

**JUDICIAL COUNCIL OF THE
TENTH CIRCUIT**

IN RE: CHARGE OF JUDICIAL
MISCONDUCT

N^o 2008-10-372-06

PETITION FOR REVIEW

On January 14, 2008, the Judicial Conference Committee on Judicial Conduct and Disability issued a decision stating, in pertinent part, that:

a cognizable misconduct complaint based on allegations of a judge not following prevailing law or the directions of a court of appeals in particular cases must identify clear and convincing evidence of willfulness, that is, clear and convincing evidence of a judge's arbitrary and intentional departure from prevailing law based on his or her disagreement with, or willful indifference to, that law.¹

Thus it would follow that, even under pre-existing rules governing the discipline of judges (28 U.S.C. § 372, *et seq.*), a judge's arbitrary and intentional departure from prevailing law based on willful indifference to that law is an appropriate ground for discipline.

In *Harrington v. Wilson*, 05-cv-01858 (D. Colo. Sep. 21, 2006), I had until Sept. 26, 2006 to submit objections to the magistrate's recommendation for dismissal pursuant to Fed. R. Civ. P. 72(b). [Dkt. # 77]. I prepared a fully-hyperlinked "digital brief," based on my consultation with Chris Vagner, the District's ECF project manager, who had explained that hyperlinked e-briefs were accepted and encouraged.² [Dkt. # 102]. Five days before this deadline, Judge Nottingham dismissed my suit *sua sponte*, erroneously concluding that no

¹ Memorandum of Decision (Judicial Conference Committee on Judicial Conduct and Disability Jan. 14, 2008) at 8. <http://www.uscourts.gov/library/judicialmisconduct/jcdopinions108.pdf>

² The district court's *Electronic Filing Guidelines* specifically authorizes the use of hyperlinks either to another portion of the same document or to Web sites. *Id.* at § X. This Court, also, accepts fully-hyperlinked briefs. See October 20th 2004 Emergency General Order *In re: Electronic Submission of Selected Documents*, amended January 1st 2006 ("Briefs may contain hyperlinks to cases and authorities"). Also, I run a legal technology firm. Our digital brief technology was presented at the Fifth Circuit's Summit on Technology, which was attended by Gary Bowden, the Director of Technology and Automation for the Circuit Courts. Our technology solutions have been widely received and well regarded by both state and federal courts.

timely objection was filed. [Dkt. #74]. I immediately moved for reconsideration [Dkt. #77] and timely submitted my objections. [Dkt. #76]. When he received a notification through CM/ECF that I had filed objections after he had already dismissed the case, he wrote as follows in his Order of Dismissal:

It is hard to imagine a more frivolous, burdensome, prolix, senseless, and harassing filing than the one containing Plaintiff's objections. The objections themselves are spread over 2,610 pages, and the exhibits occupy an additional sixty pages. The bulk of the filing consists of an apparently random mixture of copies of cases and exhibits. It is impossible to follow or make sense of this heap, and any attempt to do so would require abandonment of all other cases . . . The objections to the recommendation are "redundant, immaterial, [and] impertinent," Fed. R. Civ. P. 12(f) and will be stricken.³

The purpose of a hyper-linked brief is to save court review time, by facilitating instant review of supporting authorities. *See, e.g.,* Whiteman, Appellate Court Briefs on the Web, 97 Law Libr. J. 467, 472 (2005) ("The inclusion of supplemental material in an electronic brief simplifies the process by which a judge must gather all the relevant information needed to decide a case"). However, when a particular brief is hyperlinked with references to the trial court records, case precedents, transcripts and law review articles (somewhat prolix, by their very nature), the file naturally swells to a considerable bulk, if only because the district court's ECF software has (or had, at that time) a flaw that prevents hidden attachments in Acrobat PDF files. If Judge Nottingham had actually looked at the file (as opposed to the document summary in the ECF software), he would have recognized it as a 68-page brief, not at all out of line, in light of the fact that the prosecution filed a 63-page brief on the single issue of excluding a defense expert in the Nacchio trial.

In hope that Judge Nottingham's refusal to review the brief was genuinely motivated by being overwhelmed by the technology, I submitted an alias brief in connection with a motion for reconsideration, stating as follows:

Because this Court, apparently, disapproves of the hyper-linking of cases and authorities that are authorized by this Court's Electronic Filing Guidelines and, which was undertaken solely for the convenience of the Court and the parties,

³ *Harrington v. Wilson*, Dkt. #80.

Plaintiff has recompiled his brief without any hyper-linking, whatever, and removed all exhibits, save one, including those relating to unpublished cases that were required by the local rule. The amended brief is attached hereto in incorporated herein by reference as, "Exhibit A."

This Motion for Reconsideration was denied without explanation, in a text-only minute order [Dkt. # 83]. Furthermore, in what appears to have been an exercise of a court's inherent power in the nature of sanctions (but, without applying an *Ehrenhaus* analysis, *cf.*, *In re Hopkins*, No. 98-1186 (10th Cir. Oct. 5, 1998)), Judge Nottingham added "with prejudice" *sua sponte* to this second dismissal for want of jurisdiction. *Id.* In essence, he refused to de novo review of *any* form of objections (as required pursuant to Rule 72(b)), and refused to follow well-settled law governing how cases are to be dismissed with or without prejudice. Then, upon dismissing the case for want of jurisdiction, he adjudged the lawsuit as "vexatious and frivolous" [Dkt. #114].

A review of Judge Nottingham's conduct in this and other *pro se* cases shows a marked pattern and practice of his arbitrarily and deliberately disregarding prevailing legal standards and thereby, causing expense and delay to litigants and to the courts. As a direct and proximate result of his misconduct, I was forced to pay a \$450 docket fee and the Tenth Circuit was required to process that appeal (*Harrington v. Wilson*, No. 06-1418 (10th Cir. Jul. 18, 2007)) and, ultimately, reverse his erroneous dismissal with prejudice. This investment in time and expense would not have been necessary, but for his arbitrary and intentional departure from prevailing law based on his willful indifference to applicable law.

In his now-infamous sermon delivered from the bench to former Qwest CEO Joseph Nacchio, Judge Nottingham eloquently explained the duty of a judge:

This republic is planted thick with laws, from coast to coast. Not every one of us agrees with every one of those laws. There are people who disagree strongly, who think they can disobey the law whenever it suits their purpose. There are people who disregard the laws.

* * *

The law in a republic such as this is in danger and cannot stand if a large portion or a significant portion of the citizens of that republic come to believe that it is not evenly enforced. That is what is meant by equal justice under

the law. It is not that you get the same sentence as everyone else, of course. It is that you are treated equally.

If it is perceived that there is one law for the rich and one law for everybody else, the law will ultimately fall into disrespect.

The oath of office further defines the scope of a Judge Nottingham's duty:

Each justice or judge of the United States shall take the following oath or affirmation before performing the duties of his office: "I, [name], do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will **faithfully and impartially discharge and perform all the duties incumbent upon me** as [office] under the Constitution and laws of the United States. So help me God."

28 U.S.C. § 453 [emphasis added].

While the Joe Nacchios of the world can count on receiving the District of Colorado's equivalent of chauffeured limousine service, Judge Nottingham has displayed profound antipathy to certain classes of cases, most notably involving pro se plaintiffs and/or employment discrimination cases. One of the respondent judge's own colleagues recently admitted:

The biggest problem with your case is that Judge Nottingham hates employment cases and there's nothing you can do about it. It's random. Now don't get me wrong, he's a fine judge, but he just hates employment cases. That's why he will try to find any way in the summary judgment briefs to say there's no material issues and grant summary judgment, and if he doesn't, he will make it tough at trial, and you won't win . . . I'm going to look you right in the eye and tell you that you're gonna lose.⁴ [quoting magistrate judge Kristen Mix] [emphasis added]

"A judge should be patient, dignified, respectful, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity." Code of Conduct for U.S. Judges, Canon 3.A(3). But whenever an employment discrimination case crosses his desk, Judge Nottingham is unable to restrain his contempt. Another very recent example is an order

⁴ Pl.'s Mot. For Recusal of Judge Nottingham Pursuant to 28 U.S.C. §144 and §455(a) and (b)(1) [Dkt. #59], *Phillips v. Pepsi Bottling Group*, No. 05-cv-01322-EWN-KLM (filed Nov. 1, 2007) at 2; http://knowyourcourts.com/Nottingham/2007-11-01_StephenPhillipsRecusalMotion.pdf.

filed July 9th 2007 in No. 06-cv-01006, where the respondent judge pasted a photograph of a pig wearing lipstick to suggest that counsel's argument was unavailing.⁵

As this applies to employment cases, this antipathy can be traced back to Judge Nottingham's earliest days on the bench: I recently spoke with attorney Joe Losavio, who attested that, on a Friday, April 26, 1991, the last day of a trial in *Settle v. Centel Electric*, a striking blonde entered the courtroom gallery. The respondent judge immediately took notice, stopped the proceedings, scribbled something on a Post-itTM note, handed the note to the bailiff with instructions to give it to Centel's attorney, Bill Mattoon. The note inquired as to the name of the blonde. When Mattoon informed him that it was Losavio's wife, the disappointed judge resumed the proceedings, Losavio said.

In that same case, Losavio recalled that Nottingham refused to cause the clerk record the jury's \$172,465 verdict, which should have been a purely ministerial act. Losavio repeatedly followed-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, Losavio recalls, he accosted Losavio for his persistence. I also spoke with Don Settle: Settle, who also witnessed the passing of the note, says that he lost approximately fifty-thousand dollars as a result of Nottingham's refusal to enter the jury's judgment. Settle says Nottingham 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.

This pattern of misconduct is equally pronounced in *pro se* cases, but as Senior Judge John Kane has admitted,⁶ this problem exists throughout the District. By way of example, in an attempt to dissuade parents' rights activist Suzanne Shell from her attempt to vindicate her rights in court, Magistrate Judge Michael J. Watanabe, allegedly told her that "pro se litigants NEVER win in this court."⁷ In that same case, Magistrate Watanabe reportedly disclosed that he had "personally trained" the defendant state court judge, who had committed the acts Shell complained of and yet, he was overseeing the case.⁸

⁵ A copy of the excerpted page 17 is attached hereto and marked as "**Exhibit A.**"

⁶ In Judge Kane's review of a draft of a law review article I was working on, *Disparate Treatment of Pro Se Civil Litigants in Federal Court: A Justification for Resort to Inappropriate Self-Help?*, (avail. at http://www.knowyourcourts.com/Archives/Pro_Se_Illusion/Pro_Se_Illusion.htm, he wrote: "I . . . would add only that all *pro se* cases, not just civil rights cases, are treated shabbily and superficially by our courts, both bench and bar."

⁷ Affidavit of Suzanne Shell, Jan. 12, 2007 at 5 (on file in Case No. 08-10-372-02).

⁸ *Id.*

In another referral from Judge Nottingham, Magistrate O. Edward Schlatter corroborates Shell's allegation: "Since I've been here, in 12 years nobody who does not have a lawyer has ever proceeded to a trial and won. And that's out of 600 cases filed per year."⁹ The recipient, Yale graduate, Elizabeth Steiner, M.D., sought his recusal. Schlatter continued:

She learned from me that I have been a magistrate judge for 12 years. I mentioned '600 cases per year,' so she concluded that I handled that number of cases -- each year, every year -- for a total number of 7,200 cases over the span of my career. She figures that if approximately 60 per cent of those cases are cases that were filed by pro se litigants, I have been responsible for 4,320 pro se cases. Plaintiff learned from my remarks that none of the pro se cases survived to a jury trial where the pro se litigant prevailed.¹⁰

Additionally, it is well-known by bench and bar that Judge Nottingham has been endowed with an injudicious temperament,¹¹ despite that "Arrogance and bullying by individual judges expose the judicial branch to the citizens' justifiable contempt. The judiciary can only gain from being able to limit the occasions for such contempt." *McBryde v. Committee to Review Circuit Council Conduct*, 264 F.3d 52, 55 (D.C. Cir. 2001). Instead, as this Council already knows, he has earned "notoriety by treating the lawyers before him with disdain and disrespect."¹² He is consistently abusive, though few attorneys are brave enough to complain publicly. "Several attorneys said they didn't want to jeopardize future pleadings in front of Nottingham by commenting. 'Everyone who goes before him is nervous,' one of those attorneys said. 'Those who aren't should be.'"¹³ In summation, he "runs his courtroom as only a man with a lifetime appointment can."¹⁴ Chief Judge Richard

⁹ Order Denying PI's Mot. To Recuse, *Steiner v. Concentra, Inc.*, No. 03-N-2293 (D.Colo. Aug. 6, 2004) at 3.

¹⁰ *Id.*

¹¹ *E.g.*, Arthur Hodges, Judgment Day, *Westword*, Jun. 8, 1994 ("Judge Edward Nottingham, known for his hot temper...").

¹² Andrew Cohen, "Naughty" Nottingham: When Judges Go Bad, *The Latest 'Word*, Mar. 14, 2008, http://blogs.westword.com/latestword/2008/03/naughty_nottingham_when_judges.php.

¹³ Sara Burnett, No-Nonsense Judge Expected to Keep Nacchio Trial On Track, *Rocky Mountain News*, Mar. 3, 2007.

¹⁴ Scott Yates, Early to Rise, *Westword*, Nov. 27, 1997.

Posner characterized “the delights of tormenting the lawyers that appear before them,” as one of several *improper motives* that result in legal error.¹⁵ Similarly, Chief Judge Alex Kozinski wrote that “Judicial action taken without any arguable legal basis . . . is far worse than simple error or abuse of discretion; it's an abuse of judicial power that is "prejudicial to the effective and expeditious administration of the business of the courts.”¹⁶ Colorado Senate Majority Leader John Andrews wrote, in his April 5th column, about a “God complex leading to personal recklessness such as Colorado has seen in the Nottingham case . . . has pushed citizens and political actors to the breaking point, with consequent willingness to treat the impeachment provisions of our federal and state constitutions as less of a dead letter.”

Doubtless, many other meritorious claims lie buried in the zealously-guarded tomb of the Circuit Executive’s confidential misconduct files. Taken together, they paint a picture of a man who says, “I’ll do what I want, regardless of what the law says, because I *am* the law.”

Chief Judge Henry’s Dismissal Constitutes Plain Error

While Article III judges are the only federal servants who enjoy a freehold in their offices, that freehold is expressly limited by "good behavior" tenure,¹⁷ a common-law concept well-known to the Framers. This phrase appears to have been purloined from the English common law, where it had an established meaning imported for purposes of our law.¹⁸ Lord Coke listed three grounds for forfeiture under this standard: abuse of office, nonuse of office, and refusal to exercise an office.¹⁹ Blackstone added:

the oppression and tyrannical partiality of judges, justices, and other magistrates, in the administration and under the colour of their office [could be prosecuted] either by impeachment in parliament, or by information in the court of king's bench.²⁰

¹⁵ R.A. Posner, *Judicial Behavior and Performance: An Economic Approach*, 32 Fla. St. U. L. Rev. 1259 (2005).

¹⁶ *In Re Complaint of Judicial Misconduct*, N^o 03-89037 (9th Cir., Sept. 29, 2005)

¹⁷ U.S. Const. art. III, § 1.

¹⁸ *See, United States v. Wilson*, 32 U.S. 150, 160 (1833) (scope of the pardon power is determined by reference to English law, as the concept was borrowed from England).

¹⁹ *Henry v. Barkley*, 79 Eng. Rep. 1223, 1224 (K.B. 1596).

²⁰ 4 Blackstone, Commentaries 140-41.

Moreover, former Chief Judge Tacha has already conceded, “a legal ruling done with improper motive can constitute misconduct.”²¹ Despite that fact, Chief Judge Henry raised the bar for proof of judicial misconduct -- *sua sponte* -- to dizzying heights:

Despite complainant’s argument that legal rulings done with improper motive can form the basis of a misconduct complaint, these claims are dismissed. Complainant has offered no factual allegations or evidentiary support for the alleged improper motive other than the judge’s rulings themselves. Therefore, these claims are not cognizable as misconduct because they are “directly related to the merits of a decision or procedural ruling.” Misconduct Rule 4(c)(2). The policy behind this rule is that “the complaint procedure cannot be a means for collateral attack on the substance of a judge’s rulings.” Breyer Report, App. E., ¶ 2. Further, citation to a single separate decision by the respondent judge does not demonstrate a pattern or practice. Lacking any other basis, the claim of improper motive is dismissed because it is “wholly unsupported.” Misconduct Rule 4(c)(3).²²

Judge Henry erroneously conflated the concept of “collateral attack” with judicial misconduct. “Intentionally refusing to follow the law constitutes a legal error made in bad faith and may also be grounds for a finding of judicial misconduct.” *In re Quirk*, 705 So. 2d 172, 1997.LA.5030 (La. 1997). Moreover, as Nottingham’s intentional refusal to apply non-discretionary law must inevitably result in the violation of someone’s constitutional rights, to declare that his actions are unassailable is to declare that our judges have no obligation whatsoever to follow the law and that the “King Can Do No Wrong.”

As I previously pointed out to Chief Judge Henry, **the injury here is not so much substantive as it is procedural**. As a direct and proximate result of Judge Nottingham’s willful refusal to follow the Federal Rules of Civil Procedure, I forfeited a \$450 docket fee and Tenth Circuit staff expended resources to process that case (06-1418) and ultimately, reverse his erroneous dismissal with prejudice. This investment in time and expense would not have been necessary, but for Judge Nottingham’s arbitrary and intentional departure from prevailing law based on his open and willful indifference to the applicable law.

²¹ *In re Charge of Judicial Misconduct* No. 2006-10-372-40 (10th Cir. Jud. Council 2007) at 2.

²² *In re Charge of Judicial Misconduct* No. 2008-10-372-06 (10th Cir. Jud. Council 2007) at 2.


While one might be tempted to conclude that I received some relief because a Tenth Circuit panel reversed that part of his ruling upon my Petition for Rehearing, the remand (which, incidentally, was not captioned as a “reversal” or “vacatur”) did nothing to defray the needless expense on the part of either the parties or the court, nor will it deter Judge Nottingham’s future conduct from similarly prejudicing other litigants. Without administrative discipline from this Council, Judge Nottingham will continue to demean litigants and attorneys from the bench, as he has been reputed to have done since the 1990’s. His course of conduct has tarnished the image of the judiciary, and appropriate discipline is warranted.

PRAYER FOR RELIEF

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, each of these complaints was sufficient to establish a pattern or practice, whereas construed together, they may well have established the pattern or practice.

The Rules prescribe that it is the chief judge’s duty to investigate claims of this nature. The new rules, effective 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. Therefore, I respectfully implore 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 the Chief Judge or a special committee appointed by the Chief Judge undertake an investigation as to the dismissed claims.

Respectfully submitted this 11th day of April, 2008



Sean L. Harrington

by former supervisors constituted actionable retaliation); *White*, 126 S. Ct. at 2415. Moreover, none of the unexplained string of citations that Defendant offers in apparent support of the asserted proposition actually supports it. First, Defendant cites to *Robinson*, 519 U.S. at 346, where the Court stated its holding that former employees are protected by Title VII’s anti-retaliation provisions. This gets Defendant nowhere. Next, Defendant cites to the first page of *Selenke v. Medical Imaging of Colorado*, 248 F.3d 1249 (10th Cir. 2001). However, in the portion of *Selenke* that actually addresses retaliation, *id.* at 1264–66, there is no discussion of anything even marginally related to the proposition Defendant attributes to the case.⁶ I would suggest that defense counsel reconsider the efficacy of unadorned string citations to inapposite cases. If counsel cannot *explain* how a string of cases bolsters Defendant’s position, then such citations are no more availing than:



(Figure 1.1: Pig Wearing Lipstick)

⁶Defendant also cites two First Amendment cases rendered irrelevant by the parties’ stipulated dismissal of Plaintiff’s First Amendment claim. (*See* Def.’s Br. at 14–15.)