

**JUDICIAL COUNCIL OF THE
TENTH CIRCUIT**

IN RE: COMPLAINT UNDER THE
JUDICIAL CONDUCT AND
DISABILITY ACT

Nos. 10-17-90035 & 10-17-90036

Before **TYMKOVICH**, Chief Judge

ORDER

Two complainants have filed separate complaints of judicial misconduct against a district judge in this circuit. The complaints have been consolidated for decision because they arise out of the same underlying case and factual circumstances. My consideration of these complaints is governed by the misconduct rules issued by the Judicial Conference of the United States, entitled *Rules for Judicial-Conduct and Judicial-Disability Proceedings* (the “JCD Rules”), the federal statutes addressing judicial conduct and disability, 28 U.S.C. § 351 *et seq.*, and relevant prior decisions of the full Judicial Council of this circuit that are consistent with those authorities.

The JCD Rules and this circuit’s local misconduct rules are available to complainants on the Tenth Circuit’s web page at: <http://www.ca10.uscourts.gov/ce/misconduct>. Paper copies are also furnished by the Circuit Executive’s Office upon request. In accordance with those rules, the names of the complainants and subject judge shall not be disclosed in this order. *See* JCD Rule 11(g)(2).

The complainants, two jurors for the same trial, allege that the district judge was biased in favor of the prosecution and against the defense. Specifically, complainants

contended that the subject judge: treated the defense attorney like a child by putting the attorney in “time-out” and asking the court security officers to stand next to the attorney during portions of the trial; acted “cool” or “downright nasty” toward defendants and defense counsel; frequently interrupted the defendants and defense counsel, which interfered with their presentations; frequently sustained the prosecutor’s objections and overruled the defense’s objections; did not allow a key witness to testify for the defense; and provided misleading jury instructions.

Given the seriousness of the allegations, a limited inquiry was conducted pursuant to JCD Rule 11(b) (providing, “[i]n determining what action to take under Rule 11(a), the chief judge, or a designee, may conduct a limited inquiry. The chief judge may communicate . . . with . . . any others who may have knowledge of the matter, and may obtain and review transcripts and other relevant documents.”). The chief circuit judge designated a magistrate judge to assist in this review. As part of the limited inquiry, the subject judge responded to the allegations, trial transcripts were reviewed, and several witnesses, including the complainants and defense counsel, were interviewed.

First, complainants contend that the subject judge was biased, treating defense counsel like a child, interrupting and acting “downright nasty” toward the defendants and defense counsel. A review of the record, including trial transcripts, and interviews with witnesses were conducted to determine whether this allegation was supported by evidence. Neither a review of the record nor witness statements support the claim of bias.

A review of the transcripts revealed that, at times, the subject judge appeared short with the defense and the “time outs” and request for court security officer support was likely out of frustration and irritation. The judge did cut off defense counsel, in some cases simply stating, “I’ve ruled” without further explanation. It was clear that defense counsel strongly disagreed with the court’s pretrial rulings and routinely pressed his theory throughout the trial. This drew many sustained objections and the subject judge appeared frustrated that the defense attempted several times to get around those rulings. A thorough review of the transcripts, however, disclosed only one objectively pejorative comment by the subject judge. In response to a question by defense counsel, the judge stated, “that’s the most absurd question today.” This comment and the judge’s other actions and statements were relevant to the case at hand, which itself does not constitute misconduct. *See* Commentary to JCD Rule 3 (stating, “[i]f the judge’s language was relevant to the case at hand – for example, a statement that a claim is legally or factually “frivolous” – then the judge’s choice of language is presumptively merits-related and excluded, absent evidence apart from the ruling itself suggesting an improper motive.”).

Further, although many of the witnesses seemed surprised by the conflict between the judge and the defense, most people did not indicate that they perceived any injustice. One of the non-party witnesses interviewed even indicated that defense counsel may have brought upon himself the judge’s frustration. The judge’s statements and actions were not out of the realm of accepted judicial practice. Accordingly, the subject judge’s conduct did not rise to the level of misconduct and, besides the rulings themselves, there was no evidence of bias.

Complainants also contend that the judge more frequently ruled in favor of the prosecution, did not allow a key witness to testify for the defense and provided misleading jury instructions. As these claims were not supported by evidence of bias, they are not cognizable as misconduct because they are “directly related to the merits of a decision or procedural ruling.” JCD Rule 11(c)(1)(B); *see also* Commentary to JCD Rule 3 (stating that “[a]ny allegation that calls into question the correctness of an official action of a judge—without more—is merits-related”). The trial record has been raised on appeal and, thus, the convicted defendants’ rights to a fair and impartial trial are preserved.

Accordingly, these complaints are dismissed pursuant to JCD Rule 11(c). The Circuit Executive is directed to transmit this order to complainants and copies to the subject judge and the Judicial Conference Committee on Judicial Conduct and Disability. *See* JCD Rule 11(g)(2). To seek review of this order, complainants must file a petition for review by the Judicial Council. The requirements for filing a petition for review are set out in JCD Rule 18(b). The petition must be filed with the Office of the Circuit Executive within 42 days after the date of the chief judge’s order. *Id.*

So ordered this 2nd day of July, 2018.

/s/ Timothy M. Tymkovich

Honorable Timothy M. Tymkovich
Chief Circuit Judge