

**THE JUDICIAL COUNCIL OF THE SEVENTH CIRCUIT**  
219 South Dearborn Street  
Chicago, Illinois 60604

March 12, 2007

FRANK H. EASTERBROOK  
Chief Judge

No. 06-7-352-48

IN RE COMPLAINT AGAINST A JUDICIAL OFFICER

MEMORANDUM

The complainant, a state prisoner, maintains that the judge assigned to his petition for collateral relief delayed in resolving his case, erred in handling his discovery requests, and failed to implement an appellate decision remanding for further proceedings.

Any complaint that is “directly related to the merits of a decision or procedural ruling” must be dismissed. 28 U.S.C. §352(b)(1)(A)(ii). The allegations of this complaint fit that description. “Any allegation that calls into question the correctness of an official action of a judge ... is merits related.” Standard 2 for Assessing Compliance with the Act, *Implementation of the Judicial Conduct and Disability Act of 1980: A Report to the Chief Justice* 145 (2006). Complainant’s remedy is on appeal, not by a judicial-misconduct complaint. (An appeal from the district judge’s decision on remand is pending.)

Although delay in judicial decision-making is unfortunate and undesirable, the substantial caseload assigned to federal judges makes it impossible for them to resolve all litigation with the dispatch that would characterize an ideal system. That is why decisions about the allocation of time are merits-related and outside the scope of the statute. See Standard 2, *supra*, at 146 (“A complaint of delay in a single case is properly dismissed as merits related.”). The time taken to handle this litigation cannot be classified as a form of official misconduct; delay in one case does not imply that the judge is unwilling or unable to handle the litigation on the docket. Much of the delay that occurred

in these proceedings, moreover, was at complainant's own request, and he cannot treat the judge's acquiescence as misconduct.

In one respect, however, the complaint alleges conduct that is not related to the merits of a judicial decision. Complainant asserts that "[o]n September 17, 2004, ... the District court engaged in *ex-parte* communications with the Respondent and or his Attorney in a Status hearing that Complainant was not made aware of nor informed about the discussions therein." The district court's docket shows that on September 17, 2004, a schedule was set; the docket is otherwise uninformative about what (if anything) took place on that date.

Because it was not possible to tell from the complaint whether anything untoward had occurred, I spoke with the district judge and have engaged in follow-up correspondence. I learned that no *ex parte* communications occurred on September 17. The docket entry for that date reflects the acts of clerical personnel setting a future time at which a motion would be presented in open court. Any allegation that *ex parte* contacts occurred on September 17 is conclusively refuted by objective evidence. See 28 U.S.C. §352(b)(1)(B).

The presentation of the motion in open court took place on September 28. At my request, the district judge had a transcript prepared. This transcript reveals that counsel for the warden appeared but that petitioner was not present in person, by counsel, or over an audio or video electronic link. That proceeding accordingly was *ex parte*. Counsel for the warden suggested that the prisoner (the petitioner in the collateral proceeding, the complainant here) be given 60 days to present any evidence material to the issues that the court of appeals had identified for resolution on remand. The judge responded: "Okay. I'll do that then. ... So 60 days for the petitioner to submit any evidence, any additional evidence in support of his petition. And then we'll have a status in 60 days." The complainant was immediately notified of that decision, and a copy of this transcript has been furnished to complainant in this proceeding.

It is evident from this transcript—the entire colloquy occupies only 26 lines—that the district judge did not receive any information bearing on the merits of the case. No substantive argument was received or considered; complainant did not suffer any conceivable prejudice.

The governing rule is Canon 3A(4) of the Code of Conduct for United States Judges. This provides that "[a] judge should accord to every person who is legally interested in a proceeding, or the person's lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider *ex parte* communications on the merits, or procedures affecting the merits, of a pending or impending proceeding...". As far as I can discover, the Committee on Codes of Conduct has never issued an advisory opinion or other formal interpretation of the phrase "procedures affecting the merits". Nor is this an appropriate occasion to interpret that phrase, for two reasons.

First, although it is possible to imagine circumstances in which a nominally procedural ruling—say, one giving an imprisoned plaintiff only 48 hours to

present all evidence—would control the outcome, nothing of the kind took place. The judge gave complainant 60 days, and he does not maintain that this ruling “affected the merits” of his case. By his own allegations, therefore, there has been no inappropriate conduct.

Second, to the extent that there is uncertainty about the scope of Canon 3A(4), a proceeding under the 1980 Act is not the way to achieve resolution. That should be done under the auspices of the Committee on Codes of Conduct. It is never “judicial misconduct” to take one view rather than another of an unresolved issue. The commentary to Canon 1 observes, with respect to the Code as a whole: “Many of the proscriptions in the Code are necessarily cast in general terms, and it is not suggested that disciplinary action is appropriate where reasonable judges might be uncertain as to whether or not the conduct is proscribed.”

To sum, in this situation the procedural ruling is not alleged to have “affected” the merits, so the judicial action was proper under Canon 3A(4). With respect to other situations that could affect other litigation, elucidation of the Canon lies in the hands of the Committee on Codes of Conduct and is not a ground for a proceeding under the 1980 Act.