint naming one of the Subject Judge's family members and, in that complaint, has included allegations concerning the Subject Judge.

related matter.” Complainant further alleges that the Subject Judge continues to “indirect[ly]” receive income from his former law firm. Finally, Complainant alleges that the Subject Judge’s brother-in-law, a politician, has received substantial political donations from defendants in Complainant’s case.

Complainant contests several of the Subject Judge’s rulings, including the alleged denial of discovery. Such allegations do not constitute cognizable misconduct under the Judicial Conduct and Disability Act. *See* Rule 4(b)(1), *Rules for Judicial-Conduct and Judicial-Disability Proceedings* (“Cognizable misconduct does not include an allegation that calls into question the correctness of a judge’s ruling, including a failure to recuse.”). Because they are not cognizable, Complainant’s merits-related allegations are subject to dismissal. *See* 28 U.S.C. § 352(b)(1)(A)(ii); Rules 4(b)(1), 11(c)(1)(B), *Rules for Judicial-Conduct and Judicial-Disability Proceedings*.

With regard to Complainant’s allegations of delay, a claim of delay in a single case may qualify as cognizable judicial misconduct only if “the allegation concerns an improper motive in delaying a particular decision.” Rule 4(b)(2), *Rules for Judicial-Conduct and Judicial-Disability Proceedings*. As a factual matter, the record reveals no unduly lengthy period of inactivity in Complainant’s appeal. Notably, although the proceeding has been pending before the Subject Judge since May 2016, Complainant chose to amend the complaint numerous times, most recently in June 2018. In addition, the docket reflects substantial motions practice by both parties; as a practical matter, time must be devoted to consider and resolve each motion. Moreover, there is nothing in the

record to substantiate the claim that any purported delay is the result of an improper motive on the part of the Subject Judge. Accordingly, the allegations of deliberate delay are subject to dismissal as frivolous and unsupported by evidence that would raise an inference that misconduct has occurred. *See* 28 U.S.C. § 352(b)(1)(A)(iii); Rule 11(c)(1)(C), (D), *Rules for Judicial-Conduct and Judicial-Disability Proceedings*.

In support of his allegation that the Subject Judge engaged in “multiple occasions” of improper ex parte communications, Complainant refers to exhibit 4 of the complaint, which is an excerpt from a lengthy document that Complainant filed in the District Court. In it, Complainant argues that the Subject Judge’s recent memorandum opinion resolving the motions to dismiss reflects improper ex parte communications because: (1) it states that Complainant “apparently” is not certified by a specific organization, when the amended complaint does not expressly state that information; and (2) it states that Complainant’s surgical success provoked “hostility and envy” in the surgical community, when the complaint uses the word “hostility” but not “envy.” In addition, Complainant cites an occasion in which defense counsel allegedly had advance knowledge of a scheduled conference.

The two references to the Subject Judge’s memorandum opinion do not substantiate Complainant’s allegations. Both references appear to be nothing more than reasonable inferences drawn from information appearing on the face of the complaint. There is nothing to indicate that the information came from any outside source at all, so the two references do not provide evidence of improper ex parte communications. Complainant’s

mere speculation that such communications occurred is far from sufficient to give rise to a reasonable inference of impropriety. Indeed, in his memorandum and order on recusal, the Subject Judge expressly confirmed that he “had no[]” ex parte communications as Complainant has alleged.

Regarding defense counsel’s alleged advance knowledge of a scheduling conference, Complainant provides no evidence that the Subject Judge contacted defense counsel—as opposed, for example, to a courtroom deputy or other court employee who would typically be tasked with coordination of scheduling. Nonetheless, even if the Subject Judge did contact defense counsel to arrange a scheduling conference, judges are permitted to engage in ex parte communications for scheduling and administrative purposes, such as arranging participation in a scheduling conference.³ See Canon 3(A)(4)(b), Code of Conduct for United States Judges.⁴ Because Complainant offers no evidence that would raise an inference that misconduct has occurred, these allegations will

³ The complaint actually posits that the alleged ex parte contact was made by a Magistrate Judge, although the Magistrate Judge was not named as a Subject Judge of the complaint. Upon review, the allegations concerning the Magistrate Judge do not provide “reasonable grounds for inquiry” into the existence of judicial misconduct. Accordingly, no complaint will be identified against the Magistrate Judge. See Rule 5, *Rules for Judicial-Conduct and Judicial-Disability Proceedings*.

⁴ The Code of Conduct for United States Judges is designed to provide guidance to judges, but is not a set of disciplinary rules. “While the Code’s Canons are instructive, ultimately the responsibility for determining what constitutes cognizable misconduct is determined by the Act and these Rules, as interpreted and applied by judicial councils, subject to review and limitations prescribed by the Act and these Rules.” Commentary on Rule 4, *Rules for Judicial-Conduct and Judicial-Disability Proceedings*.

be dismissed. 28 U.S.C. § 352(b)(1)(A)(iii); Rule 11(c)(1)(D), *Rules for Judicial-Conduct and Judicial-Disability Proceedings*.

Next, Complainant's allegations concerning the Subject Judge's alleged conflict of interest do not rise to the level of judicial misconduct. Based upon a publicly available 2002 judicial opinion that Complainant appended to his complaint, Complainant alleges an attorney/client relationship between the Subject Judge and a defendant in Complainant's current case. Upon review, however, the professional relationship was not actually with a defendant in Complainant's case at all. Rather, the record reflects that the Subject Judge represented an independent non-profit organization that provides administrative support to one of the defendants in Complainant's case. As the Subject Judge confirmed in his recent memorandum and order on recusal, he "did not represent any person or entity that is now a party to this case."

Moreover, even if the Subject Judge had represented a defendant, the existence of a professional relationship in an unrelated matter more than a decade ago does not, without more, give rise to a circumstance in which the Subject Judge's impartiality might reasonably be questioned.⁵ *See, e.g.*, Canon 3(C)(1)(b), Code of Conduct for United States Judges (requiring disqualification where, *inter alia*, "the judge served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge or lawyer has been a material witness"). Accordingly, these allegations describe "conduct that, even

⁵ Notwithstanding Complainant's allegation, the copy of the opinion Complainant has provided does not relate to Complainant's current proceeding before the Subject Judge.

if true, is not prejudicial to the effective and expeditious administration of the business of the courts,” and are therefore subject to dismissal. Rule 11(c)(1)(A), *Rules for Judicial-Conduct and Judicial-Disability Proceedings*.

Complainant next alleges that the Subject Judge continues to be paid by his former law firm, which is representing one defendant in Complainant’s proceeding. Public records reveal that the Subject Judge separated from his prior law firm when he took the bench in July 2012, and that he received income from that firm only for the portion of 2012 before he became a judge. Consistent with the public records, the Subject Judge confirmed in his recusal decision that he “severed all ties with the firm when [he] was appointed to the bench in July 2012.” Complainant provides no evidence to refute the public records that demonstrate that the Subject Judge is not receiving income from his prior law firm. Because Complainant’s allegations are frivolous and unsupported by evidence that would raise an inference that misconduct has occurred, they are subject to dismissal. 28 U.S.C. § 352(b)(1)(A)(iii); Rule 11(c)(1)(C), (D), *Rules for Judicial-Conduct and Judicial-Disability Proceedings*.

Finally, Complainant alleges that the Subject Judge’s wife’s brother is a politician who has received financial donations from defendants in Complainant’s proceeding. The Subject Judge’s recusal opinion states unequivocally that he “was and [is] unfamiliar with the identities of [his brother-in-law’s] corporate donors.” Nonetheless, assuming (only for purposes of this opinion) that the allegation is true, a financial connection between the Subject Judge’s wife’s brother and a defendant do not give rise to an inference that

judicial misconduct has occurred. The Code of Conduct does not suggest that financial interests of an in-law give rise to reasonable questions about a judge's ability to act impartially. *See* Canon 3(C)(1)(b), Code of Conduct for United States Judges (requiring disqualification if “the judge knows that the judge, individually or as a fiduciary, or the judge’s spouse or minor child residing in the judge’s household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be affected substantially by the outcome of the proceeding”). Accordingly, these allegations are subject to dismissal as 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)(D), *Rules for Judicial-Conduct and Judicial-Disability Proceedings*.

Based on the foregoing, this complaint will be dismissed pursuant to 28 U.S.C. § 352(b)(1)(A)(i), (ii), and (iii).

s/ D. Brooks Smith
Chief Judge

JUDICIAL COUNCIL OF THE THIRD CIRCUIT

J.C. No. 03-19-90019

IN RE: COMPLAINT OF JUDICIAL MISCONDUCT
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ORDER

(Filed: July 3, 2019)

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)(i), (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.

s/ D. Brooks Smith

Chief Judge

Dated: July 3, 2019