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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. 07-89108

ORDER

KOZINSKI, Chief Judge:

A complaint of misconduct has been filed against a district judge of this circuit. Complainants are two pro se plaintiffs in a copyright action. They own part of Company A, and are officers of Company A. In 2004, Company A appealed a decision of the Trademark Trial and Appeal Board in favor of Company B. Company A attempted to proceed pro se, represented by one of the complainants. The district judge hearing that appeal ordered Company A several times to hire counsel, as required by a local rule. Company A didn't hire counsel, and the judge dismissed the trademark case without prejudice.

After dismissal of the trademark case, complainants, proceeding pro se, filed a copyright action against Company B. The case was assigned to the subject judge. Company B brought a trademark counterclaim against Company A. Complainants assert that Company B tried to serve Company A through complainants, but complainants refused service, stating that they were "not authorized" by Company

A to accept service on its behalf.

The initial status conference for the copyright case was held in the subject judge's chambers. The Civil Minutes for the conference state that the judge "gave plaintiffs every opportunity to describe their case," but they "were unable to articulate, in a coherent manner, a lucid description of their case." The Minutes state that "[t]he plaintiffs became agitated when the Court terminated the status conference." No court reporter was present and the status conference was not tape recorded.

Company B moved for summary judgment on the copyright claim.

Complainants then filed motions to dismiss the trademark counterclaim and to "drop" Company A as a party. Complainants also filed a motion to disqualify the subject judge and two related motions for reconsideration, all of which were denied by another judge. The subject judge granted summary judgment, and denied complainants' motions to dismiss the counterclaim and drop Company A.

Company B subsequently moved to dismiss its counterclaim, and the judge granted the motion. Complainants' appeal regarding several orders and the judgment in the case is pending.

Complainants allege that the judge incorrectly allowed Company B to "bring" the prior trademark claim in the copyright case, to join Company A by

permitting Company B's counterclaim, and to "use" the trademark case and the joinder of Company A to move for summary judgment against complainants and Company A. They allege the judge incorrectly granted summary judgment, denied their motions and permitted Company B to dismiss its counterclaim after summary judgment. They allege the judge should not have joined Company A, because it had not been served and had no representation. They allege that the subject judge failed to comply with the order of the judge handling the earlier trademark case, which said that Company A could not appear without counsel. Because all of these charges are directly related to the merits of the judge's rulings in the underlying case, they must be dismissed. 28 U.S.C. § 352(b)(1)(A)(ii); Rule 4(c)(1) of the Rules of the Judicial Council of the Ninth Circuit Governing Complaints of Judicial Misconduct or Disability (Misconduct Rules). The procedures for judicial misconduct are not a proper venue for challenging a judge's rulings. See In re Charge of Judicial Misconduct, 685 F.2d 1226, 1227 (9th Cir. Jud. Council 1982).

Complainants allege that, during the status conference, the judge spoke to them in a "rude, hostile, antagonistic manner," and threatened to have one of the complainants removed from his chambers. Judges have broad discretion in conducting proceedings, and a tone of frustration or irritation in carrying out judicial duties does not, by itself, constitute judicial misconduct. See Liteky v.

United States, 510 U.S. 540, 555–56 (1994). Because there is no verbatim recording of the proceedings at issue, it is difficult to tell whether the judge’s conduct exceeded a tolerable degree of irritation or frustration—or, instead, whether the judge acted impatiently or discourteously at all.

A judge who conducts judicial business without having an official court reporter present or otherwise recording the proceedings incurs the risk that one or more of the participants will call his conduct into question by way of a judicial misconduct complaint—as happened here. In such circumstances it is difficult—and sometimes impossible—to determine precisely what happened without relying on the testimony of witnesses. This can put the judge in an awkward position, as he may have to rely on the word of his own staff, or of the lawyers or parties on one side of the litigation, to vindicate his behavior. This may well compromise the judge’s appearance of impartiality.

Under the circumstances, the chief judge thought it prudent to counsel the subject judge concerning the allegations raised by these complainants. While asserting that he maintained proper decorum throughout the proceedings, the subject judge nevertheless recognized that he could have exercised better judgment in conducting the hearing, and undertook to do so in the future. He also undertook to conduct hearings in similar circumstances only in the presence of a court

reporter, or to use some other method of verbatim recording of the proceedings, such as audio tape. This portion of the complaint is therefore dismissed, without a finding of misconduct, on the basis of “appropriate corrective action.” 28 U.S.C. § 352(b)(2).

Complainants also allege that the judge denied them the opportunity to oppose the counterclaim and joinder of Company A. However, the counterclaim against Company A was dismissed. These charges are therefore dismissed because, even assuming that all of the allegations are true, the charged behavior does not amount to “conduct prejudicial to the effective and expeditious administration of the business of the courts.” Misconduct Rule 4(c)(2)(A); see 28 U.S.C. § 351(a).

Complainants allege that the judge’s behavior at the status conference and his unfavorable rulings exhibit bias and prejudice against them due to their pro se or socioeconomic status. They also allege that the judge acted vindictively when reviewing the record for summary judgment and did not consider certain filings. But complainants haven’t included any objectively verifiable proof (for example, names of witnesses or recorded documents) supporting these allegations. Because there isn’t sufficient evidence to raise an inference that misconduct occurred, these charges are dismissed. 28 U.S.C. § 352(b)(1)(A)(iii); Misconduct Rule 4(c)(3).

Regarding the charge that filings were not considered, the judge did reject one document as deficient. To the extent complainants object to this order, the charge is dismissed as directly related to the merits of the judge's ruling. 28 U.S.C. § 352(b)(1)(A)(ii); Misconduct Rule 4(c)(1).

Furthermore, complainants allege that the subject judge improperly reviewed their motion to disqualify the judge. Although the docket erroneously shows that the order was issued by the subject judge, the order denying the motion and the two subsequent orders regarding the motions to reconsider are all signed by another district judge. This charge is therefore dismissed because it lacks a factual foundation. 28 U.S.C. § 352(b)(1)(B).

DISMISSED.