

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. 20-90050
ORDER

THOMAS, Chief Judge:

Complainant, a lawyer, 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 the judge denied him an opportunity to be oppose an ex parte application to dismiss the case. The record indicates that complainant failed to timely file an opposition. Further, the judge allowed complainant to provide an explanation of his position during the hearing for the application. Complainant provided a brief explanation, but when questioned about the e-mails, the complainant stated that he did not "want to be a witness against myself." Accordingly, the allegation that complainant was improperly denied an opportunity to be heard is refuted by the record and must be dismissed as unfounded. 28 U.S.C. § 352(b)(1)(B).

Complainant also alleges that the judge made hostile remarks and gestures toward complainant during the hearing. "As always, in assessing these matters, context is important." In re Judicial Misconduct, 906 F.3d 1167, 1169 (9th Cir. Jud. Council 2018). The complainant's actions that were the subject of the judge's frustration involved a series of e-mails containing expletives, discriminatory epithets, and threats toward witnesses, opposing counsel, and their family

members. Further, complainant's behavior cannot be attributed to a temporary lapse of judgment by complainant. Complainant sent at least 18 e-mails with threatening language. All of those e-mails contained inflammatory language and several contained threats of physical violence. For instance, complainant mentioned opposing counsel's family members by name and indicated that he knew where opposing counsel lived. He also threatened to torture any witnesses who would attempt to testify. There is no indication that opposing counsel ever threatened complainant in a similar manner and it appears opposing counsel engaged with complainant in a professional manner. With this context in mind, we assess complainant's allegations.

Complainant points to statements by the judge describing complainant's actions as discrediting the legal profession, and suggesting that if complainant threatened the judge and his family like he did to opposing counsel, the judge would "come looking for [complainant]." Complainant also references the judge's comments about complainant making a "rookie mistake" and being "stupid enough to put it in writing or to use it in a professional setting" to support his allegations. Complainant also notes that the judge told him to "shut up."

Undoubtedly, the judge's comments were strongly worded. However, a review of the full hearing transcript reveals that the judge was frustrated and

extremely disturbed by complainant's threatening behavior. The judge mentioned several times the amount of hard work and dedication it takes to become a lawyer. He mentioned this to highlight his disappointment in the way complainant conducted himself as a lawyer and, in turn, tarnished the reputation of the legal profession. The judge also expressed his incredulity about complainant's actions, the likes of which he had never seen in his career. Given the gravity of the threats complainant lodged against opposing counsel, the judge's disappointment is a fair response.

As complainant pointed out, the judge indeed told complainant to "shut up" at one point during the hearing. A review of the transcript clarifies that the judge made this comment in response to complainant giving contradictory statements during the hearing. Complainant first stated that he would not resign and the judge proceeded to discuss fees and costs based on complainant's statement. As the judge began to discuss these matters, complainant then indicated that he had resigned from the case. Read in context, the judge's comments were, expressions of frustration regarding complainant's unproductive responses. The judge did not treat complainant in a demonstrably egregious or hostile manner. Accordingly, this allegation must be dismissed as unfounded and conclusively refuted by objective evidence. See 28 U.S.C. § 352(b)(1)(A)(iii), (b)(1)(B); In re Complaint

of Judicial Misconduct, 761 F.3d 1097, 1098-99 (9th Cir. Jud. Council 2014)

(“Misconduct includes treating litigants or attorneys in a demonstrably egregious and hostile manner. The comments here do not meet that standard. The judge did not use demeaning language or heap abuse on anybody. His statements were blunt but measured expressions of frustration”) (internal quotations and citations omitted); Judicial-Conduct Rule 11(c)(1)(D); see also In re Complaint of Judicial Misconduct, 650 F.3d 1370, 1371 (9th Cir. Jud. Council 2011) (“adverse rulings do not prove bias”).

DISMISSED.