

**JUDICIAL COUNCIL OF THE  
TENTH CIRCUIT**

IN RE: COMPLAINT UNDER THE  
JUDICIAL CONDUCT AND  
DISABILITY ACT

No. 10-19-90064

Before **TYMKOVICH**, Chief Judge

**ORDER**

Complainants, both attorneys, filed a complaint of judicial misconduct against a district judge in this circuit. My consideration of this complaint is governed by the Rules for Judicial-Conduct and Judicial-Disability Proceedings (JCD Rules), issued by the Judicial Conference of the United States; the Judicial Conduct and Disability Act, 28 U.S.C. §§ 351-364 (the Act); and relevant prior decisions of the full Judicial Council of this circuit that are consistent with those authorities.

The JCD Rules and this circuit's local misconduct rules are available on the Tenth Circuit's webpage: <http://www.ca10.uscourts.gov/ce/misconduct>. Paper copies are also furnished by the Circuit Executive's Office upon request. In accordance with those rules, the names of the complainants and the subject judge shall not be disclosed in this order. *See* JCD Rule 11(g)(2).

Complainants allege the subject judge engaged in misconduct while presiding over a civil rights case in which one of the complainants is a defendant and the other a defense witness. Specifically, they allege the judge improperly investigated factual issues outside

the record, drew erroneous conclusions from his research, and—without first providing notice or an opportunity to respond—“recklessly” published a written decision lodging “untrue and highly defamatory” attacks on complainants’ integrity.

As is relevant to this misconduct complaint, the parties in the underlying case dispute whether certain files exist. Defendants moved for summary judgment on this issue, arguing that there is no evidence of the files’ existence. Relying only on the materials the parties submitted, the judge found a dispute of fact as to the files’ existence and held defendants not entitled to summary judgment on this point. Then, the judge took judicial notice of what he deemed adjudicative facts contradicting defendants’ sworn representations that no files exist, and found those facts supplied further reason to deny defendants’ motion. *See generally* Fed. R. Evid. 201 (governing judicial notice of adjudicative facts). He also offered to hold an evidentiary hearing, on a related issue, where defendants would have an opportunity to explain apparent discrepancies between their sworn statements and the Rule 201 evidence.

Complainants maintain that they are not challenging the judge’s adverse ruling on the files issue but rather his “needless” description of additional reasons to deny summary judgment without advance notice or a hearing. In support, they cite the Code of Conduct for United States Judges, issued by the Judicial Conference of the United States; in particular, Canon 3A(4), barring *ex parte* (one-sided) communications except in limited circumstances.<sup>1</sup> In this regard, complainants state “there is no question” the judge

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<sup>1</sup> *See generally* JCD Rule 4(a)(1) (observing that cognizable misconduct includes the violation of specific standards of judicial conduct); Commentary to JCD Rule 4

“considered communications concerning a pending matter . . . obtained outside the presence of the parties or their lawyers” and stress that the judge should have provided advance notice and an opportunity to respond.

Canon 3A(4), in pertinent part, states: “a judge should not initiate, permit, or consider ex parte communications . . . concerning a pending . . . matter that are made outside the presence of the parties or their lawyers.” Although not discussed by complainants, a salient exception to the bar on ex parte communications cannot be ignored. The exception expressly allows a judge to “initiate, permit, or consider ex parte communications as authorized by law,” which brings Fed. R. Evid. 201’s judicial notice of adjudicative facts into the fold. *See* 28 U.S.C. § 2074 (specifying that rules of evidence prescribed under 28 U.S.C. § 2072 are acts of Congress); *see also* Commentary to Canon 1 (The Canons “should be applied consistently with constitutional requirements, statutes, other court rules and decisional law, and in the context of all relevant circumstances.”).

Rule 201 authorizes a judge to, at any time, independently ascertain and use facts that satisfy the requirements of judicial notice. Fed. R. Evid. 201(a)-(d). Here, contrary to complainants’ position, the judge’s description of additional reasons to deny summary judgment does not constitute cognizable misconduct because it is “directly related to the merits of [the] decision.” JCD Rule 11(c)(1)(B). Stated differently, the premise upon

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(explaining that the “Code of Conduct’s Canons are instructive” but the ultimate “responsibility for determining what constitutes cognizable misconduct is determined by the Act and these [JCD] Rules”).

which the judge's additional reasoning rests is Rule 201 evidence, and the propriety of taking judicial notice necessarily questions the correctness of that ruling.

*See* JCD Rule 4(b) (“Cognizable misconduct does not include an allegation that calls into question the correctness of a judge’s ruling[.]”). And, to complainants’ argument, while there may be good reason for a hearing in advance of taking judicial notice, Rule 201 does not require it, and a judge’s decision not to hold such a hearing is merits-related. *See id.* Instead, consistent with Rule 201(e), the judge invited defendants to address apparent contradictions between their sworn statements and the Rule 201 evidence at a future hearing. *See* Fed. R. Evid. 201(e) (“If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.”). A limited inquiry of the district court docket, in accordance with JCD Rule 11(b), revealed defendants have not accepted this invitation, to date.

The balance of complainants’ grievances center on allegedly inappropriate statements and inferences made by the judge, which they claim run afoul of the Code of Conduct, Canons 1, 2A, and 3C(1)(a). Namely, what they assert to be the judge’s “unavoidable” suggestion that defendants are liars “based entirely off of his . . . investigation of tenuous information outside the record.”

Complainants submit that it is well known that honesty is one of the most important attributes of an attorney and lament that the judge’s “accusations” were memorialized in a decision and appeared in the press. They allege the judge’s decision damaged their reputations and contend disciplinary action is merited because of “the effect of the improper activity,” Commentary to Canon 1. They also allege the judge’s

“defamatory” accusations were superfluous, resulted in an appearance of impropriety, and that his decision to accuse *only* complainants indicates he was not impartial, in violation of Canon 2A. Finally, complainants assert the judge’s actions demonstrate personal bias or prejudice, compelling disqualification contemplated by Canon 3C(1)(a), and they incorporate by reference a motion to disqualify filed in the underlying case.<sup>2</sup>

While such allegations can state valid claims for misconduct, even when they relate to a judge’s ruling, *see* Commentary to JCD Rule 4, complainants’ allegations fail because they are wholly unsupported. The JCD Rules require complainants to support their allegations with “sufficient evidence to raise an inference that misconduct has occurred.” JCD Rule 11(c)(1)(D). Additionally, having carefully reviewed the written decision at issue, the judge’s language is “relevant on its face”—identifying conflicts between sworn statements and Rule 201 evidence—and as such, “presumptively merits-related.” Commentary to JCD Rule 4; *see also* JCD Rule 4(b) (“Cognizable misconduct does not include an allegation that calls into question the correctness of a judge’s ruling, including a failure to *recuse*.” (emphasis added)).

Accordingly, this complaint is dismissed pursuant to JCD Rule 11(c). The Circuit Executive is directed to transmit this order to complainants and copies to the

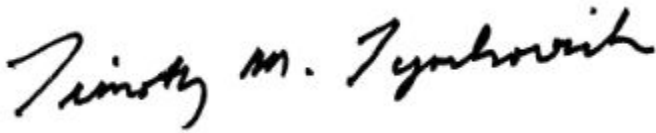
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<sup>2</sup> Complainants attach to their judicial misconduct complaint defendants’ disqualification motion, filed pursuant to 28 U.S.C. § 144 and 28 U.S.C. § 455(a). In it, defendants alleged the subject judge was biased or prejudiced, and that judicial notice did not justify his actions.

A limited inquiry of the district court docket, as permitted by JCD Rule 11(b), was conducted. It revealed that the disqualification motion was referred to a different district court judge and denied on the merits.

subject judge and the Judicial Conference Committee on Judicial Conduct and Disability. *See* JCD Rule 11(g)(2). To seek review of this order, complainants must file a petition for review by the Judicial Council. The requirements for filing a petition for review are set out in JCD Rule 18(b). The petition must be filed with the Office of the Circuit Executive within 42 days after the date of the chief judge's order. *Id.*

So ordered this 8th day of July, 2020.

A handwritten signature in black ink that reads "Timothy M. Tymkovich". The signature is written in a cursive, flowing style.

Honorable Timothy M. Tymkovich  
Chief Circuit Judge