

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

May 14, 2010

FRANK H. EASTERBROOK
Chief Judge

No. 07-10-90023

IN RE COMPLAINT AGAINST A JUDICIAL OFFICER

MEMORANDUM

Complainant, a lawyer proceeding as the plaintiff *pro se* in pending civil litigation, has been engaged in a dispute with defense counsel about discovery. After the magistrate judge assigned to manage the discovery directed complainant to appear for another four hours of a personal deposition, complainant charged the magistrate judge with misconduct.

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). 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). The allegations of this complaint fit that description, to the extent that complainant contests the decision requiring her to participate in an additional deposition.

Complainant also contends that the subject judge engaged in *ex parte* contacts with counsel for the defendants, that the judge has "conspired" with these lawyers, and that during the proceeding at which the judge directed complainant to answer another four hours of questions, the judge acted "in an openly hostile and egregious manner". The allegation of "conspiracy" is not supported by any factual particulars and is dismissed for that reason under §352(b)(1)(A)(iii). The other two allegations raise factual questions that led me to conduct a limited inquiry under Rule 11(b) of the Rules for Judicial-Conduct and Judicial-Disability Proceedings.

Complainant contends that she received calls from defense counsel in which these lawyers told her that they would submit *ex parte* applications to the subject judge. I assume that complainant's allegations are accurate, though it is unclear why lawyers would openly proclaim to an adverse party a plan to act unethically. I asked the subject

judge what happened. The judge replied by letter that her chambers received two phone calls from defense counsel on the date that complainant identified. The judge did not participate in either call.

One was taken by a law clerk, was recorded, and has been transcribed. Defense counsel asked whether "the Judge had some time to speak with all parties today." The law clerk replied that the judge was busy. The second call, also taken by a law clerk, requested permission to appear in open court the next day without the 3-day notice contemplated by the judge's normal practice. That permission was granted; again the judge did not participate. In neither of these phone calls did either defense counsel or the judge do or say anything improper. See Canon 3A(4)(b) (a judge may "permit ex parte communications for scheduling ... purposes" if the communication "does not address substantive matters"). These phone calls come within Canon 3A(4)(B). And, come the next day, complainant was present in court, having been alerted by opposing counsel of the plan to ask for the subject's judge to resolve the parties' dispute. (Complainant does not explain why she believes that scheduling requests such as the ones made by defense counsel are improper.)

This brings me to the final contention: That during this hearing the subject judge behaved "in an openly hostile and egregious manner." Complainant does not say what aspects of the judge's conduct she thinks "hostile" or "egregious," and the complaint might have been dismissed for that reason. But out of caution I asked the subject judge to have a transcript prepared. That has been done, and the transcript reveals an ordinary, and entirely polite, exchange among complainant, defense counsel, and the subject judge about how many additional hours of deposition are appropriate. The judge did not engage in misconduct; complainant's allegations are conclusively refuted by objective evidence.

Complainant's allegations of "conspiracy" and "egregious" misconduct by the subject judge are irresponsible. They disserve the judicial system. A lawyer should know better. This performance must not be repeated.