

JUDICIAL COUNCIL
OF THE FIRST CIRCUIT

IN RE
COMPLAINT NO. 01-09-90006

BEFORE

Torruella, Boudin and Howard, Circuit Judges,
Saris and Woodcock, District Judges

ORDER

ENTERED: FEBRUARY 22, 2010

Petitioner, an attorney, has filed a petition for review of Chief Judge Lynch's order dismissing his complaint of judicial misconduct, under 28 U.S.C. § 351(a), against a district judge in the First Circuit. The petitioner originally alleged that the judge engaged in misconduct while presiding over a civil rights case in which the petitioner represented the plaintiff.

The petitioner alleged that the judge violated Canon 3 of the Code of Conduct for United States Judges by ruling on motions *in limine* without having given the plaintiff the opportunity to be heard on the motions. The petitioner stated that a number of pretrial motions were filed by both parties during the week preceding the scheduled trial date and that, in such cases (where the time period for filing oppositions is not available), "it is always the case that Judges who intend to rule on the motions prior to trial hear the motions on the record at the start of trial." The petitioner asserted that the judge, instead, "ruled *ex parte* on all of the Defendants' motions *in limine* based solely on the Defendants' one-sided and often incorrect written arguments." The petitioner added that these motions were not procedural but were intended to "severely limit the

[plaintiff's] theories of liability and evidence"

The petitioner further contended that the judge then wrongfully denied the plaintiff's objection to these rulings, instead "pontificating apparently intended to show how knowledgeable he thinks he is about the issues" While the petitioner acknowledged that a court is not obligated to rule on motions *in limine* prior to trial, he maintained that, if it does so, it should "at least pretend to listen to argument on both sides of the issues before ruling" The petitioner concluded that the judge's "ex parte acts show that he has lost perspective on his required conduct as a [j]udge."

In dismissing the complaint, Chief Judge Lynch first summarized the relevant facts. Several months after petitioner filed the case on the plaintiff's behalf, the judge held an initial scheduling conference. During much of the following year, the court addressed a number of discovery disputes and other motions. The judge subsequently issued a pretrial order scheduling a final pretrial conference for the following month, setting the trial to commence five days after the final pretrial conference, and requiring that all trial materials, including motions *in limine*, be filed by two days before the pretrial conference (one week before trial). (The pretrial conference was subsequently rescheduled for one day later, four days before trial.) The pretrial order did not provide for a hearing on the pretrial motions or specify a time period during which a response or opposition should be filed.

Chief Judge Lynch further observed that both parties filed a number of motions *in limine* during the week prior to the scheduled trial date. The petitioner filed several motions on the plaintiff's behalf four days before the pretrial conference was scheduled and the defendant filed his on the following day. The day before the scheduled conference, the defendant filed oppositions to the plaintiff's motions. On the day of the scheduled conference, the court issued a

notice cancelling the final pretrial conference that had been scheduled for that day, and rescheduling the trial for the following month. On the same day, the court ruled on each of the pending motions *in limine*: it granted two of the petitioner's four motions, five of the defendant's eight motions, and provided an explanation for each ruling.

The Chief Judge noted that the petitioner promptly filed motions for reconsideration of three of the court's rulings and an "Objection . . . to *Ex Parte* Rulings by the Court." In response, the judge issued a four-page Memorandum and Order in which he first denied the petitioner's objection, explaining that it implied a misreading of both the complaint and the court's rulings. The judge then provided additional factual and legal explanation for each of the court's other rulings. In so doing, the judge discussed the historical origins of motions *in limine*, and observed that it "is within the discretion of the trial judge to invite (or discourage) such motions, and the judge has no obligation to rule on motions *in limine* prior to trial. The motion in limine, although styled as a motion, is not governed by the provisions of [the local rule] that apply to ordinary motions practice." The court ended by warning the petitioner that while his "disrespectful remarks directed to the court may provide some measure of immediate gratification, . . . similar conduct in the future invites the imposition of sanctions up to and including the striking of his appearance."

Chief Judge Lynch determined that the judge's handling of the motions *in limine* did not amount to a violation of the Code of Conduct for United States Judges, much less cognizable misconduct. Chief Judge Lynch explained that the proscription against improper *ex parte* communication in the Code of Conduct concerns discussions on the merits with counsel and others. See Code of Conduct, Commentary to Canon 3A(4) ("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."').¹ The Chief Judge observed that the defendant's motions *in limine* were not filed *ex parte*; nor was there any suggestion that the judge communicated *ex parte* with defense counsel or others in connection with the matter. See e.g., Compendium of Selected Opinions (2009), § 3.9-2. Thus, Chief Judge Lynch concluded that the issue was not one of *ex parte* communication.

The Chief Judge next explained that the judge did not deny the petitioner the "full right to be heard according to law." Canon 3A(4), *supra*. Chief Judge Lynch noted that there was no suggestion that the judge harbored any bias or other improper motive in connection with either the substance or the timing of the court's rulings -- merely that his handling of the motions was unfair to the petitioner. The Chief Judge further noted that, while the time frame for filing an opposition to the defendant's motions was compressed by the scheduled trial, the petitioner, nevertheless, simply failed to file a response before the court ruled on the motions. (In contrast, the defendant filed oppositions to the petitioner's motions before the court ruled.)

Moreover, Chief Judge Lynch observed that, despite the absence of an initial opposition, the judge heard the petitioner's arguments on the issues by means of his motions for reconsideration, in response to which the court issued a factually and legally thorough memorandum and order sequentially addressing each of the disputed rulings. Further, the Chief Judge explained that the reasonableness of deciding a motion without a response from an opposing party rests with the presiding judge. Thus, Chief Judge Lynch concluded that, while it

¹The revised Code of Conduct took effect on July 1, 2009 but the relevant provision remained substantively the same.

may have been preferable for the judge to have designated a response period for the pretrial motions, his handling of the matter did not infringe upon the "right to be heard according to law," protected by Canon 3, or constitute conduct that was in any way "prejudicial to the effective and expeditious administration of the business of the courts" ² See Order, Judicial Council of the First Circuit, In Re: Complaint No. 406, December 22, 2005, at 4 (Court's allowance of motion to dismiss prior to receiving an opposition does not, standing alone, suggest judicial misconduct.). See also Obert v. Republic Western Insurance Company, 398 F.3d 138, 145 (1st Cir. 2005) (Judge's expression of views on an issue prior to hearing from both parties does not undermine the right to be heard; judges "often express an initial leaning even before anyone speaks or right in the middle of an argument. It is then up to dissatisfied counsel to dissuade the judge . . . "). Accordingly, Chief Judge Lynch dismissed the complaint pursuant to 28 U.S.C. § 352(b)(1)(A)(i). See also Rules for Judicial-Conduct and Judicial-Disability Proceedings (Rules of Judicial Misconduct), Rules 11(c)(1)(A).

Finally, since the petitioner did not demonstrate bias or other misconduct, to the extent that the complaint derived from the petitioner's disagreement with the substance of the court's rulings on the disputed motions, it was also dismissed as not cognizable. See 28 U.S.C. § 352(b)(1)(A)(ii). See also Rules of Judicial Misconduct, Rules 11(c)(1)(B), and Compendium, *supra*, at § 3.9-2(b) ("Whether an ex parte communication is 'authorized by law' is a legal issue for the judge to decide.").

In the petition for review, the petitioner asserts that, "as has become standard for First

²The Chief Judge noted, as well, that, even if the judge's conduct infringed upon the Code of Conduct -- which it did not -- not every violation of the Code warrants disciplinary action under the misconduct statute, 28 U.S.C. § 351, et. seq. See Code of Conduct, Commentary to Canon 1.

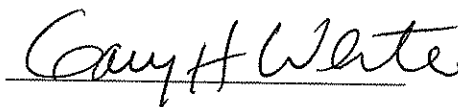
Circuit decisions, the subject Order [of dismissal] misses the entire substantive point at issue." The petitioner states that the judge's *ex parte* decisions did not involve procedural issues, but intentionally and "on the eve of trial . . . excluded an adverse party's [evidence,] issues and claims to be tried." The petitioner further argues that the term "*ex parte*" includes a "judicial decision made at the instance of one party without receiving argument from any other party adversely affected." The petitioner concludes that the judge should notify parties "if he intends to change Local Rules motion practice," and the Judicial Council should issue notice if it is "going to use a definition of '*ex parte*' distinct from how that terms is normally and universally used"

The petition for review is without merit. The petitioner offers no facts beyond those that were thoroughly dispelled by Chief Judge Lynch. Instead, he merely restates his position that the judge engaged in misconduct when he ruled on the pending motions *in limine* without the benefit of the petitioner's oppositions. This argument is fallacious.

As explained by Chief Judge Lynch, it is generally within a judge's discretion under what circumstances to decide motions without having heard from both parties. See Order, Judicial Council of the First Circuit, In Re: Complaint No. 406, *supra*, at 4, and Obert, *supra*, 398 F.3d at 145. To do so is not an improper *ex parte* communication, as prescribed by Canon 3A(4) of the Code of Conduct, or without more, indicative of bias or judicial misconduct. Where there is evidence that such a ruling is motivated by judicial bias or other improper animus, the result may be different. But the present matter is utterly devoid of any indication of illicit judicial motivation. As the Chief Judge observed, the defendant submitted a response in advance of the court's ruling, though the petitioner did not. Each of the judge's initial rulings on the motions was based on the record. Contrary to the petitioner's assertion that these rulings were issued "on the eve of trial," the court rescheduled the trial for the following month at the same time it issued the

disputed rulings. In response to the petitioner's request for reconsideration, the judge thoroughly addressed each of the petitioner's objections in turn. Thus, the contention that the court denied the petitioner a meaningful opportunity to present his views on the issues in question is unfounded. The issue is not whether the rulings were substantive or procedural, whether they were "*ex parte*,"³ whether the petitioner agreed with them, or whether they were correct. The issue is whether there is any information in the complaint or in the reviewed record suggesting that the judge's handling of the matters was improperly motivated, or otherwise inconsistent with the Codes of Conduct or the judicial misconduct statute. See note 2, *supra*. The Chief Judge aptly determined that there was not. Accordingly, the complaint was appropriately dismissed pursuant to 28 U.S.C. §§ 352(b)(1)(A)(i), and 352(b)(1)(A)(ii). See also Rules of Judicial Misconduct, Rules 11(c)(1)(A) and 11(c)(1)(B).

For the reasons stated herein, the order of dismissal issued in Judicial Misconduct Complaint No. 01-09-90006 is affirmed. See Rules of Judicial Misconduct, Rule 19(b)(1).



Gary H. Wente, Secretary

³Although not necessary to the determination of the present matter, the First Circuit has utilized the definition of "*ex parte*" provided in Black's Law Dictionary. See *U.S. v. Abreu*, 202 F.3d 386, 390 (1st Cir. 2000) *citing* Black's Law Dictionary 1221 (7th ed. 1999). "*Ex parte*" is defined as "[d]one or made at the instance and for the benefit of one party only, and without notice to, or argument by, any person adversely interested; of or relating to court action taken by one party without notice to the other . . .", Black's Law Dictionary 657 (9th ed. 2009); "*ex parte* communication" is defined as a "communication between counsel and the court when opposing counsel is not present," *id.*, at 316; and an "*ex parte* order" is "made by the court upon the application of one party to an action without notice to the other." *Id.*, at 1206.