

**JUDICIAL COUNCIL OF THE  
TENTH CIRCUIT**

IN RE: CHARGE OF JUDICIAL  
MISCONDUCT

N<sup>o</sup> 2008-10-372-06

**MOTION FOR ACCESS TO COURT FILES PURSUANT TO RULE 16(H) AND FOR MODEST  
ENLARGEMENT OF TIME TO PREPARE PETITION FOR REVIEW**

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INTRODUCTION

In your Order of Partial Dismissal of the above captioned cause, you concluded that “citation to a single separate decision by the respondent judge does not demonstrate a pattern or practice” and that I provided “no factual allegations or evidentiary support for the alleged improper motive other than the judge’s rulings, themselves.” In re Charge of Judicial Misconduct, No. 2008-10-372-06 (10<sup>th</sup> Cir. Judicial Council 2007) at 2. Yet, a requirement that a complainant attach “evidentiary support for the alleged improper motive” to an initial complaint is unduly burdensome, especially whereas the improper motive is obvious from the record. *See, e.g., Smith v. Distr. Court*, 629 P.2d 1055, 1057 (Colo. 1981) (Bias, prejudice or improper motive “is a mental condition or status—a certain ‘bent of mind’—it cannot be demonstrated, ordinarily, by direct proof”). Said differently, I appear to have been placed in the unenviable position of needing to conduct an independent investigation of other cases, litigants and attorneys, to support my contention of, “a marked pattern or practice.” The task of furnishing adequate evidentiary support is further exacerbated because, even though most of the requisite evidence is already collected in your own misconduct complaint files, dismissed complaints are sequestered from public view.

What little independent investigation I have been able to do indicates that Judge Nottingham's misconduct is traceable all the way back to 1991 —shortly after he was appointed to the bench— yet, nothing was done during these nearly twenty years, while he was abusing his office, injuring litigants and attorneys and embarrassing the federal bench. This has led many to conclude that the only reason the judge is only now being investigated is because his conduct has caught the attention of the media and that, if only he had been more careful in his personal life, he would continue to be given safe harbor. The following illustrates my point succinctly:

#### SUPPLEMENTAL ALLEGATIONS

This past Saturday, I interviewed Joseph Losavio, a retired attorney residing in Lenno, Italy. Losavios recalled that, on Friday, April 26, 1991, the last day of trial in Settle v. Centel Electric, No. 89-cv-00147 (D. Colo), a stately tall blonde entered the courtroom gallery. Nottingham immediately took notice, stopped the proceedings, scribbled something on a Post-it<sup>TM</sup> note, and handed it to the bailiff with instructions to give it to Centel attorney William Mattoon. The note inquired as to the identity of the appealing woman. When Mattoon informed him that she was Losavio's wife, the proceedings resumed, according to Losavio.<sup>1</sup>

In Centel Corp., Losavio also recalled that Nottingham refused to cause the clerk record the jury's \$172,465 verdict, a purely ministerial act. Losavio repeatedly followed-

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<sup>1</sup> Compare this account with Al Lewis's recent reporting of Judge Nottingham making, "a gratuitous reference to a somewhat acrobatic sexual position in the midst of otherwise mundane court proceedings." Al Lewis, *Not-so-honorable judge presides*, Denver Post editorial (March 16, 2008)

up with the clerk in an effort to get the judgment entered. Losavio's client, Don Settle, eventually filed a judicial misconduct complaint. Nottingham issued a written response in which, as Losavio recalls, he accosted him for pestering his clerks over it.

I also spoke with Don Settle, who witnessed the passing of the note. Settle says that he lost approximately fifty thousand dollars as a result of Nottingham's refusal to enter the jury's judgment. Settle says Nottingham later justified his usurpation of the jury's verdict because "he didn't like the precedent" that might be established for at-will employee discharge cases and, as a result, the jury's verdict was never honored.

Additionally, Mr. Losavio further noted that it has been believed by many in the legal community that the respondent judge is now or was prescribed psychotropic medications to manage an Axis I or Axis II mental illness, not otherwise specified. Losavio added his own anecdotal observation that the respondent judge's abusive conduct and "eccentricities" seemed consistent with a mental illness, such as "manic depression" and that he appeared as a person who was "off his meds." As a reasonable judge of character, I regarded Mr. Losavio's account as sincere and as an genuine concern. It is a concern serious enough to be called to the Council's attention for two important reasons: (1) It raises the question as to whether the respondent-judge was incompetent, at times, to preside over previous (or current) cases; and (2) it may be a mitigating factor for the Council to consider in its pending investigation[s] of misconduct.

#### PRAYER FOR RELIEF

Although, the five member panel of the Judicial Conference Committee concluded in its January 14, 2008 memorandum of decision that, “a judge’s pattern and practice of arbitrarily and deliberately disregarding prevailing legal standards and thereby causing expense and delay to litigants may be misconduct,” the problem here is an obvious one: The majority of the myriad complaints against Respondent in your files concern incidents related to the merits of rulings within each respective case, each and all of them were presumptively dismissed on the same basis as mine. *See* Misconduct Rule 4(c)(2); *see also* Breyer Report, App. E. Standing alone, no one of the complaints was sufficient to establish a pattern or practice of conduct, whereas construed together, they may well establish a marked pattern and practice of arbitrarily and deliberately disregarding prevailing legal standards, as alleged in my complaint. Indeed, if I had access to that information, the pattern of abuse would, in all likelihood, be easily established.

The Rules prescribe that it is your duty to investigate claims of this nature and among the few reasons that a complaint may be dismissed is when the complaint, "contains allegations that are incapable of being established through investigation." Elizabeth Bazan, *Judicial Discipline Process: An Overview*, Congressional Research Service Report for Congress No. RS22084 (March, 2005). The new rules that go into effect April 10, 2008 reiterate that the judicial disciplinary process is “fundamentally administrative and inquisitorial.” Rules for Judicial-Conduct and Judicial-Disability Proceedings, Judicial Conference Committee on Judicial Conduct and Disability, enacted Mar. 11, 2008, <http://www.uscourts.gov/library/judicialmisconduct->

[/jud\\_conduct\\_and\\_disability\\_308\\_app\\_B\\_rev.pdf](#). Therefore, I must conclude that it is not the task of the complainant to perform this kind of an investigation, but the Chief Judge or the special committee that he or she appoints or the Council, itself. Thusly, I respectfully request that you undertake this investigation.

I also respectfully request, pursuant to Rule 16(h) of the Tenth Circuit's Rules Governing Complaints of Judicial Misconduct, the opportunity to conduct a review of the Nottingham misconduct files and a corresponding enlargement of time with respect to a Petition for Review. With respect to the usual confidentiality provisions, the Comment to Rule 23 of the new Rules recently adopted by the Judicial Conference states, in pertinent part:

[A] chief judge may disclose the existence of a proceeding under these Rules. The disclosure of such information in high-visibility or controversial cases is to reassure the public that the federal judiciary is capable of redressing judicial misconduct or disability.

Clearly, this matter consists of both high visibility and controversy. Access to the preexisting complaints against Judge Nottingham is truly essential to assuring the public that the federal judiciary is serious about policing misconduct or disability, as promised them in the 2007 Year-End Report on the Federal Judiciary.<sup>2</sup>

Respectfully submitted this 24<sup>th</sup> day of March, 2008

  
Sean L. Harrington

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<sup>2</sup> “[T]he Judiciary must relentlessly ensure that federal judges maintain the highest standards of integrity. Federal judges hold a position of public trust, and the public has a right to demand that they adhere to a demanding code of conduct . . . . When entertaining a complaint about a judge, the Judiciary must apply the same qualities of reason, impartiality, and wisdom that epitomize the judicial process. . . . The public rightly expects the Judiciary to be fair but firm in policing its own.” Excerpt from the *2007 Year-End Report on the Federal Judiciary*.