

JUDICIAL COUNCIL
OF THE FIRST CIRCUIT

IN RE
COMPLAINT NO. 01-09-90006

BEFORE
Lynch, Chief Circuit Judge

ORDER

ENTERED: JULY 10, 2009

Complainant, an attorney, filed a complaint of judicial misconduct under 28 U.S.C. § 351(a) against a district judge in the First Circuit. The complainant alleges that the judge engaged in misconduct while presiding over a civil rights case in which the complainant represented the plaintiff.

The complainant alleges 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 complainant states 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 complainant asserts 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 complainant adds

that these motions were not procedural but were intended to "severely limit the [plaintiffs] theories of liability and evidence"

The complainant further asserts that the judge then wrongfully denied the plaintiff's objection to the court's "ex parte rulings," instead "pontificating apparently intended to show how knowledgeable he thinks he is about the issues" The complainant acknowledges that a court is not obligated to rule on motions *in limine* prior to trial but contends that, if it does so, it should "at least pretend to listen to argument on both sides of the issues before ruling" The complainant concludes that the judge's "ex parte acts show that he has lost perspective on his required conduct as a Judge."

The relevant facts are as follows. Several months after the complainant 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 court, thereafter, issued a pretrial order in which it, in part: scheduled a final pretrial conference for the following month, scheduled the trial to begin five days after the conference, and required that all trial materials, including motions *in limine*, be filed no later than two days before the pretrial conference (one week before trial). (The pretrial conference was subsequently rescheduled for one day later, four days before the trial was to commence.) 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.

As stated by the complainant, both parties filed a number of motions *in limine* during the week prior to the scheduled trial date. The complainant 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 rescheduling both the pretrial conference and the trial for the following month. It simultaneously ruled on each of the pending motions *in limine*: it granted two of the complainant's four motions, five of the defendant's eight motions, and provided an explanation for each ruling.

The complainant promptly filed motions for reconsideration of three of the court's rulings and an "Objection . . . to *Ex Parte* Rulings by the Court," in response to which the judge issued a four-page Memorandum and Order. The court first denied the complainant's objection, explaining that it implied a misreading of both the complaint and the court's rulings ("[T]he medical records [complainant] proposes to offer at trial . . . were not excluded. The court merely required counsel to produce any missing records to defendants and to comply with the rules of evidence governing their authentication."). 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 [local rules] that apply to ordinary motions practice." The court ended by warning the complainant 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."

The judge's handling of the motions *in limine* does not amount to a violation of the Code of Conduct for United States Judges, much less cognizable misconduct. The complainant invokes the following provision of Canon 3.

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.

Codes of Conduct for United States Judges (Code of Conduct), Canon 3A(4).¹ Although unclear in this regard, the complainant presumably asserts two violations of this provision: improper *ex parte* communication and a violation of the "right to be heard according to law." *Id.* As to the first claim, the facts simply do not demonstrate *ex parte* communication of any kind. This proscription concerns discussions on the merits with counsel and others. See Code of Conduct, Commentary to Canon 3A(4). The defendant's motions *in limine* were not filed *ex parte*, and there is no 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, the issue presented is clearly not one of *ex parte* communication.

Nor has the judge denied the complainant the "full right to be heard according to law." Canon 3A(4), *supra*. With regard to this issue, I note first that there is 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 complainant. Further, while the time frame for filing an opposition to the defendant's motions was compressed by the scheduled trial, the complainant, nevertheless, simply failed to file a response before the court ruled on the motions on the day of the scheduled pretrial conference (In contrast, the defendant filed oppositions to the complainant's motions before the court ruled.)

Most notably, despite the absence of an initial opposition, the judge heard the

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

complainant'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. While it 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 3.² Nor did the judge engage in conduct that was in any way "prejudicial to the effective and expeditious administration of the business of the courts" ³ 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"). As the complaint did not allege conduct that violates the misconduct statute, it is dismissed 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 complainant has not demonstrated bias or other misconduct, to the extent that the complaint derives from the complainant's disagreement with the substance of the

²Some motions may easily be decided without a response and the reasonableness of doing so rests with the presiding judge.

³Even 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.

court's rulings on the disputed motions, it is not cognizable. Alleged legal errors, alone, do not support a claim of misconduct. 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."

For the reasons stated, Judicial Misconduct Complaint No. 01-09-90006 is dismissed pursuant to 28 U.S.C. §§ 352(b)(1)(A)(i), and 352(b)(1)(A)(ii).

7/10/09

Date

Andrew L. Lynch

Chief Judge Lynch