

**JUDICIAL COUNCIL OF THE
TENTH CIRCUIT**

IN RE: COMPLAINT UNDER THE
JUDICIAL CONDUCT AND
DISABILITY ACT

No. 10-19-90041

Before **TYMKOVICH**, Chief Judge

ORDER

Complainant has filed a complaint of judicial misconduct against a magistrate judge in this circuit. My consideration of this complaint 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 complainant and subject judge shall not be disclosed in this order. *See* JCD Rule 11(g)(2).

Complainant, a juror in a case in which the subject judge was assigned, alleges that the subject judge engaged in misconduct during and after trial.

Complainant contends that the subject judge: did not allow the jurors to ask questions during the trial, asked the jurors to deliberate on a Friday afternoon, and provided the jurors with burdensome jury instructions. “Any allegation that calls into question the correctness of an official decision or *procedural ruling* of a judge – without more – is merits-related.” Commentary to JCD Rule 4 (emphasis added). Accordingly, these claims 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).

Complainant also asserts that the subject judge had a prior relationship with one of the parties in the matter. Specifically, complainant contends the subject judge’s former firm represented the party generally and that the judge himself represented the party in a matter as recently as 2018. Generally, “cognizable misconduct does not include an allegation that calls into question the correctness of a judge’s ruling, including a failure to recuse.” JCD Rule 4(b)(1). Nevertheless, as complainant contends that the judge’s failure to recuse may have been a result of bias, I conducted a limited inquiry. See JCD 11(b).

A review of the docket and a statement from the judge indicates that this allegation is unsupported. Before the subject judge’s first hearing with the parties, the judge issued an order disclosing his prior representation of an affiliate of the party. The subject judge noted that if any of the parties felt that there were grounds for recusal, then they shall file a motion to recuse under 28 U.S.C. § 455. No motion was filed. When the parties next appeared in court, the judge again asked the parties whether they wanted to make an oral motion for recusal. They declined and said they had discussed it and believed the judge would be fair and unbiased. The judge gave the parties one more opportunity to file a


motion for recusal. The parties did not file. The subject judge's actions were consistent with the Code of Conduct for United States Judges and do not support a claim of bias. Accordingly, the allegation can be dismissed as "lacking sufficient evidence to raise an inference that misconduct has occurred." See JCD Rule 11(c).

Finally, complainant contends that the subject judge made a negative remark about an attorney whose firm represented one of the parties to the jurors in the jury room after the verdict had been delivered. Significantly, the attorney and the firm's actions were at issue in this case and were part of the defendant's defense. In a response to my inquiry, the subject judge indicated that after the verdict was rendered, the judge asked the jury what they thought of the claims and defenses in the case, including the allegations against the attorney, and the effectiveness of related arguments. The subject judge indicated that a discussion between the judge and the jury ensued during which time the complainant could have interpreted the judge's questions or a juror's statement as negative. This allegation does not constitute cognizable misconduct. "Because of the special need to protect judges' independence in deciding what to say in an opinion or ruling, a somewhat different standard applies to determine the merits-relatedness of a non-frivolous allegation that a judge's language . . . reflected an improper motive. If the judge's language was relevant to the case at hand . . . then the judge's choice of language is presumptively merits-related and excluded" Commentary to JCD Rule 4.

Accordingly, this complaint is dismissed pursuant to JCD Rule 11(c). The Circuit Executive is directed to transmit this order to complainant 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, complainant 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 17th day of October, 2019.

A handwritten signature in black ink that reads "Timothy M. Tymkovich". The signature is written in a cursive style with a large initial 'T'.

Honorable Timothy M. Tymkovich
Chief Circuit Judge