

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

September 23, 2010

FRANK H. EASTERBROOK
Chief Judge

No. 07-10-90054

IN RE COMPLAINT AGAINST A JUDICIAL OFFICER

MEMORANDUM

Complainant is a lawyer who contends that the district judge frustrated his efforts to file a notice of appearance and represent his client, a defendant in a pending criminal prosecution. Complainant also asserts that the judge held *ex parte* hearings, manipulated the order of entries on the docket sheet, and appointed a lawyer the defendant does not want.

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). Many of this complaint’s allegations fit that description and are dismissed without further discussion.

Some of the allegations, however, are outside the scope of subsection (ii), and I therefore asked the district judge for a response. See §352(a) and Rule 11(b) of the Rules for Judicial-Conduct and Judicial-Disability Proceedings. I also asked the judge for transcripts of the proceedings at which complainant alleges that *ex parte* discussions occurred. I have considered the district judge’s written response and the transcripts.

The complaint’s most serious allegation is that the judge and the prosecutor discussed a criminal prosecution in the absence of the accused and his lawyer. My review of the transcripts shows that the accusation is unfounded. The indictment charges two defendants with federal crimes. One of the defendants was in custody in the district; the other (complainant’s potential client) was in custody in a different district. All of the proceedings that complainant characterizes as *ex parte* involved the charges against the defendant who was present in the district. There is no reason why proceedings against that defendant had to be deferred while the second defendant was

elsewhere. The proceedings in question were confined to the interests of the first defendant, plus inquiries to the prosecutor concerning when the second defendant would arrive in the district. Nothing untoward occurred; the judge's inquiries were proper under Canon 3A(4)(b) of the Code of Judicial Conduct. This aspect of the complaint is dismissed under §352(b)(1)(A)(iii) because it is conclusively refuted by objective evidence.

According to complainant, the subject judge failed in his responsibility to ensure that the defendant, while being held in a different district, was represented by counsel. Complainant does not explain how this would be accomplished. A judge sitting in one district lacks authority to appoint counsel for a person in a different district. That is the responsibility of the judge in the other district before whom the defendant is brought for an initial appearance. This aspect of the complaint is dismissed under §352(b)(1)(A)(i) because it does not allege misconduct.

Once the defendant arrived in the district where he had been indicted, counsel was appointed for him. Complainant describes this as misconduct by the subject judge on the theory that, at the time, the defendant wished to proceed *pro se*. There are two problems with this assertion. First, counsel was not appointed by the subject judge. The appointment was made by a magistrate judge after a hearing held by that magistrate judge. A magistrate judge's actions cannot be imputed to a district judge just because both judges take part in the same case. (The subject judge informs me that the defendant never asked him to dismiss the appointed lawyer.) Second, the events described in the complaint do not evince a desire by the defendant to proceed *pro se*; they imply, instead, that complainant was attempting to practice law without being admitted to the bar in the district court. Counsel asserts that he drafted documents for the defendant to file "pro se." Drafting documents for a client is the practice of law. That the lawyer tells his client to keep the lawyer's name off the documents does not make the legal work less the practice of law, or the client less a client. The practice instead constitutes an attempt to deceive the court and avoid the duties associated with legal representation. So the magistrate judge's actions cannot be understood as frustrating the defendant's preference for self-representation.

Complainant attempted to file an appearance on behalf of the defendant near the time the magistrate judge appointed a different lawyer to represent him. The judge refused to accept complainant's appearance form, for two reasons: first, it was not a proper form (instead of using the form for the district court in question, complainant used a different court's form); second, complainant was not then a member of the district court's bar. He filed neither an application for membership nor a motion for leave to proceed *pro hac vice*. A second attempt to file an appearance form met the same fate, and for the same reasons. The allegation that the judge committed misconduct on either occasion is dismissed under both subsection (i) and subsection (ii) of §352(b)(1)(A).

A third attempt by complainant to file an appearance form failed because another lawyer (the one appointed by the magistrate judge) already was representing the defendant, and complainant did not file a motion for leave of court to change the representation of a defendant who already had counsel. The judge had told complainant that such a motion was necessary; complainant ignored the judge's direction, with predictable results. The allegation that the judge committed misconduct in this respect is dismissed under both subsection (i) and subsection (ii) of §352(b)(1)(A).

Complainant's assertion that the judge manipulated the order of entries on the docket to make it appear that the defendant already had a lawyer, when he did not, and

therefore justify the rejection of a motion to dismiss that complainant attempted to file on behalf of what the record showed to be someone else's client. Complainant seems to assume that a federal district judge makes entries on docket sheets. They do not. Docket sheets are handled by personnel in the clerk's office. The rejected motion was noted on the docket sheet by a member of the clerk's staff. This aspect of the complaint is dismissed as conclusively refuted by objective evidence. And there is no reason to suspect the clerk's office of misconduct. The other lawyer (the one appointed by the magistrate judge) filed his appearance electronically; such a filing appears instantaneously on the docket, without the need for human intervention. Complainant filed the motion to dismiss on paper. It takes time for paper to be filed and docketed.

Complainant appears to believe that enforcing rules such as the requirement of membership in a court's bar, the filing of notices and motions, and the completion of prescribed forms, are "technicalities" the enforcement of which is misconduct. A lawyer who has this view of procedural rules will not do either his client or the judicial system any good. Much of the law entails the enforcement of rules that may be called "technical," but which are essential to the maintenance of orderly procedures. A judge does not commit misconduct by insisting that procedures be followed.