

JUDICIAL COUNCIL
OF THE FIRST CIRCUIT

IN RE
COMPLAINT NO. 01-20-90005

BEFORE
Howard, Chief Circuit Judge

ORDER

ENTERED: DECEMBER 4, 2020

Complainant, an incarcerated defendant and a pro se litigant, has filed a complaint under 28 U.S.C. § 351(a) against a district judge in the First Circuit in connection with complainant's criminal case over which the judge presided. The misconduct complaint is not indicative of misconduct and is baseless.

Complainant contends that the judge engaged in improper ex parte communication in violation of the Code of Conduct for United States Judges (Code of Conduct). Specifically, complainant alleges that, a number of years after complainant's conviction and sentencing, the judge engaged in improper and "prejudicial" ex parte communication with staff of the U.S. Probation Office, by clarifying a condition of complainant's supervised release. Complainant also alleges that the judge engaged in "biased, dishonest, and prejudicial behavior" because the supervised release condition in the written judgment differed from that included in the judge's oral order at the sentencing hearing.

Complainant concludes that the judge should be removed from any cases involving complainant or the victim in complainant's criminal case.¹

As an initial matter, the judicial misconduct complaint process does not provide an avenue for removing a judge from pending or future cases, as complainant requests. See Rules for Judicial-Conduct and Judicial-Disability Proceedings (Rules of Judicial-Conduct), Rules 11, 19, and 20.

The reviewed record, including the misconduct complaint, the dockets of the relevant proceedings, and the courts' orders, provides no evidence of improper ex parte communication, bias, dishonesty, or any other judicial wrongdoing. The record indicates that complainant was convicted after a jury trial, and the judge sentenced complainant to a term of imprisonment and imposed a term of supervised release. At the sentencing hearing, the judge orally imposed a number of special conditions of release. The judge subsequently issued a written judgment in which the relevant condition of supervised release was phrased differently than in the oral order.

Subsequently, complainant brought a pro se civil rights suit against various prison officials in state court, arguing that defendants' interpretation and enforcement of the relevant special condition of release had violated complainant's constitutional rights. Defendants removed the case to a federal court not in the First Circuit and moved to dismiss. In support of the motion to dismiss, the warden of the institution in which

¹ Complainant also makes various allegations against the prosecutors in the underlying criminal case. As the judicial misconduct complaint procedure applies only to current federal judges, these allegations are not addressed. See 28 U.S.C. § 351, et seq.; and Rules for Judicial-Conduct and Judicial-Disability Proceedings (Rules of Judicial-Conduct), Rule 1(b).

complainant was incarcerated filed an affidavit in which it was stated that, in enforcing the special condition, the warden had been advised that U.S. Probation Office staff had clarified the intended scope of the condition of release with the sentencing court.

Complainant moved pro se to amend the judgment issued in the criminal case to conform the relevant special condition to that imposed orally at complainant's sentencing. The government assented to the motion. The judge granted it and, subsequently, amended the judgment accordingly.

The misconduct complaint is without merit. The complaint and the reviewed record fail to indicate that the judge violated the Code of Conduct, let alone engaged in misconduct.² The judge's communication with staff of the U.S. Probation Office, as proffered in the complaint and averred in the warden's affidavit, does not constitute improper ex parte communication under either the Code of Conduct or under the Rules of Judicial-Conduct, as neither prohibit a judge from communicating with court staff.³ See Code of Conduct, Canon 3(A)(4) and Commentary ("[While], a judge should not initiate, permit, or consider ex parte communications or consider other communications

² A violation of the Code of Conduct may inform consideration of a judicial misconduct complaint but does not necessarily constitute judicial misconduct under the statute. See Code of Conduct for United States Judges, Canon 1 Commentary (While the Code of Conduct may "provide standards of conduct for application in proceedings under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 (28 U.S.C. §§ 332(d)(1), 351-364), [n]ot every violation of the Code should lead to disciplinary action."); and Rules of Judicial-Conduct, Commentary to Rule 4 ("While the Code [of Conduct's] Canons are instructive, ultimately the responsibility for determining what constitutes cognizable misconduct is determined by the Act [28 U.S.C. § 351, et seq.] and these Rules . . .").

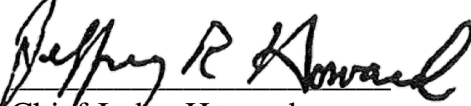
³ See 18 U.S.C. § 3602 (providing that probation officers are appointed by and serve the district court in which they are appointed); 18 U.S.C. § 3603 (establishing the duties of probation officers as including, among other things, supervising and instructing probationers on conditions of release imposed by the sentencing court, reporting probationers' conduct to the sentencing court, and "perform[ing] any other duty that the court may designate"); and 43 Stat. 1259, ch. 521 (Probation Act of 1925) (establishing probation as a sentence in the federal courts and empowering courts to appoint probation officers).

concerning a pending or impending matter that are made outside the presence of the parties or their lawyers . . . [a] judge may consult with other judges *or with court personnel* whose function is to aid the judge in carrying out adjudicative responsibilities." (emphasis added)); and Rules of Judicial-Conduct, Rule 4(a)(1)(C) ("Cognizable misconduct includes . . . engaging in improper ex parte communications *with parties or counsel for one side in a case.*" (emphasis added)). Accordingly, the communication as described between the judge and probation office staff was not "improper ex parte communication," as it took place between the judge and "court personnel," as opposed to with "[a] part[y] or counsel for one side in a case." See Code of Conduct, Canon 3(A)(4) and Commentary; and Rules of Judicial-Conduct, Rule 4(a)(1)(C).

The record fails to support complainant's allegation that either the initial discrepancy between the supervised release condition in the written judgment and that included in the judge's oral order or the court's subsequent order amending the written judgment is remotely indicative of bias or dishonesty. See supra pp. 2-3. To the contrary, the record is devoid of any indication of improper judicial motivation, and the judge promptly resolved the inconsistency between the initial oral and written orders in accordance with complainant's request. See supra p. 3. Therefore, the misconduct complaint is dismissed as not indicative of misconduct and as baseless, pursuant to 28 U.S.C. §§ 352(b)(1)(A)(i) and 352(b)(1)(A)(iii), respectively. See also Rules of Judicial-Conduct, Rules 11(c)(1)(A) and 11(c)(1)(D).

For the reasons stated, the misconduct complaint is dismissed, pursuant to 28 U.S.C. §§ 352(b)(1)(A)(i) and 352(b)(1)(A)(iii). See also Rules of Judicial-Conduct, Rules 11(c)(1)(A) and 11(c)(1)(D).

December 4, 2020
Date


Chief Judge Howard