

FILED

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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

**JUDICIAL COUNCIL
OF THE NINTH CIRCUIT**

**IN RE COMPLAINT OF
JUDICIAL MISCONDUCT**

No. 15-90164

ORDER

THOMAS, Chief Judge:

An attorney alleges that a district judge had a conflict of interest in a civil case due to a familial-like relationship with opposing counsel. He further alleges that the judge improperly delayed disclosing that conflict. A review of the relevant status hearing transcript shows that a month before trial was scheduled, the judge indeed disclosed that he “helped raise” defense counsel, and asked whether the parties would agree to proceed before a magistrate judge. Defense counsel was amenable to the magistrate judge presiding, and complainant, plaintiff’s counsel, agreed as long as the trial date remained the same. When the magistrate judge could not accommodate that trial date, complainant then moved to recuse the subject judge based on the alleged conflict of interest. Noting that complainant’s recusal motion was not “legally sufficient,” the subject judge nonetheless recused. The chief district judge then reassigned the case to a different district judge.

In addition to reviewing the status hearing transcript and the recusal order, I conducted a limited inquiry as authorized by Judicial-Conduct Rule 11(b). I requested that the subject judge explain his relationship with defense counsel. In response, the judge explained that defense counsel was a childhood friend of the judge's son who, many years ago, lived in the neighborhood and sometimes ate dinner at their home. The judge has had no personal contact with defense counsel since that time. He clarified that he only "helped raise" defense counsel "in the sense that all members of a community help raise a child." The judge maintains that he did not have a conflict of interest, but decided to disclose the relationship after complainant listed defense counsel as a percipient witness for trial.

Complainant's charges regarding the judge's decision whether to recuse are directly related to the merits of the judge's rulings and are therefore dismissed. *See* 28 U.S.C. § 352(b)(1)(A)(ii); Judicial-Conduct Rule 11(c)(1)(B); *see also In re Complaint of Judicial Misconduct*, 623 F.3d 1101, 1102 (9th Cir. Jud. Council 2010) (holding that the decision not to recuse is merits-related). Complainant has produced no evidence of a corrupt motive or even that recusal was appropriate. *See* 28 U.S.C. § 352(b)(1)(A)(iii); *In re Complaint of Judicial Misconduct*, 569 F.3d 1093, 1093 (9th Cir. 2009). That the subject judge eventually recused does not mean that the judge's failure to recuse earlier in the case was misconduct.

Complainant further alleges that the judge inappropriately called him on the telephone to discuss the scheduling of the trial. But ex parte communications are allowed “for scheduling, administrative, or emergency purposes,” provided that “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.” *See* Code of Conduct for United States Judges, Canon 3(A)(4)(b). Complainant does not allege that the communication was substantive, and has not suggested that the communication hindered his client’s case. This claim is therefore dismissed as unfounded. *See* 28 U.S.C. § 352(b)(1)(A)(iii); Judicial-Conduct Rule 11(c)(1)(D).

Finally, complainant alleges that during the same phone call, the judge admitted that he was taking medication that affected his memory, and advised that he had been diagnosed with memory problems affecting his ability to preside over a lengthy trial. Pursuant to the Judicial Conduct and Disability Act, any person who believes that a federal judge “is unable to discharge all the duties of office by reason of mental or physical disability,” 28 U.S.C. § 351(a), may file a complaint stating the reasons for his belief. *See In re Complaint of Judicial Misconduct*, 758 F.3d 1161 (9th Cir. Jud. Council 2014) (noting that complaints concerning disability are taken seriously, and are welcome and encouraged).

In response to my inquiry, the district judge explained that he was not under medical treatment for any memory issue, had never been diagnosed with memory deficiencies, and never made such a statement to complainant. The judge acknowledged that he told complainant that during an illness, he “had been prescribed a medication that had affected [his] memory” which required him to have the prescription changed. The judge had discussed the issue with his doctor, who apparently prescribed a different medication, after which the judge suffered no more “negative memory events.”

Complainant has not pointed to a hearing transcript, or specified any date on which signs of a disability were discernible from the record in support of his allegations. Complainant has not specified any other behavior that would cause concern about a mental disability other than the judge’s alleged “admission” during the scheduling phone call. If the judge were concerned about side effects from medication, then the judge acted appropriately in modifying his schedule.

In furtherance of my limited inquiry, I also reviewed appeals to the Ninth Circuit of the judge’s cases for the last three years. No issues regarding the judge’s competency were raised by the parties or evident from the appellate court’s dispositions.

From the evidence submitted, it appears that any short-term infirmity the judge faced was resolved when his doctor switched his medication. Without more specific facts, complainant's allegations are insufficient to "raise an inference that . . . a disability exists." Judicial-Conduct Rule 11(c)(1)(D); 28 U.S.C. § 352(b)(1)(A)(iii); *In re Complaint of Judicial Misconduct*, 758 F.3d 1161 (9th Cir. Jud. Council 2014). Thus, I cannot conclude from the record or the limited inquiry that the judge "is unable to discharge the duties of his office by reason of mental or physical disability" pursuant to 28 U.S. C. § 351(a).

For these reasons, I must dismiss the complaint.

DISMISSED.