

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

March 16, 2009

FRANK H. EASTERBROOK
Chief Judge

Nos. 07-09-90028 to -90042

IN RE COMPLAINT AGAINST FIFTEEN JUDICIAL OFFICERS

MEMORANDUM

The court of appeals has deferred briefing in complainant's appeal until it decides whether he may proceed *in forma pauperis*. Believing that this process has taken too long, complainant has charged 15 appellate judges with misconduct.

Because I am one of the judges named in the complaint, the first question is whether I am disqualified. If I am disqualified, then every judge of the circuit is disqualified, and no one would be authorized to screen the complaint. (Complainant has omitted one circuit judge, but this seems to be an oversight caused by his having an out-of-date list of the court's members. Among the judges who are named is one who died more than two years ago. I conclude that complainant meant to name all of the court's judges, so referring this complainant to the sole omitted judge would be inappropriate; it would just lead complainant to add that judge's name to the list.)

Although it is possible to refer a complaint to another circuit, this is inappropriate when the complaint is insubstantial and all judges have been named only as a harassing device. See *Implementation of the Judicial Conduct and Disability Act of 1980: A Report to the Chief Justice* 116–17 (2006). Under these circumstances the Rule of Necessity allows the Chief Judge to make a preliminary ruling on the complaint. See the Commentary on Rule 25 of the Rules for Judicial-Conduct and Judicial-Disability Proceedings.

Rule 25(g) could be read to suggest that this step is appropriate only if the Judicial Council gives permission in advance. I do not think that a sound reading when, as here, a complainant names a majority of the Council, which itself would be unable to muster a quorum without invocation of the Rule of Necessity. But if complainant believes that I should not have participated in this proceeding, he may file a petition for review by the Council and ask it to assign someone else to the matter.

The complaint against Circuit Judge Fairchild is dismissed under 28 U.S.C. §352(b)(1)(A)(i). Judge Fairchild died in February 2007 and is no longer within the scope of the 1980 Act.

The complaint against the other judges is dismissed under 28 U.S.C. §352(b)(1)(A)(ii), which provides that 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, *Report* at 145. How much time to take in making a decision is a procedural ruling. See *id.* at 146 (“[a] complaint of delay in a single case is properly dismissed as merits related”).

Complainant maintains that the clerk of the district court has committed misconduct by beginning the process of collecting the filing fees from complainant’s prison trust account, and that the clerk of the court of appeals has engaged in misconduct by telling complainant that he is not entitled to file motions concerning the merits of his appeal until his fee status has been resolved. Complainant appears to think that, if his motion for leave to proceed *in forma pauperis* should be granted, then he would not owe any fees. That’s not correct. Complainant became liable for the entire fee as soon as he filed a notice of appeal. If the motion for leave to proceed *in forma pauperis* is denied, then the fee must be paid in full before the appeal proceeds; if it is granted, then the fee may be paid in installments. Either way, the fee is due. So the district clerk did not err—nor did the appellate clerk. An effort to jump the gun is properly resisted. Moreover, as clerks are not judicial officers, this aspect of the complaint is outside the scope of the 1980 Act.