

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

December 31, 2008

FRANK H. EASTERBROOK  
Chief Judge

No. 07-08-90114

IN RE COMPLAINT AGAINST A JUDICIAL OFFICER

MEMORANDUM

Complainant, a prisoner representing himself in a suit against the warden, believes that the district judge had improper *ex parte* conversations with the lawyer representing the warden.

The basis of complainant's belief is a statement in one of the judge's orders that forms consenting to decision by a magistrate judge have not been filed. This must mean, complainant surmises, that the judge discussed this issue with counsel for the warden. Complainant says that he did not receive a form for consent, so the process must have been oral rather than in writing.

For current purposes I assume that complainant's understanding is correct: That the judge, or someone acting on the judge's behalf, asked counsel for the warden whether they would consent to final decision by a magistrate judge. There is nothing inappropriate about such a request.

The governing rule is Canon 3A(4) of the Code of Conduct for United States Judges. This provides that "[a] judge should accord to every person who is legally interested in a proceeding, or the person's lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider *ex parte* communications on the merits, or procedures affecting the merits, of a pending or impending proceeding...". A request that a party consent to decision by a magistrate judge is not one "on the merits"; nor is the possibility of consent a procedure "affecting the merits"—not only because mutual consent is required, but also because a magistrate judge will apply the same substantive rules as a district judge.

Complainant also accuses the judge of "putting words in [his] mouth." By this complainant means that the judge has described the events, and the nature of the claims, differently from the way complainant has done. This is normal; judges are

entitled to summarize and often need to correct litigants' legal misunderstandings. To the extent complainant believes that the judge has not grasped the essence of his contentions, that argument can be presented on appeal from any final decision. The subject is outside the scope of the Judicial Conduct and Disability Act of 1980. To the extent that complainant contests the substance of any judicial decision, 28 U.S.C. §352(b)(1)(A)(ii) provides that proceedings under the 1980 Act are not the appropriate forum: The Judicial Council is an administrative rather than a judicial body.