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Office of the Circuit Executive
Byron White United States Courthouse
1823 Stout Street
Denver, Colorado 80257

RE: N^o 08-10-372-__ / Edward W. Nottingham, Judge

Dear Chief Judge Henry:

The purpose of this memorandum is to supplement the Complaint Form.

The gravamen of this grievance is two-fold:

- (1) To ask this Council to breathe meaning into the plain language of the Good Behavior provision of Article III; ¹ and
- (2) To ask this Council to apply former Chief Judge Tacha's statement that, "a legal ruling done with improper motive can constitute misconduct." ²

¹ U.S. CONST. art. III, § 1, cl. 2 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office").

² Jan. 4, 2007 Order in *In Re Charge of Judicial Misconduct*, 10th Cir. No. 2006-10-372-40 ("I agree with complainant's supposition that a legal ruling done with improper motive can constitute misconduct"); *see also In Re Complaint of Judicial Misconduct*, N^o 03-89037 (9th Cir., Sept. 29, 2005) ("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") (citing 28 U.S.C. § 351(a); Jeffrey M. Shaman, Steven Lubet & James J. Alfini, *Judicial Conduct and Ethics*, § 2.07, p. 50 (3d ed. 2000) ("Judges abuse the power of the judicial office when they abbreviate or change critical aspects of the adversary process in ways that run counter to the scheme established by relevant constitutional and statutory law"); *In re Quirk*, 705 So. 2d 172, 178 (La. 1997) ("A single instance of serious, egregious legal error, particularly one involving the denial to individuals of their basic or fundamental rights, may amount to judicial misconduct"); Jeffrey M. Shaman, *Judicial Ethics*, 2 GEO. J. LEGAL ETHICS 1, 9 (1988)).

Introduction

In drafting this grievance, I am guided by Judge Tacha's statement from her [order](#) in *Charge of Judicial Misconduct*, No. 2006-10-372-40 that:

This circuit 's rules . . . state . . . only that the misconduct procedures may not be used to have a judge disqualified from a specific case . . . The rules do preclude the use of a legal decision - erroneous or otherwise - as grounds for misconduct.

On the other hand, the same order explains that an argument cannot be "both 'directly related to the merits of a procedural ruling or decision' and frivolous, as that term is defined in our rules." (citing Misconduct Rule 4(c)(3) ("a term that includes making charges that are wholly unsupported or lacking sufficient evidentiary support to raise an inference that some kind of cognizable misconduct has occurred")). Further, a complaint alleging only conduct "directly related to the merits of a decision or procedural ruling" does not allege misconduct within the meaning of 28 U.S.C. § 352(b)(1)(A)(ii), because the misconduct procedure is not designed as a substitute for, or supplement to, appeals or motions for reconsideration.

I am also guided by the most recent Committee on Conduct and Disability [January 14, 2008 memorandum decision](#). Among other things, the Committee concluded 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.

. . .

[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.

As you may be aware, legislation was proposed to increase salaries for the federal judiciary. Senator Patrick Leahy, who has led this effort, explained:

Our democracy and the rights we enjoy depend on a strong and independent Judiciary . . . During the last few years it has been the courts that have acted to protect our liberties and our Constitution. . . . The quality of the Judiciary is threatened if judges' salaries are inadequate to attract and retain our best legal minds. Given the essential role that the Judiciary plays in our system of government, we should pass this raise to judicial salaries.³

Although, I am sympathetic that the federal judiciary's salary has not been commensurate with the private sector, it does seem reasonable —given Senator Leahy's particular reasoning— that Americans may feel betrayed when certain federal judges have, not only failed to protect individual liberties and our Constitution but [rather], have been instrumental in violating those liberties and our Constitution, hence the instant grievance.

Allegations

In my district court proceeding (N^o 05-cv-01858), I had until midnight of September 26th 2006 to submit objections to a magistrate's recommendations under Rule 72(b). [Docket 77](#). I prepared a fully-hyperlinked "digital brief," which was based on my consultation with Chris Vagner, the district's ECF project manager, who had explained that hyperlinked e-briefs were accepted and encouraged.⁴ [Docket 102](#). Five days before this deadline, the trial judge (Nottingham), dismissed my suit, erroneously concluding that no timely objection was filed. [Docket 74](#). I moved for reconsideration ([docket 77](#)) and timely submitted my brief. [Docket 76](#). When he received a notification through CM/ECF that I had filed objections *after* he had already dismissed the case,

³ [February 14, 2007 address](#).

⁴ 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.

he took note of the number of pages on the document history display and became very cross.⁵ In his renewed Order of dismissal, he wrote:

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.⁶

From this unprovoked assailment, it is clear that Judge Nottingham had not even looked at the objections, which amounted to nothing more than a sixty-eight page 1.5-line spaced brief.⁷ A refusal to consider objections filed to a magistrate's recommendations, in my opinion, constitutes serious legal error.

"Serious legal error is more likely to amount to misconduct than a minor mistake"⁸ and litigants generally have a reasonable expectation that a judge will perform those duties imposed on him or her by law (including, for example, Rule 72(b)).⁹ What occurred next, however, is what transmogrified what might have been construed as an honest error (followed by an angry unwarranted, albeit discretionary, rebuke) into a legal ruling done with an improper motive:

⁵ For purely technical reasons related to limitations within the district court's ECF software (more fully set forth in my [Opening Brief](#) in [N^o 06-1418](#) at pp. 5 – 6), and which were beyond my control, Nottingham mistook my brief as a 2,610 page brief, rather than a 68-page brief.

⁶ [Docket 80 at 2](#).

⁷ Here, I define "Looked" simply as opening up the PDF document on his computer and glancing at the first or second page. Had he done so, Judge Nottingham would have seen a plain explanatory notice on the first page and would have learned that all, save one exhibit, were unpublished opinions (required by D.C.Colo.LCivR. 7.1(D) to be attached as a formality and not requiring his attention) and he would not have mistaken the document as anything other than a 68-page brief).

⁸ Shaman, Lubet & Alfini, *Judicial Conduct and Ethics*, § 2.02, p. 37 (3d ed. 2000)

⁹ I have a reasonable expectation that the judge will actually look at the document[s] I have filed in good faith (just as I am assuming that you are now reading this complaint and, perhaps, even this footnote). As a litigant, who paid a docket fee and, who pays taxes into the system that makes our court system possible, I maintain this expectation especially when the judge's wife has testified in court (later reported by the newspapers) that the same judge has sufficient time to browse pornography [a] Web site[s] from the computer in chambers.

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), Judge Nottingham *sua sponte* added "with prejudice" to this second dismissal for want of jurisdiction. *Id.* I moved for reconsideration (docket #'s [81](#) & [82](#)) and submitted an amended, non-hyperlinked version of the brief. *Id.* He denied that Motion without comment. In essence, he refused to de novo review *any* form of objections, required of him by Rule 72(b) and he refused to follow well-settled law governing how cases are to be dismissed with or without prejudice). [Docket 83](#). Then, after he had dismissed the case for want of jurisdiction (thereby depriving the court from ruling on the merits), Judge Nottingham adjudged the case as, "vexatious and frivolous." [Docket 114](#).

For the reasons cited hereinabove, I will not argue why and how my case was not frivolous or even that the trial judge lacked authority to [mis]characterize the case, once he dismissed the case for lack of jurisdiction and denied me the opportunity to prove my claims. I appealed and prevailed on that issue. However, the fact that he did not follow the law in doing so and the fact that he refused to remedy this plain error (even when respectfully pointed out) was probative of his spiteful motive. It was a way of saying, "I'll do what I want, regardless of what the law says, because *I* am the law. If you don't like it, appeal it and see you back here in a year or two."

Because his actions were intended to throw me out of court, they implicated the fundamental First Amendment right of access to the courts. "The sort of evaluation that measures the seriousness of legal error is admittedly somewhat subjective, but the courts seem to agree that legal error is egregious when judges deny individuals their basic or fundamental procedural rights." Shaman, Lubet & Alfini, *supra* at note 2.

Judge Nottingham's attitude of indifference is especially disquieting, given what he recently pontificated to defendant Joe Nacchio:

[T]he Court is a public institution in this Republic, and it has a duty to promote respect for the law . . . I believe this Court is in a position to articulate what is meant by respect for the law, so . . . I will address your fellow citizens about what is meant by respect for the law.

. . .

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.¹⁰

¹⁰ *U.S. v. Nacchio*, [July 27, 2007 transcript at 82](#).

Indeed, Judge Nottingham found these words apropos when the media was present taking notes, yet they have no application in some obscure *pro se* civil case, such as mine.

This attitude of indifference, characterized by Judge Nottingham's conduct in this and other *pro se* cases, shows a marked pattern and practice of 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, I was forced to pay a \$450 docket fee and the staff of your court was required to process that case (06-1418) and, ultimately, reverse Judge Nottingham's 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 willful indifference to the applicable law.

While one might be tempted to conclude that I received some "justice" because a Tenth Circuit panel in N^o 06-1418 reversed that part of his ruling on my Petition for Rehearing, the panel's 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 or to deter Nottingham's future conduct from similarly prejudicing other litigants.¹¹ 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 conduct has tarnished the image of the judiciary, which brings me to my final point, a discussion of extrajudicial conduct.

“

A federal judge can be lazy, lack judicial temperament, mistreat his staff, berate without reason the lawyers and litigants who appear before him, be reprimanded for ethical lapses, verge on or even slide into senility, be continually reversed for elementary legal mistakes, hold under advisement for years cases that could be decided perfectly well in days or weeks, leak confidential information to the press, pursue a nakedly political agenda, and misbehave in other ways that might get even a tenured civil servant or university professor fired; he will retain his office.

Richard A. Posner,
Overcoming Law,
Harvard Univ. Press, 1996,
p.111

¹¹ The Tenth Circuit panel did not review either my [Opening Brief](#), the defendants' [Answer Brief](#) or my [Reply Brief](#) and, instead, limited their consideration to the [Magistrate's recommendations](#) and their law clerk's memorandum/summary. For example, although the appeal concerned the dismissal of a Complaint for want of jurisdiction, the order in 06-1418 did not include the word "Complaint." The Tenth Circuit panel did not address my specific assignments of error concerning Judge Nottingham's actions as discussed herein.

Applicability of the Good Behavior Provision

Of all government officials, judges, in particular, are well-respected and largely viewed as models of fidelity and integrity. They often seem like the last bulwark standing athwart the hordes of unprincipled pols, who would betray the Constitution at the first sign of a campaign contribution.¹²

If one accepts this as true, one has a reasonable expectation that judges have a unique responsibility to respect the law and to protect the rights of the individual. One also has a concomitant expectation that judges are the least likely among our civil servants to violate those rights. When a judge does intentionally violate rights, the Judicial Council has a duty to discipline that judge, not only to deter future violations of individual rights but, also to help maintain respect for the judiciary.

Because sustainable respect for the judiciary is essential to ensuring independence of the judiciary,¹³ a belief that a textual interpretation of the Good Behaviour provision is nothing more than a cross-reference to the seldom-invoked impeachment power recognized in Article II [Section 4]¹⁴ is misplaced. In fact, one purpose of the Article III's good-behaviour provision was to promote a degree of judicial independence.¹⁵ If judicial independence had been an unqualified value or purpose of Article III, the Constitution could simply have given judges absolute life tenure (unconstrained by any good-behaviour provision—or even, for that matter, the possibility of impeachment). The Framers did not do that, obviously, because the value of judicial independence was qualified by the need to ensure that judges behaved responsibly and to hold accountable judges who fell short of that requirement.¹⁶ Indeed, maintaining respect for the judiciary requires that the Good Behaviour provision be given meaning and effect.

¹² Saikrishna B. Prakash, *America's Aristocracy*, 109 YALE L.J. 3 (1999), pp. 541-585

¹³ For example, U.S. District Judge John E. Jones III acknowledged this as, "the creeping disrespect for the judiciary that exists today," in his [February 10, 2006 address to the Anti-Defamation League](#). Likewise, former Justice Day-O'Connor has traveled the country, including Denver, to address what she perceives as a lack of public civics awareness and resulting disrespect for the independence of the judiciary.

¹⁴ Martin H. Redish, *Response: Good Behaviour, Judicial Independence, and the Foundations of American Constitutionalism*, [116 YALE L.J. 139](#), 141 (2006) (commenting that a construction of the Good Behaviour Clause to create a lower standard for removing misbehaving judges than the Impeachment Clause, seriously endangers the ability of the independent federal courts to police the constitutional excesses of the political branches and to protect individual rights from majoritarian incursion”).

¹⁵ Saikrishna Prakash and Steven Smith, *How to Remove a Federal Judge*, [116 YALE L.J. 72](#), 87 (2006)

¹⁶ *Id.*

As you already know, Judge Nottingham reportedly viewed pornographic Web sites (<http://adultFriendFinder.com>) from chambers, whilst refusing to review litigants' briefs; spent three thousand dollars in a single night at a topless bar but, then testified before a tribunal that he couldn't recall how such money was spent; and parked in a van-accessible disabled parking space and reportedly identified himself as a federal judge and reportedly threatened to have the U.S. Marshalls Service remove a disabled person, who confronted him and blocked his exit. This conduct, whether alleged or admitted, has brought disrepute to the judiciary. To contend otherwise is to declare that, "[The King Can Do No Wrong.](#)"

It is appropriate to call to your attention these additional facts and reports is because:

[M]isconduct proceedings under the Judicial Conduct and Disability Act are adversarial only to the extent that they may be initiated by complaint and usually allow interested parties some opportunity to present their respective view of the events in question. Fundamentally, however, misconduct proceedings are inquisitorial and administrative. Chief circuit judges need not passively await the filing of complaints and then referee a contest between a complainant and a judge, bounded by the four corners of the complaint.

. . .

Furthermore, Illustrative Rule 10(a) allows special committees, on which chief judges sit *ex officio*, the right to "expand the scope of the investigation to encompass" misconduct that is "beyond the scope of the complaint."¹⁷

Also, because I am a member of the legal community in Colorado, I am already aware that the Tenth Circuit judges are familiar with Judge Nottingham's reputation (both positive and negative). As to the latter, he is widely known as impatient, intemperate, irascible, caustic, abrasive and demeaning. Though some journalists and, perhaps, some minority of the public may find these eccentricities entertaining (or more desirable than Judge Lance Ito's media persona), they undermine the dignity of the court and unfairly caricaturize the judiciary.

For the foregoing reasons and based on the foregoing authorities, I respectfully request that the within complaint be docketed for consideration by the Council.

Sean L. Harrington

¹⁷ Committee on Judicial Conduct and Disability January 14, 2008 Memorandum of Decision