

Judicial Council of the Seventh Circuit
219 South Dearborn Street
Chicago, Illinois 60604

December 21, 2011

Circuit Judge Joel M. Flaum*

Nos. 07-11-90072 to -90074

IN RE COMPLAINTS AGAINST THREE JUDGES

MEMORANDUM

Pursuant to the Judicial-Conduct and Judicial-Disability Act (the “Act”), 28 U.S.C. §§ 351-364, complaints have been filed in this circuit charging a three-judge panel with misconduct. The complaints allege that the judges have acted inconsistently with the Code of Conduct for United States Judges (the “Code”). Complainant—an attorney who appeared before the judges—alleges that a judicial opinion authored by one of the judges was a personal, public attack on complainant. The main objection is to the opinion’s inclusion of two pictures—one of an ostrich with its head in the sand and another of a suited man with his head similarly buried. The pictures were evidently meant to depict complainant’s willful avoidance of dispositive legal authority that was repeatedly brought to complainant’s attention. Complainant maintains that the opinion violated § (A)(3) of Canon 3 of the Code, which states, in pertinent part, “A judge should be patient, dignified, respectful, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity.” Complainant further contends that the two judges who joined the opinion were in violation of Canon 3 as well. Complainant mistakenly cites a judicial code of conduct used by certain state courts, but the federal Code has a similar provision, § (B)(5) of Canon 3, which provides, “A judge should take appropriate action upon learning of reliable evidence indicating the likelihood that a judge’s conduct contravened this Code” Complainant’s implication is that a violation of the Code is

* These complaints were assigned to Circuit Judge Joel M. Flaum pursuant to 28 U.S.C. § 351(c).

a per se violation of the Act, and thus the three judges have committed actionable misconduct.

Under the Act, the Judicial Conference of the United States has the authority to prescribe rules establishing procedures for complaints. 28 U.S.C. § 358(a). Both the Judicial Conference's prescribed rules (the "Rules") and the Act itself acknowledge that actions constitute misconduct when they are "prejudicial to the effective and expeditious administration of the business of the courts." 28 U.S.C. § 351(a); RULES FOR JUDICIAL-CONDUCT AND JUDICIAL-DISABILITY PROCEEDINGS, Rule (3)(h)(1) (hereinafter "RULES"). By alleging violations of Canon 3, complainant implies that such violations of the Code are necessarily prejudicial to this court's effective and expeditious administration. While the standard for misconduct under the Act is not "subject to precise definition," the commentary to the Rules explains the interplay between the Code and the Act in stating that "[a]lthough [the Code] may be informative, its main precepts are highly general; the Code is in many potential applications aspirational rather than a set of disciplinary rules." RULES, *Commentary on Rule 3*; see also *In re Charge of Judicial Misconduct*, 62 F.3d 320, 322 (9th Cir. 1995) ("With the Act, Congress imposed a standard for discipline that is significantly lower than, and conceptually different from, the ideals embodied in the [Code].").

Whether the depictions contained in the challenged opinion advance the aspirational goals reflected in § (A)(3) of Canon 3 is not the pertinent inquiry. Rather, the question is whether the photo-enhanced opinion had a prejudicial effect on the administration of the business of this court. The inclusion of photographs to underscore a decision already reached by the court could not have such an effect. The opinion, therefore, was not prejudicial to the effective and expeditious administration of the court's business, and thus does not constitute misconduct under the Act. It follows that the non-authoring judges on the panel also did not commit misconduct. The complaints, therefore, are dismissed under 28 U.S.C. § 352(b)(1)(A)(i) and Rule 11(c)(1)(A) of the Rules.