

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

March 21, 2024

Chief Judge Diane S. Sykes

Nos. 07-24-90009, -90010 & -90011 (America First Legal Foundation)

Nos. 07-24-90018, -90019 & -90020 (Judicial Watch, Inc.)

IN RE COMPLAINTS AGAINST CHIEF JUDGE NANCY J. ROSENSTENGEL,
DISTRICT JUDGE STACI M. YANDLE, and DISTRICT JUDGE DAVID W. DUGAN*

MEMORANDUM AND ORDER

On January 29, 2024, America First Legal Foundation filed a misconduct complaint against three judges in the Southern District of Illinois concerning their policies for oral argument on motions. The complaint alleges that (1) in January 2020 Chief Judge Nancy J. Rosenstengel and District Judge Staci M. Yandle entered standing orders adopting new policies governing oral argument on motions in cases before them; (2) in October 2020 District Judge David W. Dugan entered a similar order; and (3) all three orders discriminate on the basis of sex and race by giving preferential treatment to oral-argument requests by “female and minority attorneys.”

On March 6, 2024, Judicial Watch, Inc., filed a misconduct complaint against the same three judges making similar allegations that these standing orders discriminate on the basis of sex, gender, race, and ethnicity. (The complaint is dated February 26 but did

*The Judicial Conduct and Disability Act establishes a rule of confidentiality for judicial-conduct proceedings. Under the Act, “all papers, documents, and records” in the proceedings are confidential, with a few limited exceptions. 28 U.S.C. § 360(a); *see also* RULES FOR JUD.-CONDUCT & JUD.-DISABILITY PROC. r. 23. Final orders are publicly released, but the orders may not identify the subject judge without consent and may not identify the complainant unless the chief judge or judicial council finds disclosure appropriate. RULES FOR JUD.-CONDUCT & JUD.-DISABILITY PROC. r. 24. Each complainant here—America First Legal Foundation and Judicial Watch, Inc.—publicly released its complaint by posting it on its website, together with a press release. The complaints concern public records—namely, the judges’ standing orders governing oral arguments. Identifying the complainants by name is therefore appropriate. The judges have consented to the use of their names. § 360(a)(3).

not reach the clerk's office until March 6.) I consolidated this second complaint with America First's for disposition.

The standing orders, copies of which are attached to the complaints, are materially identical. Each one is captioned "In re: Increasing Opportunities for Courtroom Advocacy." Each begins by noting a "growing trend in which fewer cases go to trial," resulting in "fewer in-court advocacy opportunities" for attorneys, especially "newer attorneys (attorneys practicing for less than seven years) in general, and women and underrepresented minorities in particular."

To "encourage[] the participation of newer, female, and minority attorneys in proceedings in [their] courtroom[s]," each judge adopted "the following procedures regarding oral argument" on motions:

1. After a motion is fully briefed, as part of a Motion Requesting Oral Argument, a party may alert the Court that, if argument is granted, it intends to have a newer, female, or minority attorney argue the motion (or a portion of the motion).
2. If such a request is made, the Court will:
 - A. Grant the request for oral argument on the motion if it is at all practicable to do so.
 - B. Strongly consider allocating additional time for oral argument beyond what the Court may otherwise have allocated were a newer, female, or minority attorney not arguing the motion.
 - C. Permit other more experienced counsel of record the ability to provide some assistance to the newer, female, or minority attorney who is arguing the motion, where appropriate during oral argument.

Rosenstengel Order at 1–2, Jan. 17, 2020; Yandle Order at 1–2, Jan. 7, 2020; Dugan Order at 1–2, Oct. 6, 2020.

America First and Judicial Watch argue that these standing orders are facially unconstitutional because they establish a policy of preferential treatment based on a lawyer's sex, gender, race, or ethnicity. They further contend that this discriminatory

treatment violates Canon 2A of the *Code of Conduct for United States Judges* and Rule 4(a)(3) of the *Rules for Judicial-Conduct and Judicial-Disability Proceedings*.

The Judicial Conduct and Disability Act broadly defines judicial misconduct as “conduct prejudicial to the effective and expeditious administration of the business of the courts.” 28 U.S.C. § 351(a). Violating a standard of conduct set forth in the Code of Conduct or Judicial Conference rules may constitute misconduct. RULES FOR JUD.-CONDUCT & JUD.-DISABILITY PROC. r. 4 cmt.

Canon 2A requires judges to “respect and comply with the law and ... act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.” Rule 4(a)(3) provides: “Cognizable misconduct includes intentional discrimination on the basis of race, color, sex, gender, gender identity, pregnancy, sexual orientation, religion, national origin, age, or disability.”

America First and Judicial Watch contend that a policy of preferential treatment based on a lawyer’s sex, gender, race, or ethnicity seriously imperils public confidence in the integrity and impartiality of the judiciary. In addition to the concern about unconstitutional discrimination, they argue that granting oral-argument requests and allocating argument time based on criteria unrelated to the demands of the case undermines public confidence in the integrity and effective administration of the business of the courts. This is so because a reasonable observer would lose faith in the integrity of the adjudicative process if he learned that a judge has a policy of making case-related decisions (like decisions about oral argument) based on factors other than the merits and needs of the case. The threat to public confidence is particularly acute if the extraneous factor is the sex, gender, race, or ethnicity of a party’s lawyer. Finally, the complainants argue that the standing orders incentivize—or at a minimum encourage—law firms and litigants to discriminate on the basis of sex, gender, race, or ethnicity in hiring lawyers and staffing cases, which also erodes public trust and confidence in the integrity and impartiality of the judicial system.

As specified in the Act, I reviewed the complaints and conducted a limited inquiry to determine “whether appropriate corrective action has been or can be taken without the necessity for a formal investigation” by a special committee. 28 U.S.C. § 352(a)(1). I invited the judges to respond, met with them personally, and reviewed the judges’ case-management procedures posted on the district court’s website. In the course of this inquiry, I confirmed that all three judges have “taken appropriate voluntary corrective action that acknowledges and remedies the problem[] raised by the complaint[s].” RULES FOR JUD.-CONDUCT & JUD.-DISABILITY PROC. r. 11(d)(2).

In fact, Judge Dugan took corrective action long before these complaints were filed. As he explained in our meeting and elaborates in the attached letter,¹ in June 2022 he commenced a periodic review of his case-management procedures. At the conclusion of that review, he deleted the standing order in question and removed references to “women and underrepresented minorities” from the “Oral Argument” section of his case-management procedures. The district court’s IT department confirmed that as of October 14, 2022, these changes were reflected on the court’s website. Accordingly, the order in question was not in effect when these complaints were filed and had not been for some time.

It’s not clear why America First did not examine Judge Dugan’s current case-management procedures before filing its complaint. Nor is it clear how or where the organization obtained a copy of the inoperative October 2020 order. Judicial Watch acknowledged that it could not find Judge Dugan’s order on the district court’s website but proceeded with its complaint against him based on news reports. In any event, Judge Dugan recognized the problem created by the language in his 2020 standing order and rescinded the order nearly 18 months ago. Additionally, in response to America First’s complaint, Judge Dugan initiated a search for any requests for oral argument pursuant to the 2020 order and found none. He expressed regret for any confusion.

For these reasons, the allegations against Judge Dugan lacked a factual foundation when the complaints were filed and are conclusively refuted by objective evidence. Accordingly, the complaints against him are dismissed pursuant to 28 U.S.C. § 352(b)(1)(B).

Chief Judge Rosenstengel and Judge Yandle have also recognized the concerns created by the language in their standing orders. During my inquiry, both judges acknowledged the problem and took voluntary action to correct it. As they explain in the attached letters,² they rescinded the standing orders in question and removed references to “women and underrepresented minorities” from the “Oral Argument” sections of their case-management procedures. Like Judge Dugan, Chief Judge Rosenstengel and Judge Yandle also state that they have never granted or denied a request for oral argument based on an attorney’s sex, race, or other immutable characteristic.

The primary goal of the Judicial Conduct and Disability Act is to ensure compliance with the rules and norms of judicial ethics. The judges’ corrective action is a complete and

¹ Judge Dugan consented to public disclosure of his letter. § 360(a)(3).

² Chief Judge Rosenstengel and Judge Yandle consented to public disclosure of their letters. *Id.*

appropriate remedy for the problem raised in these complaints.³ There is no need for an investigation by a special committee. Because Chief Judge Rosenstengel and Judge Yandle have taken appropriate voluntary corrective action, the complaints against them are concluded pursuant to 28 U.S.C. § 352(b)(2).

* * *

In sum, all three judges have rescinded the standing orders that are the subject of these complaints. They also revised their case-management procedures, which now state only that the judges “welcome” or “encourage” oral argument by “relatively inexperienced attorneys.” The judges no longer have a policy of preferential treatment for new or inexperienced attorneys or any other particular group of lawyers; more specifically, the judges have eliminated their prior policies of preferential treatment based on a lawyer’s sex, gender, race, or ethnicity.

* * *

For the foregoing reasons, the complaints against Chief Judge Rosenstengel and Judge Yandle (Nos. 07-24-90009, -90010, -90018, and -90019) are concluded pursuant to § 352(b)(2). The complaints against Judge Dugan (Nos. 07-24-90011 and -90020) are dismissed pursuant to § 352(b)(1)(B).

The complainants may petition the Judicial Council of the Seventh Circuit for review of this order in accordance with Rule 18(b) of the *Rules for Judicial-Conduct and Judicial-Disability Proceedings*. 28 U.S.C. § 352(c); see RULES FOR JUD.-CONDUCT & JUD.-DISABILITY PROC. r. 11(g)(3). A petition for review must be filed in the clerk’s office of the United States Court of Appeals for the Seventh Circuit not later than 42 days of the date of this order.⁴

³ To be clear, the judges’ letters do not mention Judicial Watch’s complaint because it had not yet been filed. As noted above, the complaint was dated February 26 but did not reach the clerk’s office until March 6.

⁴ The public disclosure of these complaints generated media attention and significant interest in this matter among the bench, bar, public officials, and the public. Accordingly, immediate release of this order is appropriate (rather than deferring release until the 42-day review period expires or the right of review has been exhausted). See RULES FOR JUD.-CONDUCT & JUD.-DISABILITY PROC. r. 23(b)(7)–(8) & cmt. The judges agreed. *Id.* r. 23(b)(7).



**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS**

DAVID W. DUGAN
U.S. DISTRICT JUDGE

TEL: 618.482.9225

**750 MISSOURI AVENUE
EAST ST. LOUIS, ILLINOIS 62201**

The Honorable Diane S. Sykes
Chief United States Circuit Judge
Seventh Circuit Court of Appeals
517 East Wisconsin Ave, Room 721
Milwaukee, WI 53202

March 7, 2024

Dear Chief Judge Sykes

Thank you for your official inquiry and the opportunity to respond to the conduct complaint (“Complaint”) filed by Mr. Gene Hamilton of America First Legal Foundation.

As I have indicated, Mr. Gene Hamilton of the America First Legal Foundation’s Complaint is not accurate. I am unsure why Mr. Hamilton did not investigate the contents of my Chambers Procedures before he registered the Complaint against me because, if he would have conducted even minimal investigation, such as a simple Google search, he would have learned that the language that now concerns him did not appear in my procedures. In fact, my procedures were revised more than a year *before* Mr. Hamilton filed his Complaint, and those revisions included the removal of any reference to “women and underrepresented minorities”.

By way of background, I would like to point out that, in June of 2022, I began conducting my first periodic review of my procedures after I took the bench and, over several months, I considered and then made a number of changes, among which was to remove reference to “women and underrepresented minorities” in the “Oral Argument” section. As of October 14, 2022, those changes were reflected on our website with the assistance of our IT department.

I want to add that, when I learned of the Complaint, I asked that a search be conducted for any motion or request made by any party or attorney for oral argument on

Hon. Diane S. Sykes
March 7, 2024

the basis of race, sex or any immutable characteristic. We found none, and I am not otherwise aware of any such motion or request.

Relevant here is the fact that I almost universally grant a request for oral argument, save only those instances where I believe there to be no real benefit from such a hearing, which is quite rare. So, I can assure you, the Court, the Council, Mr. Hamilton and the public generally that, notwithstanding Mr. Hamilton's allegations, I have not on any occasion in my now 7 years on both the State and Federal benches granted, denied or even seriously entertained, access to oral argument specifically or to our court generally on the basis of race, sex, age or any immutable characteristic, nor will I in the future. Still, I recognize and acknowledge how such references could cause confusion for someone and, for that, I am regretful.

Should you require any further information, please do not hesitate to call on me.

Thank you for your effort and kind attention in this matter.

Very Truly Yours,

The image shows a handwritten signature in cursive that reads "David W. Dugan". The signature is written over a circular official seal. The seal features an eagle with wings spread, perched on a shield with a red and white striped field and a blue chief with stars. The text around the seal reads "UNITED STATES DISTRICT COURT" at the top and "SOUTHERN DISTRICT OF ILLINOIS" at the bottom.

David W. Dugan
U.S. District Judge

cc: Hon. Chief Judge Nancy J. Rosenstengel
Hon. Staci M. Yandle
Sarah Schrup
Lynda Schoop



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS

NANCY J. ROSENSTENGEL
Chief Judge

Tel: 618.482.9172
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750 MISSOURI AVENUE
EAST ST. LOUIS, ILLINOIS 62201

March 1, 2024

The Honorable Diane S. Sykes
Chief United States Circuit Judge
Seventh Circuit Court of Appeals
517 East Wisconsin Avenue, Room 721
Milwaukee, WI 53202

CONFIDENTIAL & BY EMAIL

Dear Chief Judge Sykes:

In January 2020, I entered a Standing Order as part of my Case Management Procedures to expand courtroom opportunities for young lawyers (after hearing from a colleague that other judges were doing this). As you know that decision is the subject of a Judicial Misconduct Complaint filed by Gene Hamilton of American First Legal Foundation.

I acknowledge that I chose the wrong means to accomplish my goal of expanding courtroom opportunities for young lawyers. As worded, the Standing Order created perceived preferences based on immutable characteristics. As such, my procedures have been revised, and the Standing Order eliminated. As to Oral Argument on Motions, the procedures now read (on page 7):

- **Oral Argument on Motions**
Local Rule 7.1(c) addresses oral argument on motions. Judge Rosenstengel may set dispositive motions for hearing but does not do so in every case. The parties will be notified by an electronic notice in CM/ECF when a hearing is set. As set forth in Rule 7.1(c), counsel may file a motion requesting a hearing if oral argument on any motion is desired.

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Judge Rosenstengel encourages the active participation of relatively inexperienced attorneys in all courtroom proceedings, particularly with respect to oral argument on motions where that attorney drafted or contributed significantly to the briefing on the motion but recognizes, of course, that there may be many circumstances in which it is not practical for a newer attorney to argue a motion. Thus, the Court emphasizes that it draws no inference from a party's decision not to have a newer attorney argue any motion before the Court. The Court likewise will draw no inference about the importance of any motion, or the merits of a party's argument regarding the motion, from the party's decision to have (or not to have) a newer attorney argue the motion.

The entire packet of procedures is available on our website, <https://www.ilsd.uscourts.gov/documents/Rosenstengel.pdf>.

Finally, notwithstanding the allegations in the Complaint, I can assure you, the Judicial Council, and the public with absolute certainty that I have never based my decision to grant or deny oral argument on an attorney's sex, race, or any other immutable trait, nor would I ever do so. In fact, during almost ten years on the bench, I have routinely granted requests for oral argument except for a few rare occasions when I did not believe a hearing would assist me in deciding the issues. I believe the revised procedures reflect my true intent and remedy the concerns raised. I sincerely regret the confusion.

Very truly yours,

The image shows a handwritten signature in black ink that reads "Nancy J. Rosenstengel". The signature is written in a cursive style. Behind the signature is a circular seal, which is the official seal of the U.S. District Court for the District of Columbia, featuring an eagle and the text "U.S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA".

Nancy J. Rosenstengel
Chief U.S. District Judge

cc: Hon. Staci M. Yandle
Hon. David W. Dugan
Sarah Schrup
Lynda Schoop

United States District Court
Southern District of Illinois
301 West Main Street
Benton, Illinois 62812

Chambers of
STACI M. YANDLE
DISTRICT JUDGE

March 6, 2024

The Honorable Diane S. Sykes Chief
United States Circuit Judge Seventh
Circuit Court of Appeals
517 East Wisconsin Avenue, Room 721
Milwaukee, WI 53202

CONFIDENTIAL & BY EMAIL

Dear Chief Judge Sykes:

In January 2020, I entered a Standing Order as part of my Case Management Procedures in an effort to expand courtroom opportunities for inexperienced lawyers. As you are aware, that procedure and Standing Order are the subject of a Judicial Misconduct Complaint filed by Gene Hamilton of American First Legal Foundation.

While I have never granted or denied oral argument to an attorney based on their sex or race, nor would I, I acknowledge that as worded, the procedure and Standing Order created a perception of preferences based on immutable characteristics. As a result, I have eliminated the Standing Order and revised my Case Management Procedures for oral argument as follows (pages 4-5):

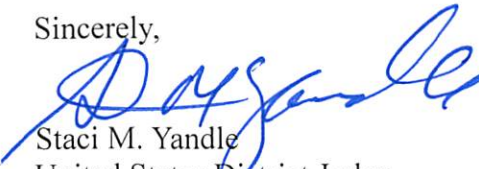
- **Oral Argument**

Judge Yandle will set motions for hearing at her discretion. Counsel may file a motion requesting a hearing if oral argument on the motion is desired.

The Court is cognizant of a growing trend in which fewer cases go to trial and in which there are generally fewer in-court advocacy opportunities. This is especially true for relatively inexperienced attorneys (attorneys practicing for less than seven years). To that end, Judge Yandle encourages the active participation of relatively inexperienced attorneys in all courtroom proceedings, particularly with respect to oral argument on motions where that attorney drafted or contributed significantly to the briefing on the motion. Judge Yandle recognizes that there may be circumstances under which it is not practical for an inexperienced attorney to argue a motion and draws no inference from a party's decision not to have a newer attorney argue any motion before the Court. Judge Yandle likewise draws no inference about the importance of any motion, or the merits of a party's argument regarding the motion, from the party's decision to have (or not to have) a newer attorney argue the motion.

The revised Case Management Procedures reflect my true intent and are attached. I believe the revisions and elimination of the Standing Order remedy the concerns raised.

Sincerely,



Staci M. Yandle
United States District Judge

cc: Hon. Nancy J. Rosenstengel
Hon. David W. Dugan
Sarah Schrup
Lynda Schoop