CIRCUIT COUNCIL
FOR THE FIRST CIRCUIT

IN RE:

COMPLAINT NO. 152

Before
Breyer, Chief Judge.

ORDER

Entered April 26, 1994

Complainant has filed a complaint of judicial misconduct under 28 U.S.C. § 372(c) against a district judge. Although the complaint is not crystal clear, it appears to allege as follows. After complainant had filed a lawsuit that was before the district judge, counsel for one of the defendants sent the judge a letter. This letter apprised the judge that a federal court in another circuit, in response to what it deemed vexatious litigation on complainant's part, had issued an injunction barring complainant from further filings in any federal court relating to the subject matter of certain commercial disputes complainant had already litigated repeatedly. The district judge then dismissed complainant's suit -- apparently without awaiting or seeking any response from complainant -- on the ground that the suit was precluded by this injunction.

Complainant argues that by dismissing complainant's lawsuit in this manner, the judge denied complainant due process. This letter, complainant alleges, was not served on complainant and therefore constituted an improper ex parte communication between the judge and opposing counsel. Further, the judge relied on this ex parte information even though the judge "had compelling reason to believe the information false and knew the directions were criminally motivated and improper." According to complainant, the judge was "fixed" and "corrupted" as part of a conspiracy involving complainant's litigation opponents and certain judges in other federal courts. In supplements to the complaint, complainant alleges that the judge failed to fully disclose the ex parte information; failed to take punitive action against the attorney

cc: All Parties

who supplied the ex parte information; failed to recuse on the basis of the ex parte communication; and delayed taking action on various matters in complainant's case. Finally, complainant alleges that various entries are missing from the district court docket sheet in complainant's case.

Insofar as the complaint alleges that the judge's sua sponte order of dismissal was erroneous or denied complainant due process, or that the judge erred in denying complainant's other requests for judicial action, I dismiss the complaint as directly related to the merits of the judge's rulings. Complainant's proper recourse is by way of appeal to the court of appeals at the appropriate time, not by way of a complaint of judicial misconduct under § 372(c). Rule 1(e) of the Local Rules Governing Complaints of Judicial Misconduct or Disability.

The complaint fails to provide any factual support whatsoever for the bald charges that the information contained in the letter was either false or known by the judge to be false; that the judge acted with illicit motives in ruling against complainant; or that the judge was part of a conspiracy with opposing parties and other federal judges to harm complainant.

By the same token, complainant's allegation that the judge acted improperly in failing to recuse is frivolous because complainant has set forth no facts to suggest that any basis for recusal existed. In addition, the § 372(c) complaint procedure is not the proper vehicle to challenge a federal judge's failure to recuse. Rule 1(e).

The allegation that the judge delayed acting on various matters in complainant's case is not cognizable under the Act. Rule 1(e). Complainant, again, has provided no factual support for the implicit allegation that any delay was deliberate and reflected an illicit motive against complainant personally.

The complaint provides no reason to suspect, assuming arguendo that entries in fact are missing from the district court docket sheet, that the judge was in any way responsible for such errors or that any errors were malicious and not inadvertent.

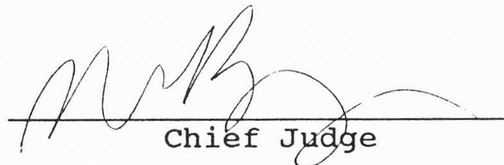
I turn, finally, to complainant's charge that the judge was involved in an ex parte communication, or acted on the basis of information obtained ex parte, in the form of the letter to the judge from opposing counsel. I cannot tell from the complaint and attachments whether or not the letter in fact was, or was not, served on complainant. Only the first page of the letter, on which the judge entered the handwritten order of dismissal, is appended to the complaint. Even assuming, arguendo, that the letter was not served upon complainant, the complaint provides no reason to suspect that the judge was aware that it was not. A judge's innocent reliance on a filing that, unbeknownst to the judge, was not served on the opposing party does not constitute misconduct.

In any event, all that the letter apparently did was call the judge's attention to a case, published in a federal case reporter, in which an injunction had been issued by another federal court against further repetitive filings by complainant concerning the subject-matter of the action before the judge. Accordingly, even if, arguendo, the judge's reliance on this document violated the letter of the prohibition on ex parte communications contained in Canon 3A(4) of the Code of Conduct for United States Judges, any such violation was insubstantial, or de minimis, only.

It is important, of course, that a judge take care to avoid even de minimis violations of Canon 3A(4). Nevertheless, any such violation, if it occurred, did not rise to the level of misconduct that could warrant discipline under 28 U.S.C. § 372(c).

Although the Code of Conduct for United States Judges provides much guidance in interpreting the substantive standard of conduct set out in § 372(c)(1) -- "conduct prejudicial to the effective and expeditious administration of the business of the courts" -- the standards of conduct found in the Code of Conduct and in § 372(c)(1) are by no means co-extensive. Some of the provisions of the Code of Conduct are too general and hortatory in nature to be imported wholesale, and enforced by their literal terms, under § 372(c). See Report of the National Commission on Judicial Discipline and Removal, at 98 (1993) ("the Code was not intended as a source of disciplinary rules, and not all of its provisions are appropriately regarded as enforceable under the Act"). By the same token, a purely de minimis violation of the letter of a provision of the Code of Conduct -- even a specific, non-hortatory provision such as Canon 3A(4) -- does not necessarily transgress the standard of conduct set out in § 372(c)(1). Under the circumstances here, I find that § 372(c) is not implicated.

The complaint is dismissed as directly related to the merits of decisions or procedural rulings, 28 U.S.C. § 372(c)(3)(A)(ii), as frivolous for lack of factual support, 28 U.S.C. § 372(c)(3)(A)(iii), and as not in conformity with the Act's substantive standard set out in § 372(c)(1), 28 U.S.C. § 372(c)(3)(A)(i).



Chief Judge