

THE JUDICIAL COUNCIL OF THE SEVENTH CIRCUIT
219 South Dearborn Street
Chicago, Illinois 60604

November 26, 2008

FRANK H. EASTERBROOK
Chief Judge

No. 07-08-90110

IN RE COMPLAINT AGAINST A JUDICIAL OFFICER

MEMORANDUM

Complainant, who describes himself as an attorney in a common-law jurisdiction other than the United States, appears to be a relative of the defendant in a federal criminal prosecution. He contends that the district judge assigned to that prosecution (in which the defendant has been found guilty by a jury but not yet sentenced) has committed misconduct by flouting the Constitution and conspiring with the prosecutor.

Complainant believes that the subject judge has wilfully misconstrued the scope of the first amendment's protection of threatening statements. Whether the judge has understood and applied the law correctly is, however, a subject for the court of appeals rather than the Judicial Council, which is an administrative body. Any complaint that is "directly related to the merits of a decision or procedural ruling" must be dismissed. 28 U.S.C. §352(b)(1)(A)(ii). The allegations of this complaint fit that description. "Any allegation that calls into question the correctness of an official action of a judge ... is merits related." Standard 2 for Assessing Compliance with the Act, *Implementation of the Judicial Conduct and Disability Act of 1980: A Report to the Chief Justice* 145 (2006).

Portions of the trial transcript included with the complaint show that complainant is challenging judicial rulings. He contends, for example, that the jury instructions defining a "true threat" are incorrect. He maintains that the judge should have allowed defense counsel to argue to the jury a legal position at variance with the instructions. But deciding what instructions to give, and directing both the lawyers and the jurors to follow the instructions rather than their own views of the law, are normal steps in litigation, squarely covered by §352(b)(1)(A)(ii).

The complaint concludes by accusing the judge of "conspiring" with the prosecutor. The basis of this accusation is an exchange in open court, on the final day of trial, in which the prosecutor opposes a remark by defense counsel, saying in part: "That's not the instruction the Court is going to give about how the jury should be informed in

which the statement was made.” Complainant asks how, other than collusion, the prosecutor could know what instructions the judge would give the jury later that day. That the prosecutor knew the instructions in advance “shows an unholy nexus between” the judge and the prosecutor, according to complainant.

I am surprised that a person styling himself as a lawyer would make such a contention. In federal courts (and, I should think, the courts of other common-law countries) counsel for both sides submit proposed jury instructions and hold a conference with the judge to discuss the subject before the jury retires to deliberate—often, indeed, before the trial begins. The judge must entertain argument and make rulings far enough in advance that counsel can take the instructions into account when making their arguments to the jury. See Fed. R. Crim. P. 30(b). The docket sheet in the criminal prosecution shows that the parties submitted proposed jury instructions before the trial began, and that a jury-instruction conference was held, and rulings made, the day before the prosecutor referred to “the instruction the Court is going to give”. It is not necessary to hypothesize a conspiracy, or even an *ex parte* exchange, to explain the prosecutor’s knowledge. A lawyer, even one not licensed to practice in the federal courts, must look up the rules and understand normal procedure before accusing a judge of conspiracy and an “unholy nexus” with the prosecutor. This aspect of the complaint is dismissed under §352(b)(1)(A)(iii) because it does not present any evidence of misconduct.