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

December 17, 2009

FRANK H. EASTERBROOK
Chief Judge

Nos. 07-09-90136 & -90137

IN RE COMPLAINT AGAINST TWO JUDICIAL OFFICERS

MEMORANDUM

Complainant is a state prisoner who wants federal collateral relief. His petition was dismissed because it named the wrong respondents—prosecutors and other public officials, but not the warden of the prison where complainant was confined.

Three years later, in 2008, he filed a complaint under the Judicial Conduct and Disability Act of 1980, accusing the judge of misconduct for not ruling in his favor and conducting an independent investigation into his conviction and confinement. I dismissed that complaint (No. 07-08-90047) under 28 U.S.C. §352(b)(1)(A)(ii), which provides that any complaint "directly related to the merits of a decision or procedural ruling" must be dismissed. See also Rule 11(c)(1)(B) of the Rules for Judicial-Conduct and Judicial-Disability proceedings. "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).

Shortly after I dismissed No. 07-08-90047, complainant asked the district judge to reopen the unsuccessful collateral attack. Likely complainant took this route, rather than filing a proceeding with the warden as respondent, because the time to seek collateral relief had expired. 28 U.S.C. §2244(d). The judge denied that motion, and complainant has filed a second proceeding against not only the judge who made this decision, but also against a second judge who concluded that the first is not recused.

Despite my ruling in No. 07-08-90047, which informed complainant about §352(b)(1)(A)(ii), the current complaint does not mention that statute or make any effort to demonstrate how its allegations come within the 1980 Act. If complainant believes that a ruling on a motion to recuse a judge is outside §352(b)(1)(A)(ii), he is mistaken. See *Report* at 146. Deciding whether to render judicial service in a case is itself a procedural ruling covered by §352(b)(1)(A)(ii).

What is more, complainant is mistaken to suppose that he can remove a judge at will by filing a charge under the 1980 Act. Last year's complaint is the only reason given in the current complaint for thinking that the district judge should have removed himself. Litigants cannot issue peremptory challenges against federal judges and effectively choose who will decide their cases. Neither a complaint against a judge under the 1980 Act nor a civil suit against the judge (which complainant says he plans to file) requires a judge to step aside. See Advisory Opinion 103 issued by the Committee on Codes of Conduct (concluding that neither a complaint under the 1980 Act nor a suit against a judge automatically prevents the judge from serving in other litigation by or against the person who has complained against or sued the judge).

Failure to mention §352(b)(1)(A)(ii) leads me to suspect that the current complaint was filed to harass rather than to bring misconduct to light. Any future complaint that does not make a serious effort to engage the language of the 1980 Act will be dismissed summarily, and I will order complainant to show cause why further frivolous use of the Act's processes should not be curtailed. See Rule 10(a) of the Rules for Judicial-Conduct and Judicial-Disability proceedings. Complainant also must understand that his threatened civil suit against the judges would be frivolous (judges are entitled to immunity for acts taken in resolving litigation), would count as a "strike" for the purpose of 28 U.S.C. §1915(g), and would expose complainant to sanctions.