

JUDICIAL COUNCIL  
OF THE FIRST CIRCUIT

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IN RE  
COMPLAINT NO. 01-23-90001

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BEFORE  
Barron, Chief Circuit Judge

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ORDER

ENTERED: MAY 4, 2023

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Complainant, an incarcerated criminal defendant, has filed a complaint, under 28 U.S.C. § 351(a), against a chief district judge in the First Circuit. Complainant alleges judicial misconduct in connection with a visit that the judge made to a prison in which complainant was incarcerated in 2021 and its purported impact on complainant's criminal proceeding. The misconduct complaint is baseless and is not indicative of misconduct.

Complainant alleges that the judge, the warden, "[s]tate [h]ealth officials[,] and a Covid[-19] expert" visited the facility during the pandemic in order "to inspire detainees to receive the Covid-19 vaccine and future boosters." Complainant explains that the prison was "quarantined [sic] and in lockdown [due to the pandemic]," the vaccination rate was "very low," and the "facility was rampant with Covid[-19] cases." Complainant further alleges that "[a]t the conclusion of the health and wellness presentation[, the judge] took the stage [and] told the

detainees that taking the vaccine shows a commitment to community and in '[the judge's] Court' that social responsibility would be looked upon favorably." (Emphasis included).

Complainant asserts that, during the presentation, the judge indicated that the warden would "scribe a letter" to the counsel of the detainees who "took [the] recommendation and accepted the vaccine . . . commending the detainee/client."<sup>1</sup> Complainant adds that "[the judge] said that the letter should then be presented to the Court for favorable consideration . . . [and] note[d] that [the judge] could only speak for [the district] and not [for] Federal Courts in other jurisdictions."

Complainant states that he "went directly to the Chief Judge to confirm [the judge's] commitment to have his court 'look favorably upon those who took social responsibility,'" which "gave [complainant] hope . . . as he had already gotten the immunization," and which "linked" with his counsel's "commitment . . . that [complainant] would receive time served at sentencing if [he] took a plea." Explaining that he was physically and mentally depleted from the conditions of his incarceration, complainant states that "[i]f not for [the judge's] appearance at [the prison, he] would have been very hesitant in [his] acceptance and much more strategic in executing a plea agreement." Complainant continues that he got vaccinated as requested by the judge<sup>2</sup> and that he "signed a plea partially based on the [the judge's] verbal commitment [that the court would look favorably upon those who complied]."

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<sup>1</sup> Complainant includes with the complaint a copy of a letter from the warden to complainant's counsel, informing counsel that complainant completed the facility's vaccination program, explaining that participation in the program indicates a commitment to the safety of others, and expressing gratitude to complainant.

<sup>2</sup> At one point, complainant suggests that he was vaccinated following and in response to the judge's presentation, while at another, he states that he had been vaccinated previously.

Complainant states that, at his subsequent sentencing, the presiding judge<sup>3</sup> at the time did not mention or consider complainant's "[s]ocial [r]esponsibility" in receiving the vaccine and imposed a significant sentence beyond that served. Complainant recounts the numerous motions that he filed pro se following the sentencing and infers, based on the presiding judge's rulings on these motions, that the subject judge and the presiding judge communicated about the prison visit and conspired to "cover-up valuable information regarding [the judge's] appearance and presentation at [the facility]." <sup>4</sup> Complainant concludes that he was "coerced" by the judge, who "outright lie[d]" by stating that the court would "look upon [complainant] favorably [and] pr[e]yed upon the weak . . . state of the detainee population [when the judge] made promises [the judge] knowingly would not fulfill" by "offering a reward for taking [the] recommendation to receive the vaccine."<sup>5</sup>

Because complainant's central allegation – that the judge "promised favorable treatment in [the judge's] court" to detainees who chose to be vaccinated – could, if true, suggest a violation of the Code of Conduct for United States Judges (Code of Conduct)<sup>6</sup> and potentially

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<sup>3</sup> Complainant subsequently filed a misconduct complaint against the presiding judge, arising from the judge's handling of complainant's case, see Judicial Misconduct Complaint No. 01-23-90002, after which the judge recused from the proceeding.

<sup>4</sup> Complainant attaches two of these motions to his complaint. In the first motion, complainant essentially recounts the allegations contained in the present complaint, specifying the month of the judge's visit to the facility as "the approximate time [complainant] was presented a plea agreement . . . ."

<sup>5</sup> Complainant includes allegations of wrongdoing against his attorney. The governing statute and the Rules for Judicial-Conduct and Judicial-Disability Proceedings (Rules of Judicial-Conduct) provide for the filing of complaints against federal judges only. See 28 U.S.C. § 351, and Rules of Judicial-Conduct, Rules 1 and 3(h). Accordingly, any allegations against complainant's attorney are not addressed. Also included with the complaint is a letter from complainant's mother to the judge complaining, in part, that, contrary to the judge's statement during the visit, the sentence recently imposed on complainant by the court did not take into consideration complainant's vaccination status, and that, during the prison visit, the judge spoke to complainant "personally asking what he was doing there . . . ." Complainant also includes a letter from the judge to complainant's mother, dated a number of days after the mother's letter was postmarked, stating that, because the case was not assigned to the judge and is on appeal, the judge has no role in and cannot comment on the matter.

<sup>6</sup> 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, 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

merit further investigation, I conducted a "limited inquiry," in accordance with Rule 11(b) of the Rules for Judicial-Conduct and Judicial-Disability Proceedings (Rules of Judicial-Conduct). See Code of Conduct, Canon 2B ("A judge should neither lend the prestige of the judicial office to advance the private interests of the judge or others nor convey or permit others to convey the impression that they are in a special position to influence the judge."). This inquiry fails to substantiate complainant's claims or present any basis for further investigation. See Rules of Judicial-Conduct, Commentary on Rule 11 ("[D]ismissal is appropriate 'when a limited inquiry . . . demonstrates that the allegations in the complaint lack any factual foundation or are conclusively refuted by objective evidence.'" (quoting 28 U.S.C. § 352(b)(1)(B))). The limited inquiry included a thorough review of complainant's case record, obtaining a written response from the subject judge to the allegations in the complaint, and interviews with multiple witnesses identified by complainant and others as having attended the presentation at the prison. The resulting information and subsequent analysis follow.

#### Complainant's Criminal Proceeding

Complainant was initially arrested, charged with several counts of fraud, and released on home confinement. Several months later and following his failure to appear at a scheduled hearing, complainant was rearrested in another jurisdiction and, after a revocation hearing, ordered detained pending further proceedings. Complainant was subsequently indicted on multiple fraud and related charges, as well as failure to appear, and the case was assigned to the presiding judge (who is not a subject of this complaint). See supra note 3. Complainant was

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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 . . .").

represented by counsel appointed under the Criminal Justice Act, and his trial was postponed several times due to the pandemic. In the spring of 2021, a plea agreement was filed, and, more than a week later, complainant pled guilty on two of the counts on which he was charged and requested to be sentenced in person. A number of months later, in the fall of 2021, complainant appeared in person for his sentencing before the presiding judge. At his sentencing, complainant exercised his right to allocution, and the court sentenced complainant under the governing guidelines to several years of imprisonment, followed by several years of supervised release.<sup>7</sup>

Following an unsuccessful appeal, see supra note 7, the presiding judge denied complainant's request for appointed counsel, and complainant filed pro se a number of motions, including a motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255, based primarily on claims of ineffective assistance of counsel, and the two motions he included with the misconduct complaint, see supra note 4. Among the grounds for relief complainant presented in the first motion was the principal allegation in his misconduct complaint – that the subject judge promised complainant "favorable treatment" in his criminal proceeding during the judge's visit to the prison, and that complainant relied on this "commitment" in accepting a plea agreement. The presiding judge denied this motion, explaining that it does not include a request for relief, but simply describes complainant's perception of the subject judge's presentation at the prison, which is a factual issue for resolution in the habeas proceeding.

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<sup>7</sup> Complainant appealed his sentence, asserting ineffective assistance of counsel, and, in a lengthy opinion, the Court of Appeals dismissed the appeal, without prejudice to the right of complainant to prosecute his ineffective assistance of counsel claims in a collateral proceeding under 28 U.S.C. § 2255.

### Subject Judge's Response

At my direction, the subject judge was asked to respond in writing to the allegations contained in the complaint. The judge promptly submitted a lengthy written response, providing the date of the visit as occurring in the summer of 2021, roughly two months after complainant had accepted a plea agreement, and identifying the individuals who participated in or attended the presentation.<sup>8</sup>

The judge explained that the judge "arranged [the] visit" as part of the "administrative role [of a] [c]hief [j]udge, to help inform the detainees of the importance of being vaccinated for their own health and the health of other detainees." The judge described the visit, which commenced with a meeting in a conference room to plan the presentation, at which it was decided that the public health consultant would be the "main speaker" because it was thought that "straight public health information had the best possibility of being effective." In addition, the judge agreed that the warden would offer to write a letter, when requested by a detainee, to inform the court that the detainee was vaccinated. See supra note 1. The warden explained that such letters were regularly submitted at the request of a detainee concerning the detainee's good conduct or successful completion of a program. The judge reported that the presentation took place in a common area and began with the warden explaining the purpose of the gathering and his willingness to send a letter to the court on behalf of detainees who chose to get vaccinated "to demonstrate that they were being responsible citizens." The warden then introduced the judge who "indicated that [the judge] was there in [the chief judge's] administrative role . . . and . . . thought it important that [the detainees] have access to truthful public health information." The

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<sup>8</sup> These individuals included the court's public health consultant, a probation officer, the U.S. Marshal, prison officials, including the warden and outside counsel, and a person under supervision.

judge reiterated the warden's offer to write the letter and stated that the judge "had no idea how any individual judge of any court would consider such a letter, but that [the judge] routinely received letters from the [w]arden at the time of sentencing and . . . considered everything" submitted. The judge then introduced the public health consultant, who made a presentation and took questions.

The judge further indicated that it was "never said, implied, or hinted that if [the detainees] got vaccinated, and the [w]arden wrote a letter, that they would get favorable treatment" or that the judge "made any representations about what [complainant's] sentencing judge would do with a letter from the [w]arden." Noting that complainant had changed his plea months before the presentation and "was already vaccinated," the judge stated that there was "no promise [made], explicitly or implicitly, in any manner to any detainee." Finally, the judge did "not recall speaking to any detainees," including complainant.

With respect to related communications, the subject judge recounted being contacted by the presiding judge after complainant filed the referenced motion. See supra p. 5. The judge confirmed receipt of the letter from complainant's mother and the judge's response as appended to the complaint. See id. and supra note 5.

#### Witness Interviews

As part of the Chief Judge's limited inquiry, the Circuit Executive interviewed five individuals who were identified as having participated in or witnessed the judge's presentation at the prison, including the public health official, the U.S. Marshal for the district and his chief deputy, the prison warden, and a probation officer. The same format was conducted for each interview, during which the relevant confidentiality parameters of the Rules of Judicial-Conduct

were explained, and each witness was asked to describe the visit to the best of his ability, including date, attendees, and content of presentations. Witnesses were asked specifically whether they recalled the judge saying anything about "[the judge's] court looking favorably" upon those who were vaccinated, whether a letter from the warden would be provided, and whether the judge spoke personally to any detainee during or after the presentation.

The public health official (hereinafter "doctor") provided the date of the visit, during mid-summer of 2021, and explained this its purpose was to provide public health information in an effort to dispel detainees' concerns with the vaccine, as there was a very low vaccination rate and a very high rate of infection at the prison. The doctor reported that the warden introduced the presentation, that the judge spoke for roughly five minutes, and that the doctor then provided a presentation on the vaccine. The doctor recalled that the judge's main theme was "about community and looking out for everybody." The doctor reported no recollection of the judge saying anything about "[the judge's] court" or "favorable treatment." The doctor indicated that, at the conclusion of the presentation, one detainee (not complainant) approached the judge and him, and recounted his experience with Covid-19.

The U.S Marshal indicated that the visit was organized in an effort to increase the vaccination rate at the facility. The marshal recounted the attendees, including the Chief Deputy U.S. Marshal, and described the group's planning meeting in the conference room. See supra p. 6 and note 8. The marshal stated that the judge "basically talked to the inmates about how well the vaccine would provide physical protection." He did not recall the judge saying anything about "favorable treatment" by the court, and said that the central focus was inmates' concern about "whether the vaccine was effective." The marshal concluded that detainees asked questions about the vaccine's effectiveness, but none approached the judge.



The Chief Deputy U.S. Marshal indicated that he did not recall the content of the judge's presentation, as his objective was to ensure the judge's security, and that he did not see any detainee approach or speak to the judge separately.

The prison warden explained that a presentation by an epidemiologist and the chief judge was arranged to explain the benefits of the vaccine to detainees. On the day of the visit, the group, as generally described consistently throughout, met in the conference room to introduce themselves and plan the presentation. The warden said that it was agreed that they would explain the benefits of the vaccine, and that the warden would offer to write a "general letter" indicating that the detainee had received the vaccine, "which shows responsibility to the community." The warden stated that the "common theme [of the judge's presentation] was the health and safety surrounding the vaccine" and that the "judge allowed the epidemiologist to do most of the talking and answering questions." The warden further indicated that the type of letter he offered to write, and did for several detainees, is not unusual and is provided for various accomplishments, such as completing work programs. He said that he thought that the judge represented that the letter would be considered in the sentencing process, but that he did not recall the judge saying anything about the court "looking favorably" on those who chose to get vaccinated, as the judge was "trying to educate the population as to the benefits of the vaccine." The warden recalled the judge answering questions from several detainees who had approached the judge.

The probation officer provided the date of the visit during the summer of 2021 and reported that the judge introduced the doctor and him, both of whom then explained the benefits of the vaccine. He said that the judge spoke only for a few minutes, and that the doctor answered questions from inmates concerning the vaccine. With respect to the specifics of the judge's remarks, the probation officer stated that, as it was two years ago, he did not recall specifics. He

did recall a detainee approaching the individual on supervised release who was with the judge, and there was a brief interaction, which the probation officer did not hear.

### Discussion

The limited inquiry demonstrates that the judge made a presentation to detainees at the prison during the summer of 2021, intended to improve the Covid-19 vaccination rate among the incarcerated population. Despite complainant's claim that the visit was in the spring, the "approximate time the [complainant was presented a plea agreement,]" the judge's visit occurred several months after complainant had accepted the plea agreement. Accordingly, complainant's assertion that he relied on the judge's presentation in deciding to change his plea is "conclusively refuted by objective evidence." See 28 U.S.C. § 352(b)(1)(B).<sup>9</sup>

Moreover, and critical to the dismissal of this complaint, complainant's central claim – that the judge used the judicial office to promise complainant and other detainees "favorable treatment" in their criminal proceedings in the district court – is wholly unsupported by all "reasonably accessible" information. See Rules of Judicial-Conduct, Commentary on Rule 11. The judge explicitly denies having made any such claim(s), and none of the witnesses interviewed support complainant's version of these events. See id. ("[D]ismissal following a limited inquiry may occur when a complaint refers to . . . witnesses and the . . . witnesses all support the subject judge." (citation omitted)).<sup>10</sup> Not one witness corroborated complainant's claim that the judge promised or suggested that complainant (or other detainees) would be

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<sup>9</sup> The witnesses also confirm that, as the judge indicated, the judge spoke briefly at the beginning of the presentation, introducing the doctor and others, not after the public health official, as complainant alleges.

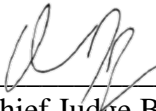
<sup>10</sup> Although not determinative of the present matter, it is noted that the misconduct complaint concerns specific statements allegedly made more than a-year-and-a-half ago in the middle of the pandemic. Such delayed allegations prejudice the ability to conduct any meaningful investigation. See Boudin, C.C.J., Order, In re: Complaint No. 400 (March 3, 2005), and Rules of Judicial-Conduct, Rule 9 (Where "the passage of time has made an accurate and fair investigation of a complaint impracticable, the complaint must be dismissed . . .").

accorded leniency or any other dispensation in their criminal proceeding for agreeing to be vaccinated. In sum, the limited inquiry conducted in response to complainant's allegations demonstrates that complainant's claim that the judge intentionally misused the judicial office and "lied" to entice complainant (or others) to be vaccinated "lack[s] any reliable factual foundation." See id. There is, likewise, no corroboration of complainant's related assertion that the judge conferred separately with complainant, let alone "confirmed" a "commitment" which, based on the limited inquiry, the judge did not in fact make.

As the limited inquiry does not suggest that there was anything improper about the judge's presentation at the prison, complainant's inference that the subject judge and the presiding judge conspired to "cover-up valuable information" about the visit is equally unfounded. Any communication between the presiding and subject judges concerning the judge's prison visit does not alone evidence improper ex parte communication, in contravention of Canon 3 of the Code of Conduct, or any other wrongdoing. See supra note 6; Code of Conduct, Canon 3A(4)(b) ("[A] judge should not initiate, permit, or consider ex parte communications or consider other communications concerning a pending or impending matter . . . [except] when circumstances require it . . . for . . . administrative . . . purposes" and "if the ex parte communication does not address substantive matters and the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication[.]") and Canon 3A(4) Commentary ("The restriction on ex parte communications concerning a proceeding includes communications from lawyers, law teachers, and others who are not participants in the proceeding. A judge may consult with other judges or with court personnel whose function is to aid the judge in carrying out adjudicative responsibilities.").

For the reasons stated, Complaint No. 01-23-90001 is dismissed as baseless and as not indicative of misconduct, pursuant to 28 U.S.C. §§ 352(b)(1)(B) and 352(b)(1)(A)(i). See also Rules of Judicial-Conduct, Rules 11(c)(1)(D) and 11(c)(1)(A).

May 4, 2023  
Date

  
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Chief Judge Barron