

FILED

OCT 19 2018

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

**JUDICIAL COUNCIL
OF THE NINTH CIRCUIT**

**IN RE COMPLAINT OF
JUDICIAL MISCONDUCT**

No. 18-90087

ORDER

THOMAS, Chief Judge:

Complainant, a pro se prisoner, has filed a complaint of judicial misconduct against a district judge. Review of this complaint is governed by the Rules for Judicial Conduct and Judicial-Disability Proceedings (“Judicial-Conduct Rules”), the federal statutes addressing judicial conduct and disability, 28 U.S.C. § 351 et seq., and relevant prior decisions of the Ninth Circuit Judicial Council. In accordance with these authorities, the names of complainant and the subject judge shall not be disclosed in this order. See Judicial-Conduct Rule 11(g)(2).

The Judicial Conduct and Disability Act provides a remedy if a federal judge “has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts.” 28 U.S.C. § 351(a). A chief judge may dismiss a complaint if, following review, he or she finds it is not cognizable under the statute, is directly related to the merits of a decision or procedural ruling, or is frivolous or lacks sufficient evidence to raise an inference of misconduct.

See 28 U.S.C. §§ 352(b)(1)(A)(i)-(iii). Judicial misconduct proceedings are not a substitute for the normal appellate review process, and may not be used to seek reversal of a judge's decision, to obtain a new trial, or to request reassignment to a different judge.

Complainant alleges that during jury deliberations in his criminal trial, the judge improperly gave an ex parte oral instruction to the jury. Complainant raised this same allegation in a 28 U.S.C. § 2255 motion to vacate judgment in the underlying case. In support of that motion (and the current misconduct complaint), complainant attached a declaration by one of the jurors, stating that the juror was confused by the judge's "oral instructions to us after we had been deliberating a while that all 12 of us had to agree before a verdict could be rendered." According to the declaration, the juror believed that he could be in the juror room "for days until all 12 of us agreed on a verdict." In denying the motion, the judge noted that he did not recall discussing any non-administrative matters with the jury, that the docket shows no evidence of communications between the court and the jury, and that deliberations lasted only five hours, leaving little time for the court to have had any ex parte communication with the jury.

Pursuant to a limited inquiry under Judicial-Conduct Rule 11(b), the courtroom deputy assigned to complainant's trial was contacted. The deputy

confirmed that he remembers complainant's trial, and does not recall any mid-deliberation communications between the judge and jury. The deputy also noted that there is no docket entry indicating that the jury ever submitted a question or asked to speak with the judge during deliberations, and that it would be standard practice for any jury question or communication to the judge to be noted on the docket and discussed on the record between the court and counsel.

Based on the judge's recollection of the trial, the courtroom deputy's recollection of the trial, the courtroom deputy's description of standard practices in juror deliberations, and the underlying record, it is highly unlikely that any ex parte communication in fact occurred. Accordingly, complainant's allegations are dismissed as unfounded and conclusively refuted by objective evidence. See 28 U.S.C. § 352(b)(1)(A)(iii), (B); In re Complaint of Judicial Misconduct, 761 F.3d 1097, 1098-99 (9th Cir. Jud. Council 2014); Judicial-Conduct Rules 3(h)(1)(D), 11(c)(1)(D).

DISMISSED.