

JUDICIAL COUNCIL OF THE THIRD CIRCUIT

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J.C. No. 03-19-90005

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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: April 26, 2019)

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 Magistrate 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 is a licensed attorney who represented the plaintiff in a civil proceeding. Counsel for the defense moved to disqualify Complainant, alleging a conflict of interest based on a prior representation. After briefing, the Subject Judge directed

Complainant to provide a certification concerning the potential conflict of interest. Complainant partially complied, and the Subject Judge twice ordered additional clarification. Complainant then moved to recuse the Subject Judge.

The Subject Judge held hearings on the disqualification and recusal issues. Ultimately, the Subject Judge declined to recuse and ordered appointment of counsel for plaintiff for the limited purpose of providing a consultation concerning the potential conflict of interest. Complainant sought reconsideration of the limited counsel appointment. While the reconsideration motion was pending, appointed counsel reported that the plaintiff wished to retain new counsel. The Subject Judge then ordered Complainant terminated from the representation and dismissed the disqualification motion as moot. Substitute counsel has entered an appearance for the plaintiff and the matter is proceeding. Complainant filed a notice of appeal to the presiding District Judge in which he argued that there was no evidence of a conflict of interest, that the Subject Judge intimidated and coerced his client into terminating the representation, and that the disqualification issue has caused unreasonable delay in the litigation. Substitute counsel later withdrew Complainant's appeal.

This complaint of judicial misconduct presents substantially the same allegations as Complainant's appeal to the presiding District Judge. Specifically, Complainant alleges that the Subject Judge mishandled the disqualification motion by, *inter alia*, "expand[ing] defendant's argument regarding a possible conflict" and "question[ing] the veracity of a conflict waiver provided by [Complainant]." Complainant further alleges

that the Subject engaged in coercion and “improper influence and intimidation of [his] client” by appointing independent counsel to question the plaintiff about the potential conflict, “despite a complete lack of any evidence having been provided.” In addition, Complainant argues that the focus on the alleged conflict of interest amounts to the “allowance of delay tactics, which . . . have allowed this case to languish for 1,015 days.” Finally, Complainant implies that the Subject Judge improperly declined to recuse herself because it allegedly is “undisputed, and in fact admitted by all parties, that a member of the current defense firm provided work to [the Subject Judge’s] law firm before [the Subject Judge] became a magistrate.”

Pursuant to Rule 11(b), *Rules for Judicial-Conduct and Judicial-Disability Proceedings*,<sup>1</sup> the Subject Judge was asked to respond to Complainant’s allegations. The Subject Judge provided a response and the complaint is now ripe for disposition.

Many of Complainant’s allegations reflect his disagreement with the Subject Judge’s disposition of the disqualification motion, including her decision to appoint an independent counsel to consult with plaintiff about the potential conflict of interest, as well as Complainant’s disagreement with the Subject Judge’s decision not to recuse. These allegations are merits-related. “An allegation that calls into question the correctness of a judge’s ruling, including a failure to recuse, without more, is merits-related.” Rule 3(h)(3)(A), *Rules for Judicial-Conduct and Judicial-Disability*

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<sup>1</sup> The *Rules for Judicial-Conduct and Judicial-Disability Proceedings* were amended effective March 12, 2019. Because this complaint was filed in January 2019, prior to the effective date of the amended rules, the newly amended rules do not apply to this complaint.

*Proceedings*). Because merits-related allegations do not constitute cognizable misconduct under the Judicial Conduct and Disability Act, such allegations will be dismissed. *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*.

A claim of undue delay also is not generally cognizable as judicial misconduct. A claim of delay effectively poses a challenge to the merits of official actions by the judge – *i.e.*, the decision to assign a lower priority to a particular case – and thus is merits-related. *See* Rule 3 Commentary, *Rules for Judicial-Conduct and Judicial-Disability Proceedings*. 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 3(h)(3)(B), *Rules for Judicial-Conduct and Judicial-Disability Proceedings*.

The record does not support Complainant’s allegation that the proceeding has “languished” for more than 1,000 days. The proceeding was removed to federal court in April 2016 and, by August of that same year, the parties had requested that the case be suspended so that relief could be pursued in state court. The case did not become active in District Court until February 2018. The decision to suspend the case for nearly two years cannot fairly be described as a period of undue delay attributable to the Subject Judge. Moreover, when the case once again became active, the defendants raised the current issue concerning Complainant’s potential conflict of interest and Complainant filed for recusal. These motions demanded the Court’s attention for about a year, but the time devoted to resolving the parties’ motions for disqualification and recusal do not amount to undue

delay. Indeed, the record reflects that the Subject Judge held multiple hearings and issued several orders in the course of addressing those motions. Now that replacement counsel has entered an appearance, the case is once again moving forward. It is therefore apparent that there was no period in which this matter “languished” as Complainant alleges.

Moreover, although Complainant alleges that the Subject Judge acted with an improper motive in the form of “improper influence and intimidation of [his] client,” these allegations are unsubstantiated. Complainant’s claims of coercion and intimidation are premised solely upon the Subject Judge’s decision to appoint an independent counsel to consult with Complainant’s client about the potential conflict of interest. As previously discussed, Complainant’s disagreement with that decision is merits-related and non-cognizable. Although Complainant alleges that the Subject Judge “expanded defendant’s argument regarding a possible conflict” and “questioned the veracity of a conflict waiver provided by [Complainant,]” a close review of the record, including the relevant hearing transcript, reveals no instance of conduct prejudicial to the effective and expeditious administration of the business of the courts. *See* Rule 3(h)(1), *Rules for Judicial-Conduct and Judicial-Disability Proceedings*. Rather, the Subject Judge engaged in consideration of the issues presented, and did not coerce or intimidate the plaintiff while doing so. Complainant’s allegations are therefore 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*.

Finally, to the extent Complainant’s claims concerning the Subject Judge’s failure to recuse are not merits-related, they do not rise to the level of judicial misconduct. Complainant observes that it is “undisputed, and in fact admitted by all parties, that a member of the current defense firm provided work to [the Subject Judge’s] law firm before [the Subject Judge] became a magistrate.” In her response to the complaint, the Subject Judge clarifies the nature of the professional relationship at issue. Specifically, more than a decade ago when the Subject Judge was in private practice, she worked as local counsel with an attorney who is a member of the defense firm (but who has not appeared as defense counsel). Since then, the Subject Judge has not had any further professional or personal relationship with that attorney. Without more, a brief professional relationship more than a decade ago does not give rise to a circumstance in which the Subject Judge’s impartiality might reasonably be questioned. *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”).<sup>2</sup> Accordingly, these allegations describe “conduct that, even if true, is not prejudicial to the effective and expeditious administration of the business of the courts,” and are therefore subject to

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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*.

dismissal. Rule 11(c)(1)(A), *Rules for Judicial-Conduct and Judicial-Disability Proceedings*.

In conclusion, upon careful review, the allegations of this complaint do not establish conduct on the part of the Subject Judge that rises to the level of judicial misconduct. Rule 3(h)(1), *Rules for Judicial-Conduct and Judicial-Disability Proceedings*. Based upon the foregoing, this complaint will be dismissed pursuant to 28 U.S.C. §§ 352(b)(1)(A)(ii) and (iii).

s/ D. Brooks Smith  
Chief Judge

JUDICIAL COUNCIL OF THE THIRD CIRCUIT

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J.C. No. 03-19-90005

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ORDER

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(Filed: April 26, 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)(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: April 26, 2019