

JUDICIAL COUNCIL OF THE THIRD CIRCUIT

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J.C. No. 03-13-90027

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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: July 1, 2013)

PRESENT: McKEE, Chief Judge.

This is a complaint filed by an attorney under the Judicial Conduct and Disability Act, 28 U.S.C. §§ 351-64, against a United States District Judge (hereinafter “Subject Judge”). For the reasons discussed below, the complaint will be dismissed.<sup>1</sup>

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). The “misconduct

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<sup>1</sup> Complainant’s niece filed a related complaint which has been dismissed in a separate opinion and order. See J.C. No. 03-13-90026.

procedure [under the Act] is not designed as a substitute for, or supplement to, appeals or motions for reconsideration. Nor is it designed to provide an avenue for collateral attacks or other challenges to judges' rulings." In re Memorandum of Decision of Judicial Conference Committee on Judicial Conduct and Disability, 517 F.3d 558, 561 (U.S. Jud. Conf. 2008).

Complainant is an attorney and the uncle of a woman who filed a civil suit in District Court against her adoptive parents alleging abuse. Complainant did not file an appearance on behalf of his niece, but the defendants filed a pleading alleging that although the niece claimed to be proceeding *pro se*, Complainant was in fact helping her with the litigation. In his Memorandum Opinion, the Subject Judge cautioned Complainant that to the extent he was advising his niece in a "ghost-writer" capacity, both are advised that such a practice is strongly disapproved as unethical and as a deliberate evasion of the responsibilities imposed on attorneys." The Subject Judge went on to cite case law on the issue and stated that, "[Complainant] is warned that, as an attorney, his actions may be unethical and could serve as a basis for sanctions."

Complainant concedes that he has not read the Subject Judge's opinion himself, and that his allegations are based on his niece's account of the opinion. Nonetheless, he maintains that the Subject Judge stated that he "will subject [him] to discipline" for being an attorney ghostwriter for his niece. Complainant contends that he has "never heard of a judge assuming the role of a witness against a lawyer. I did not appear before this judge.

I did not evince criminal or civil contempt before this judge.” According to Complainant, this amounts to “making public commentary about the merits of a pending or impending proceeding in violation of Canon 3(A)(6)” and violates Canon 3(A)(5) because the Subject Judge’s comments delayed “prompt and fair resolution” of his niece’s civil suit.

Complainant further alleges that, “I can ‘ghostwrite’ anything I want for anyone I want . . . . There is no local rule anywhere in the Third Circuit that requires identification of ‘ghostwriters’.”

These allegations of misconduct are dismissed. In the first instance, the Subject Judge did not make any finding of misconduct with respect to Complainant, but merely cautioned him about possible sanctions based on the relevant case law if he engaged in unethical behavior. Cautioning an attorney and a litigant in a Memorandum Opinion about possible sanctions for conduct in the course of a civil suit pending before the judge is plainly not improper public comment within the meaning of Canon 3(A)(6). Canon 3(A)(6) (“The prohibition on public comment on the merits does not extend to public statements made in the course of the judge’s official duties. . . .”). Furthermore, the Subject Judge did not assume the role of a “witness against” Complainant. In fact, Canon 3B(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.” Here, the Subject Judge cautioned that unethical behavior on the part of Complainant could be subjected to

sanctions. Irrespective of whether the Subject Judge was correct concerning the unethical nature of Complainant's uncle's alleged conduct or his ability to sanction him, the Subject Judge's statement does not support a complaint of judicial misconduct under the Act.<sup>2</sup> Nor is there any evidence that making such a comment in a Memorandum Opinion resulted in delay of the pending litigation in violation of Canon 3(A)(5). Accordingly, Complainant's allegations are dismissed as frivolous and unsupported by any 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.

Complainant also alleges that the Subject Judge engaged in misconduct because he read about Complainant in a "document filed with the court by one defendant [which was] not provided to [his niece]. Apparently, the Subject Judge wrote in his document that [his niece] had to pay a fee to the Clerk of Court to get a copy of the defendant's filing."

Complainant contends that this document was an improper *ex parte* communication because:

a defendant filed something with the judge who not only considered it, but wrote in his Memorandum that [Complainant] has to pay for copies from the Clerk of Court. That is to say that [my niece's] defendants are absolved of having to provide a copy of their communications with the court to her, and that [my niece's] obligation is to intuit and track down such communications and pay for copies of them.

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<sup>2</sup> I express no opinion as to the merits of the Subject Judge's statements regarding whether the uncle's putative conduct was unethical and potentially subject to sanctions. In any event, to the extent Complainant seeks to collaterally attack any of the Subject Judge's rulings, his allegations are subject to dismissal as merits-related. See 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.

Even assuming *arguendo* that the documents in question were not served by the defendants on his niece, the docket reflects that they were docketed and publicly available. In addition, copies of the updated docket reflecting all documents filed in the case were sent to the parties by the Court prior to issuance of the Subject Judge's Memorandum Opinion. The docket further reflects that the Subject Judge instructed the parties that communications with the Court must be served upon all the parties and attach a certificate of service. Under these circumstances, there clearly was no improper *ex parte* communication between the Subject Judge and the defendants. Moreover, the cost of copies of any documents requested from the Court is based on policy directives from the Administrative Office of the Courts and not individual judges. Accordingly, Complainant's allegations are dismissed as frivolous and unsupported by any 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.

For the foregoing reasons, the complaint is dismissed pursuant to 28 U.S.C. § 352(b)(1)(A)(ii) and (iii).

/s/ Theodore A. McKee  
Chief Judge

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ORDER

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(Filed: July 1, 2013)

PRESENT: McKEE, 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 of the Court of Appeals within **35 days** of the date on the letter informing the parties of the Chief Judge's order.

18(b) Form. The petition should be in letter form, addressed to the Circuit Executive of the Court of Appeals, 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 of the Court of Appeals for the Third Circuit and on the Court of Appeals’ internet site, [www.ca3.uscourts.gov](http://www.ca3.uscourts.gov).

/s/ Theodore A. McKee  
Chief Judge

Dated: July 1, 2013