JUDICIAL COUNCIL OF THE THIRD CIRCUIT

J.C. No. 03-11-90141

IN RE: COMPLAINT OF JUDICIAL MISCONDUCT
OR DISABILITY

ORIGINAL PROCEEDINGS UNDER 28 U.S.C. § 351

MEMORANDUM OPINION

(Filed: March 19, 2013)

PRESENT: SLOVITER, RENDELL, AMBRO, FUENTES, KANE, SLEET, LANCASTER, JOYNER, SIMANDLE, Members of the Judicial Council

SLOVITER, Circuit Judge.[1]

This is a complaint filed by an attorney under the Judicial Conduct and Disability Act, 28 U.S.C. §§ 351-64, against a United States District Judge (the "Subject Judge").[2]

[1] Judge Sloviter, the most-senior active circuit judge not disqualified, presided over this matter pursuant to Rule 25(f) of the Rules for Judicial-Conduct and Judicial-Disability Proceedings. Pursuant to Rule 25(a), Chief Judge McKee and Judge Scirica did not participate in consideration of this matter. The Rules for Judicial-Conduct and Judicial-Disability Proceedings govern judicial misconduct proceedings under the Act, and therefore apply to this proceeding. See Rule 1. Unless otherwise specified, all Rules cited in this Report are the Rules for Judicial-Conduct and Judicial-Disability Proceedings.

[2] All papers and documents related to investigations conducted under 28 U.S.C. § 353(c) are confidential and shall not be disclosed except in accordance with 28 U.S.C. § 360 and Rules 23 and 24. In view of the disposition of the complaint, the Judicial Council has determined that the name of the Subject Judge should not be disclosed. Rule 24(a)(2).

For the reasons discussed below, the Judicial Council adopts the factual findings and recommendations for action in the Special Committee's Report and dismisses the complaint.

I. BACKGROUND

Complainant, a licensed attorney, primarily represents plaintiffs in personal injury lawsuits. Complainant filed a series of substantially identical motions seeking the Subject Judge's recusal from eight otherwise-unrelated cases over which he presided. The cases were consolidated for purposes of resolving the recusal motions. In essence, the recusal motions alleged that the Subject Judge harbored such animus against Complainant personally that he could no longer impartially preside over any case in which she participated as counsel.

While the recusal motions were pending, Complainant filed the first of multiple petitions for a writ of mandamus on behalf of the plaintiffs in the cases in which she had filed recusal motions. This petition sought relief from discovery orders that the Subject Judge had issued in connection with the recusal motions. The Court of Appeals denied the petition without prejudice in all aspects "except that [the Subject Judge] is hereby directed to refer all discovery matters relating to the issue of disqualification to a U.S. Magistrate Judge." All discovery matters relating to the recusal motions were thereafter referred to a Magistrate Judge.

Accordingly, for purposes of preserving confidentiality, certain names, dates, and other identifying information such as case names have not been included.

After recusal-related discovery had concluded, the Subject Judge held a three-day hearing on the consolidated recusal motions. Complainant presented fourteen witnesses in support of recusal and testified herself. She presented multiple witnesses who testified about the Subject Judge's allegedly hostile treatment of Complainant, particularly during a specific trial (hereinafter "Case II"). Of significance to these proceedings and as will be discussed in detail below, Complainant and her associate (who will be referred to as "Witness I") testified to having *ex parte* conversations with the Subject Judge about a pending appeal (hereinafter "Case I"), which allegedly took place at a Judicial Conference. In addition, Witness I gave emotional testimony about an additional *ex parte* telephone conversation in which the Subject Judge allegedly stated that the recusal motions would be denied, that Complainant would not be practicing law much longer, and that he could assist Witness I in finding a new job.

The Subject Judge issued a Memorandum Opinion and Order denying the recusal motions. He held that there "is no objective evidence of settled animosity or bias against [Complainant] or her clients." Thereafter, Complainant began filing petitions for a writ of mandamus – six in total – seeking review of the Subject Judge's recusal decision and the Judge's disqualification from the cases in which the recusal motions were filed. A panel of the Court of Appeals denied the petitions.

On December 27, 2011, before the mandamus petitions were ruled on, Complainant filed a complaint of judicial misconduct naming the Subject Judge, as well another United States District Judge and a United States Magistrate Judge. J.C. Nos. 03-

11-90139, 03-11-90140, 03-11-90141. In a Memorandum Opinion and Order dated April 26, 2012, Judge Sloviter, acting under Rule 25(f), dismissed the complaints against the District Judge and the Magistrate Judge. See J.C. Nos. 03-11-90139, 03-11-90140.

Complainant's remaining complaint against the Subject Judge, J.C. No. 03-11-90141, is addressed in this Memorandum Opinion. The complaint sets forth the following broad allegations of judicial misconduct:

(1) the Subject Judge made *ex parte* "not-so-veiled threats" or "alternative offers of assistance" to Witness I prior to his testifying at the recusal hearing, see Compl., Section III(D);

(2) the Subject Judge engaged in *ex parte* "threats" intended to coerce Complainant to withdraw appellate grounds from a pending appeal, see Compl., Section III(B);

(3) the Subject Judge treated Complainant in an abusive and hostile manner, see Compl., Section III(C);

(4) the Subject Judge engaged in inappropriate efforts to coerce settlements, see Compl., Section III(A);

(5) the Subject Judge inappropriately influenced a Magistrate Judge, see Compl., Section III(E);

(6) the Subject Judge received "derogatory" information about Complainant and failed to disclose receipt of that information to Complainant, see Compl., Sections III(F) & (G); and

(7) the Subject Judge "disclaimed" that the ABA Model Code of Judicial Conduct applies to him, see Compl., Section III(H).

After an in-depth analysis of the complaint and accompanying materials, including the recusal hearing transcripts, Judge Sloviter determined that the allegations warranted a limited inquiry under 28 U.S.C. § 352(a). See also Rule 11(b). As part of the limited

inquiry, Judge Sloviter requested that the Subject Judge file a written response to the complaint. Although the Subject Judge was invited to comment on the entire complaint, the limited inquiry specifically requested a response to allegations (1) through (4).

The Subject Judge filed a response on April 18, 2012.[3] The Subject Judge denied that he had treated Complainant in an abusive or hostile manner, that he had threatened Witness I in an *ex parte* telephone conversation, that he had engaged in improper *ex parte* conversations at the Judicial Conference, or that he had employed any improper tactics or techniques during the conduct of settlement conferences. The substance of the response will be discussed in more detail where relevant below.

After considering the Subject Judge's response and the record as a whole, Judge Sloviter determined that disputed issues of material fact remained, particularly with regard to the conflicting accounts of the alleged telephone conversation with Witness I and the encounters at the Judicial Conference. The Act and the applicable rules prohibit making findings of fact "about any matter that is reasonably in dispute." 28 U.S.C. § 352(a); see also Rule 11(b); Commentary on Rule 11 ("An allegation of fact is ordinarily not 'refuted' simply because the subject judge denies it . . . . If it is the complainant's word against the subject judge's – in other words, there is simply no other significant evidence of what happened or of the complainant's unreliability – then there must be a special-committee investigation."). Accordingly, Judge Sloviter determined

[3] As is his right under 28 U.S.C. § 352(a), the Subject Judge did not authorize release of his response to Complainant.

that the Act and the applicable rules required referral of the complaint to a Special Committee. See 28 U.S.C. § 353(a); Rule 11(f).

On May 2, 2012, Judge Sloviter appointed a Special Committee. The five Committee members were Judge Sloviter as the presiding judge, Circuit Judges Kent A. Jordan and Thomas I. Vanaskie of the United States Court of Appeals for the Third Circuit, and Senior District Judges Anne E. Thompson of the United States District Court for the District of New Jersey and Donetta W. Ambrose of the United States District Court for the Western District of Pennsylvania. The same day, Judge Sloviter certified the record in J.C. No. 03-11-90141 to the members of the Special Committee. See 28 U.S.C. § 353(a)(2); Rule 12(d). The Special Committee thereafter voted to appoint the Honorable Jane R. Roth, Senior Circuit Judge of the United States Court of Appeals for the Third Circuit, as the Committee's Investigator in accordance with Rule 13.

After appointment of the Special Committee, a panel of the Court of Appeals issued an order that affirmed "in all respects" the Subject Judge's orders in Case II and rejected Complainant's claims of hostile treatment by the Subject Judge. That panel determined that, "there are no instances in which the District Judge acted improperly or in which his actions could be inferred to be improper. There is no error here." The same panel reversed, on procedural grounds only, a contempt holding against Complainant in another case.[4]

[4] The relevance of these two rulings will be discussed in more detail in Section III(C).

II. THE SPECIAL COMMITTEE'S INVESTIGATION

Although the entire complaint was referred to the Special Committee, the Special Committee determined that its investigation would focus on the allegations raising disputed issues of material fact: (1) the *ex parte* telephone conversation with Witness I; and (2) the *ex parte* discussion or discussions at the Judicial Conference. In the course of investigating the complaint, the Special Committee's Investigator conducted confidential interviews with fourteen individuals with potentially relevant information about these allegations.

Judge Roth conducted eight interviews via Skype video conference. These included: Complainant's former co-counsel in a case; a lawyer formerly in Complainant's firm ("Attorney A"); a lawyer currently in Complainant's firm; opposing counsel in Case II; a friend of Witness I's ("Attorney B"); Complainant's former co-counsel in a case; Witness I; and one of Complainant's clients in Case I. Judge Roth conducted four interviews by telephone: opposing counsel in one of Complainant's cases; a judge for whom one of Complainant's former colleagues had clerked (and who had attended the Judicial Conference); Witness I's mother; and Witness I's father. Finally, Judge Roth met in person with an attorney who worked with Complainant on a case and an individual who testified at the recusal hearing.

Upon completion of her investigation, Judge Roth prepared and submitted a Report to the Special Committee. The most salient aspects of the Report are briefly summarized below.

According to the Investigator's Report, Attorney A, who had worked with Complainant, confirmed that she had a conversation with the Subject Judge while Witness I was also present at the Judicial Conference. Report at 3. Judge Roth's subsequent interview with Witness I revealed that he also recalled a conversation with the Subject Judge at the Judicial Conference. Id. at 6.

Judge Roth also asked Witness I about the alleged *ex parte* telephone conversation with the Subject Judge. Witness I recalled that the telephone conversation occurred after the recusal motions were filed. Id. at 11. Witness I stated that the Subject Judge called him to respond to Witness I's invitation to participate in a Continuing Legal Education ("CLE") event. Id. at 11-12. According to Witness I, though, the conversation moved on to a discussion in which the Subject Judge acknowledged that Witness I was "in a difficult spot" and offered to help Witness I look for job opportunities. Id. at 12.

Judge Roth also interviewed other individuals identified as having knowledge about the incidents in question, which yielded varying accounts. Upon review of Judge Roth's Report, the Special Committee determined that there was "sufficient evidence to warrant a formal fact-finding proceeding." Commentary on Rule 14. The Special Committee believed that a formal hearing would assist the Committee in assessing the credibility of the witnesses and in resolving the remaining disputed issues of material fact. The Special Committee determined, however, that the hearing would be limited in scope to two allegations of the complaint: (1) the allegation that the Subject Judge made "*ex parte* threats to [Witness I]" (see Compl., Section III(D)); and (2) the allegation that

the Subject Judge "made *ex parte* threats to [Complainant] and [Witness I] designed to coerce [Complainant] to withdraw [the appeal filed regarding Case I]" (hereinafter "the Appeal") (see Compl., Section III(B)).

The Special Committee ordered Complainant and Witness I to appear at a hearing. The Special Committee also requested that the Subject Judge appear as a witness at the hearing. See Commentary on Rule 14 ("With respect to testimonial evidence, the subject judge should normally be called as a committee witness.").

On September 20, 2012, shortly after providing the Subject Judge with notice of the hearing, two attorneys entered an appearance on the Subject Judge's behalf ("Counsel"). On November 7, 2012, the Special Committee hearing proceeded. As permitted under Rule 15(e), the Subject Judge and Counsel were present for the entire proceeding. Counsel began the hearing by presenting an opening statement.

Complainant, who was not represented by counsel, was called by the Special Committee as the first witness. Complainant gave an opening statement and was then questioned under oath by Judge Roth and the Special Committee. Counsel conducted cross-examination. Questioning was limited to issues related to the two allegations being considered at the hearing.

After Complainant's testimony was concluded and she left the hearing, Witness I appeared as the next witness. Witness I also was questioned under oath by Judge Roth and the Special Committee. Counsel again had the opportunity to conduct extensive cross-examination. Because the proceedings extended late into the day, the hearing was

adjourned at the conclusion of Witness I's testimony. On November 16, 2012, the hearing resumed and the Subject Judge testified under oath. He responded to questions by Judge Roth and the Special Committee and, through counsel, provided a brief concluding statement.

Upon conclusion of the hearing and after full consideration of the record, on January 16, 2013, the Special Committee filed its Report with the Judicial Council pursuant to 28 U.S.C. § 353(c) and Rule 17. A copy of the Report was sent to the Subject Judge in accordance with Rule 15. Complainant was provided with notice of the filing of the Report pursuant to Rule 16(a).[5] Although the Subject Judge was offered an opportunity to file a response to the Report and to present argument through counsel pursuant to Rule 20(a), he advised the Judicial Council that he did not wish to file a response or to present argument.

The Judicial Council voted unanimously to adopt the factual findings and recommendations for action in the Special Committee's thorough and well-reasoned Report. In accordance with Rule 20(f), this memorandum opinion sets forth the Judicial Council's factual determinations and explains the reasons for the Judicial Council's dismissal of the complaint. Rule 20(f).

[5] Complainant is not entitled to a copy of the Special Committee's Report, and we decline to exercise our discretion to release a copy of the Report to Complainant. Rule 16(a).

III. JUDICIAL COUNCIL'S FACTUAL DETERMINATIONS AND DISPOSITION OF CLAIMS

A. Section III(D): "[The Subject Judge] has made *ex parte* threats to [Witness I]."

Complainant alleges that the Subject Judge made *ex parte* threats or "alternative offers of assistance" to Witness I conditioned on the content of Witness I's testimony at the recusal hearing.

1. Complainant's Allegations

Complainant alleges that "[s]hortly after" the motions to recuse the Subject Judge were filed, the Subject Judge called Witness I on the telephone. Compl. at 5. Complainant further states that Witness I "gave sworn testimony at the recusal hearing that, the [Subject Judge] made not-so-veiled threats – or alternative offers of assistance – conditioned on the content of [Witness I's] testimony at the upcoming recusal hearing." Id. at 5-6. Complainant then quotes from Witness I's testimony at the recusal hearing about receiving a call from the Subject Judge where the Judge allegedly stated that he knew Witness I was in a "tough spot", offered to help him look at a jobs, and indicated that the recusal motions would be denied. Id. Complainant further states, "[Witness I] was so upset about the call and his fear about what the Subject Judge would do to him that he broke down and cried on the stand during the recusal hearing. Id. Complainant emphasizes that "[the Subject Judge] has never…disputed on the record that his telephone call with [Witness I] occurred." Id. She then requests an "investigation" into whether the Subject Judge's *ex parte* "threats" constitute misconduct and whether his

intent was to "offer a reward for [Witness I's] silence or a punishment if he testified truthfully." Id.[6]

2. Witness I's Testimony at Recusal Hearing

A review of the transcript of Witness I's testimony at the recusal hearing reflects that Witness I did testify that the Subject Judge called him after the recusal motions were filed. Recusal Hrg. Tr., Vol. III, at 223. Witness I stated, "I'm under oath. I don't want to talk about a number of these things, but I'm sworn to tell the truth." Id. at 223. Witness I went on to summarize the call as follows:

> The substance of his [the Subject Judge's] call was to check in on me, and that he knew I was in a tough spot, and that the fact that the recusal motions had been filed, and that the affidavits were suborned and perjured and would be investigated. And you know, frankly, that if I needed help, [the] judge could help me looking at jobs … or anything like that if I needed to get out of there.

Id. at 223-224.

Immediately after stating "I needed to get out of there," Witness I indicated that the Subject Judge was "looking" at him during the testimony. Id. at 224. ("And I'm just putting on the record, Your Honor is looking at me, I feel like you're –"). The Subject Judge interrupted this statement and stated, "I am looking at you, [Witness I], because this is outrageous." Id. Witness I then testified:

[6] Complainant cites to the American Bar Association's Model Code of Judicial Conduct (the "ABA Model Code"). The ABA Model Code, however, is not binding in these proceedings. Moreover, the ABA Model Code is not the code relied on and referenced in the Rules. Rather, the Rules cite to the Code of Conduct for United States Judges issued by the Judicial Conference.

> And that if, because you [Complainant] may not be around practicing law much longer in this jurisdiction, and that the Judge wasn't going to go into the conversations that he and I had had in chambers, and that he wasn't going to recuse.

Id. Witness I further testified:

> I felt that I was in a difficult spot with the practice of law. And specifically with the situation that I'm referring to in this testimony, because you know, I felt like I was damned if I did, I was damned if I didn't. If I told the truth on one hand, it's going to be, it could be detrimental to me. It's very difficult for a twelve-year lawyer to say things that, indeed, happened that I'm testifying about with a Federal District Court Judge, particularly when I've had a relationship with the Judge, and have considered that to be a very cordial relationship. And that now these motions have been filed, and the Judge is checking in on me, and I don't want to run afoul of him, but yet, I don't want to not take care of the clients, or breach a duty to the clients. So, I know I'm emotional about it, because it's a tough situation. But I've decided to, after getting advice, just to follow my heart and let it fall where it may, whatever happens.

Id. at 230-231. During his testimony, Witness I broke down in tears. Id. at 265.

3. Special Committee Hearing Testimony

During the Special Committee hearing, the Committee heard sworn testimony about this alleged conversation from Witness I, Complainant, and the Subject Judge.

(a) Complainant's Testimony

In the initial portion of Complainant's testimony, she reiterated her allegations that Witness I had a conversation with the Subject Judge where the Judge indicated that Complainant had obtained false affidavits that suborned perjury and that she would be disbarred. Special Committee Hrg. Tr., Nov. 7, 2012, at 45. She also repeated that Witness I testified that the Subject Judge offered him "help in obtaining other

employment if, of course, he declined to testify as to statements that [the Subject Judge] had made that were improper as to myself." Id. at 46.

Complainant denied pressuring Witness I to testify about this call and emphasize things that were beyond the scope of the actual call. Id. at 64. When pressed about why Witness I would have said in an interview that he was pressured by her to say things that had not occurred, Complainant told the Special Committee, "I can't tell you that. [Witness I] has subsequently been terminated from my office." Id. at 66. Complainant also stated that she had cause for concern about Witness I's honesty. Id. at 70. Later, upon cross-examination by the Subject Judge's counsel, she said that Witness I was terminated for attempting to bribe an employee. Id. at 90. In addition, Complainant conceded that she had stated in a District Court pleading that Witness I lacked candor with the court and had made misrepresentations. Id. at 90-91.

Complainant further asserted that she never gave Witness I any reason to believe that his bonus would be dependent upon how he testified in connection with the recusal motions. Id. at 68. Complainant claimed that she did not calculate his bonus payment; it was up to the accountant and not within her discretion. Id. at 71.

Of particular importance concerning Complainant's allegations concerning the putative telephone conversation, however, Complainant informed the Committee that:

> It has become clear to me, although I did not know that at the time, and I didn't discover it until shortly before his termination, but many things that he told me about cases turned out not to be true. And many things he told me about conversations turned out [not] to be true….

Id. at 129.

Complainant later volunteered the following at the conclusion of her testimony:

> I don't have any actual knowledge that the statements that he made [about the *ex parte* telephone conversation] were not true. I have since tried to investigate myself whether or not there's independent evidence of whether or not it's true or not . . . . In complete candor, I don't know if that conversation even occurred or not.

Id. at 130.

(b) Witness I's Testimony

At the hearing, Witness I claimed that his memory of the telephone conversation was no longer clear and he adopted his prior testimony at the recusal hearing. Special Committee Hrg. Tr., Nov. 7, 2012, at 143. Witness I said he had not had the opportunity to review the recusal hearing transcript prior to testifying at the Special Committee hearing. Id. at 148. Witness I did recall that the Subject Judge called him back about a CLE program, but that during the conversation the Subject Judge acknowledged he (Witness I) was "in a difficult spot" and he (the Subject Judge) "wasn't offering anything of value or any particular firm, but certainly I could call on him." Id. at 143-145.[7] Witness I also recalled the Subject Judge describing the affidavits filed in the recusal proceedings as suborning perjury. Id. at 146.

Initially, Witness I said he did not recall that anything else was said about the motion to recuse, such as how the Judge was going to rule on the motion, but later he said

[7] Witness I denied that there had ever been other *ex parte* discussions in chambers about trying to find a different law firm or moving out of the area. Id. at 145.

that the Subject Judge indicated it was unlikely the motions would be granted. Id. at 160-161. After Judge Roth read him the recusal transcript, Witness I later affirmed that he had testified truthfully at the recusal hearing when he stated that the Subject Judge said he wasn't going to recuse and that the Subject Judge wasn't going to go into the conversation that he and Witness I had in chambers. Id. at 171. Witness I did not recall what the transition was between the discussion of the CLE and the rest of the telephone conversation. Id. at 164.

Witness I said he cried during his recusal hearing testimony because he was putting the Subject Judge in a difficult spot. Id. at 168. Witness I said he did not perceive "any threat" in the conversation he had with the Subject Judge. Id. at 173. When asked by the Subject Judge's counsel whether there was any offer of assistance in exchange for or conditioned upon his testimony at the recusal hearing, Witness I replied, "Absolutely, there was no such offer, no such conditioning. I mean, none." Id. at 231. Witness I likewise confirmed that the Subject Judge never talked to him at all about his testimony at the recusal hearing. Id.

Witness I acknowledged that he had not testified about the conversation in his deposition taken prior to the recusal hearings. Id. at 149. He said he did not testify about it at the deposition because he did not believe that he had been asked "a catch-all question or I didn't feel that I was asked a question directly calling for that conversation." Id.[8] He

[8] The putative catchall question at the deposition was, "Did the Subject Judge make any other statements which you consider to verify his dislike, disdain or lack of impartiality

said he ultimately told Complainant about the conversation prior to the recusal hearing because he thought he might be asked an open-ended question by other counsel requiring him to talk about the conversation. Id. at 172-173. On cross-examination by the Subject Judge's counsel, Witness I reiterated that he did not perceive that a catchall question had been asked at the deposition and "wasn't actively trying to withhold anything." Id. at 221. Witness I acknowledged, though, that he did not say anything to Complainant about the call until nearly eight months after it happened. Id. at 224.

When asked by Judge Roth if Complainant was holding him "financial hostage," Witness I indicated that she was. Id. at 141-142. Witness I conceded that he felt that the bonus each year would depend to some extent on his attitude towards Complainant and his compliance with what she wanted him to do. Id. at 143. Witness I further stated that his income was dependent on Complainant's judgment and discretion. Id. at 228.

Witness I testified that he spoke to his parents after his recusal hearing testimony about the Subject Judge's call, stating, "I think I told my dad that I thought that it had been a horrible day, that the truth is the truth, and it's out there." Id. at 168. Witness I said he told his father that Complainant wanted him to testify about things that did not happen and he refused. Id. at 156. Witness I said that Complainant had been pressuring him to file a sworn affidavit in the recusal proceedings, which included untrue allegations, and he had refused. Id. at 157-159. With respect to the telephone call,

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towards Complainant?" Id. at 220. In response to this question, Witness I did not testify about his alleged telephone call with the Subject Judge.

though, Witness I said Complainant wanted him to "add in any negative animus towards her, but she knew I wasn't going to do it. So she really didn't press that hard." Id. at 160.

Witness I denied Complainant's allegations about what happened before his termination by Complainant. Id. at 191.

(c) The Subject Judge's Testimony

The Subject Judge denied that his telephone conversation with Witness I discussed anything but the CLE event and his ability to attend. Special Committee Hrg. Tr., Nov. 16, 2012, at 275-276; Response at 1. The Subject Judge also denied ever discussing with Witness I that he leave Complainant's firm or that he re-locate. Special Committee Hrg. Tr., Nov. 16, 2012, at 255. When asked if he ever suggested to Witness I that he leave and that he could help Witness I find a new job, the Subject Judge replied, "Absolutely not." Id. at 256; see also id. at 277. The Subject Judge denied ever saying anything to Witness I about the affidavits being perjured testimony or about Complainant being in difficulties for suborning perjury. Id. at 275-276. The Subject Judge likewise denied ever saying that Complainant was "not going to be practicing in this jurisdiction much longer" and that Witness I was in a "difficult" position. Id. at 276-277.

The Subject Judge described the call as "extremely brief" and stated that the recusal hearing was not mentioned at all. Id. Nor did he recall speaking about any other subject matter than the CLE. Id. at 276. The Subject Judge categorically denied making threats. "I just want to make this very clear. The charges are that I made threats. I

categorically deny ever threatening anyone directly or indirectly, and if anything was mistaken by anybody it was never intended. I would not do that." Id. at 291. The Subject Judge described Witness I's testimony at the recusal hearing as "all fabricated." Id. at 280.

4. Findings and Conclusions

Upon consideration of the full record, including the hearing testimony summarized above, we agree with the Special Committee that there is insufficient evidence to conclude that the Subject Judge made statements during a telephone conversation with Witness I that rose to the level of judicial misconduct. Whatever was said, Witness I did not view it as a threat or a bribe. The words spoken, even as testified to by Witness I in the recusal hearing, do not suggest a *quid pro quo*. In addition, there is no evidence that the Subject Judge had any other conversations with Witness I that could be construed as intending to elicit untruthful testimony in connection with the recusal motions or to otherwise interfere with the adjudication of those motions.

In this regard, we observe that Complainant herself informed the Committee that "many things" Witness I told her about cases and conversations "turned out" to be "not true". Special Committee Hrg. Tr., Nov. 7, 2012, at 129. At the hearing, Complainant acknowledged that "[i]n complete candor, I don't know if that conversation even occurred or not." Id. 130.

Although Witness I denied being pressured aggressively regarding his recusal hearing testimony, he did testify that Complainant asked him to submit a false affidavit

about the Subject Judge and said that she wanted him to "add in any negative animus towards her". Id. at 158-160. As her employee, Witness I was particularly susceptible to pressure from Complainant; in fact, Witness I conceded that Complainant held him "financial hostage". Id. at 141.

Moreover, although Witness I was asked a very open-ended question at a deposition preceding the recusal hearing, he did not testify concerning the alleged *ex parte* telephone conversation. Witness I's explanation that he did not believe he had been asked a "catchall" question at the deposition strains credulity, particularly in view of the other credibility concerns discussed above.

Finally, it is significant that both the Subject Judge and Witness I – the only two parties to the conversation in question – deny that any threats were made during the telephone conversation. Special Committee Hrg. Tr., Nov. 7, 2012 at 168, 173, 230-231; Special Committee Hrg. Tr., Nov. 16, 2012, at 291.

For these reasons, we adopt the findings and recommendations for action in the Special Committee's Report. The facts on which Complainant's allegations in Section III(D) are based "have not been established" and are therefore dismissed under Rule 20(b)(1)(A)(iii).

B. Section III(B): "[The Subject Judge] made *ex parte* threats to [Complainant] and [Witness I] designed to coerce [Complainant] to withdraw appellate grounds in [the Appeal]."

In Section III(B) of the complaint, Complainant alleges that improper *ex parte* discussions concerning a pending appeal occurred between the Subject Judge, Witness I,

and Attorney A, during a Judicial Conference. To fully understand these allegations of misconduct, a detailed recitation of the relevant procedural history and background is required.

1. Procedural History and Background

Complainant's firm represented the plaintiff in Case I, a personal injury suit that was assigned to the Subject Judge. The Subject Judge entered a pre-trial order excluding the testimony of certain of the plaintiff's proposed expert witnesses. Case I proceeded to a three-day jury trial over which the Subject Judge presided. Pursuant to the jury's verdict, the Subject Judge entered judgment in the plaintiff's favor.

Complainant filed a notice of appeal on the plaintiff's behalf (the Appeal). The next day, the Subject Judge entered an order in Case I directing the plaintiff to file a "Statement of Issues Complained of on Appeal" in the District Court.[9] After the Subject Judge issued the order, but before the deadline for filing the statement in response to the order, a Judicial Conference was held. The Subject Judge attended the Conference, as did Complainant and two of her colleagues, Witness I and Attorney A. It is at this Conference that the *ex parte* discussions allegedly took place; we will return to that issue shortly.

[9] The Subject Judge testified that he was familiar with this type of order in Pennsylvania state court practice. See Pa. R. App. P. 1925(b); Special Committee Hrg. Tr., Nov. 16, 2012, at 259. He also testified that Case I is the only one in which he has ever filed an order of this kind. Id.

Later that month, Complainant filed in Case I the statement of issues on appeal. Among other things, Complainant argued that the Subject Judge had erred by excluding the testimony of certain expert witnesses without holding a Daubert hearing. Meanwhile, the Appeal was ongoing. Complainant filed Appellant's brief, which (in relevant part) argued that the District Court erred by excluding expert witnesses without holding a Daubert hearing. Several months later, Appellee filed a brief, which argued that the decision not to hold a Daubert hearing was within the discretion of the District Court.

After briefing was complete in the Court of Appeals, the Subject Judge issued a memorandum opinion and order in Case I providing a statement of reasons for having excluded the plaintiff's experts. The opinion explained that a Daubert hearing was not held because "[n]otwithstanding [the plaintiff's] representation to the contrary on appeal, the parties agreed, during a conference, that a Daubert hearing was not necessary and the motion could be decided on the basis of the reports." In a footnote, the Subject Judge stated, "[t]he rationale for the rulings affecting the plaintiff's experts was not recorded. This memorandum is issued to explain the bases for limiting expert testimony and to correct a misstatement made by the plaintiff on appeal regarding the parties' waiving a Daubert hearing."

Complainant filed a response to the opinion. With regard to the statement that she had waived a Daubert hearing, Complainant responded, "[Attorneys for the plaintiff] ha[ve] searched the record and ha[ve] no recollection of the issue of waiving Daubert Motions being discussed or agreed to." The defendant corporation filed a reply to

Complainant's response, in which defense counsel stated that he recalled that a Daubert hearing had been waived.

Complainant filed a notice in the Court of Appeals withdrawing the Daubert claim. The notice stated, "after Appellant counsels [*sic*] conversation with [the Subject Judge] in which he has confirmed that he has notes indicating discussions as to waiving Daubert hearings by Appellant; Appellant withdraws all arguments related to failure to conduct Daubert hearings." Ultimately, the Court of Appeals issued an opinion affirming the District Court's judgment.

2. Allegations of Misconduct and Response

In Section III(B) of the misconduct complaint, Complainant alleges that the Subject Judge communicated *ex parte* with Complainant's colleagues shortly after the Appeal was filed with the intent to coerce or threaten Complainant into dropping the Daubert claim. Specifically, she alleges that "[the Subject Judge] approached [Witness I and Attorney A] – both attorneys who had worked on [Case I] – at this conference and told them if [the plaintiff] didn't drop parts of his appeal, he would, among other things, take actions that would adversely impact me and my other clients in other cases." Compl. at 4. In addition, in the mandamus petition appended to the misconduct complaint,[10] Complainant further alleges that "[the Subject Judge] instructed [Complainant] to 'contact [her client]' and let [the Subject Judge] know the decision

[10] This mandamus petition was withdrawn pursuant to Fed. R. App. P. 42(b).

during the conference." Later in the petition, she alleges, "[the Subject Judge] followed up on this threat and asked whether [the client] was going to withdraw his appeal. When [Complainant] said 'no,' [the Subject Judge] responded, 'well, I'm going to have to write, I'm going to have to write!'"

Complainant first raised similar allegations of improper *ex parte* communications in the motions seeking the Subject Judge's recusal. See Complainant's Affirmation at ¶ 4, Exh. 1 to Mot. for Recusal. No recusal motion was filed in Case I, however, so the allegations were not presented as a basis for the Subject Judge's recusal from that matter.[11] Rather, Complainant presented the allegations as background support for her claims of hostile treatment. She claimed, in essence, that her alleged personal conflict with the Subject Judge began when she initially declined to follow the Subject Judge's *ex parte* instruction to withdraw the Daubert claim from the Appeal.

At the recusal hearing, Complainant attempted to present testimony from Witness I and Attorney A concerning the alleged *ex parte* discussions. The Subject Judge prohibited them from testifying on the topic, however. See Recusal Hrg. Tr., Vol. III, at 231-32 (Witness I testimony); id. at 364-65 (Attorney A testimony). Thus, only Complainant testified on the issue.

[11] The Court of Appeals filed the opinion affirming the District Court's judgment in Case I the month before Complainant filed the recusal motions.

Specifically, Complainant testified that she had a conversation with the Subject Judge about the Appeal during the Judicial Conference, in the presence of Witness I. Recusal Hrg. Tr., Vol. II, at 384-85. She stated:

> And then I was actually approached by [the Subject Judge], I believe, while [Witness I] was present, in which he informed me that he knew that . . . I had filed an appeal in [Case I], and that he didn't think that was a good idea. And that if I continued with that appeal, that he would be 'forced' to issue an opinion that would be bad for my experts who were in that case, but also in many of my other cases, such that it would damage my expert in those cases as well. And I should contact my client and convince my client to dismiss that appeal.

Id. According to Complainant's recusal hearing testimony, this conversation took place in "a big meeting room area in the hotel" during the Judicial Conference. Id. at 385. Complainant further testified that the Subject Judge approached her a second time during the Conference to ask if she had contacted the client about dropping the appeal. Id. at 385-86. "I told him that I did, and that my client was not going to dismiss his appeal. And then he said well, then I'm going to have to write, I'm going to have to write." Id. at 386. Complainant testified that this second conversation "either happened at the cocktail before, before the Museum of Art, or at the Museum of Art. Later in the evening time." Id.

Complainant also alleged in the recusal motion that, during a trial of a separate case (Case II), "[the Subject Judge] demanded that [Complainant] inform the appellate court that she was withdrawing the claim that Plaintiff had not waived a Daubert hearing in [Case I] or he would sanction her in [Case II], and repeatedly stated that 'that would be

added to the sanctions order.'" Mot. for Recusal at 11. At the recusal hearing, Complainant testified that the alleged demands were made off the record during side-bar discussions. Recusal Hrg. Tr., Vol. III, at 8 ("There were several times that you discussed this with me at sidebar in which there is no record."); see also id. at 104-05.

The record in Case II reflects one reference to the Appeal.[12] On the first day of trial testimony in Case II, the Subject Judge and Complainant engaged in a conversation that they agree was about Complainant's notice of withdrawal of the Daubert claim from the Appeal. The entirety of the exchange follows:

> THE COURT: Did you file what you said you were going to file?
>
> [COMPLAINANT]: Yes, last night.
>
> THE COURT: I didn't see it.
>
> [COMPLAINANT]: I filed last night at 8 o'clock. I did, at eight o'clock. [A paralegal] is the person who filed it, my paralegal.
>
> THE COURT: Get me a copy of it tomorrow.
>
> [COMPLAINANT]: Huh?
>
> THE COURT: Give me a copy of it tomorrow.

[12] Apart from Complainant's testimony, no additional evidence was presented in the recusal proceeding or during the Special Committee's investigation that the Subject Judge repeatedly threatened her with sanctions during Case II for her actions in the course of the Appeal.

The notice of withdrawal of the Daubert claim was filed in the Appeal on the previous day, as discussed in this exchange.[13]

In his written response to the complaint, the Subject Judge addresses a number of Complainant's allegations. He confirms that he did have a conversation with Witness I and Attorney A about the Appeal during the Judicial Conference. Response at 3. The Subject Judge states, however, that "Complainant misstates and mischaracterizes discussions . . . regarding the [Appeal]." Id. Specifically, he alleges that "during a social discussion with [Attorney A] and [Witness I], I expressed my surprise that a notice of appeal had been filed because [the plaintiff] had prevailed at trial. I inquired what the grounds for the appeal might be. When [Attorney A] raised a question of the rulings on the expert witnesses, I explained that there had been no Daubert hearings. At the same time, we talked about the practice of lawyers avoiding specific rulings on expert witnesses." Id. Referring to Complainant's allegation during her recusal hearing testimony concerning an alleged conversation between the two of them before or during a reception at the Museum of Art, the Subject Judge states: "I was not there. I did not attend that reception or any event at the Art Museum." Response at 3.

The Subject Judge states that the discussions with Complainant's colleagues "were not *ex parte* conversations" because "[n]othing discussed concerned the merits of any

[13] In the hearing before the Special Committee, the Subject Judge testified that this exchange did not concern any threat of sanctions in the subsequent trial. Special Committee Hrg. Tr., Nov. 16, 2012, at 271.

matter pending before the court. I had already ruled on the experts' proffered testimony and the case had concluded."[14] Id.

3. Hearing Before the Special Committee

During the course of its investigation, the Special Committee determined that a formal fact-finding proceeding would assist in resolving any remaining factual disputes concerning the allegations in Section III(B) of the complaint. See Commentary on Rule 14. Complainant, Witness I, and the Subject Judge provided sworn testimony concerning the substance of the alleged *ex parte* discussions.

At the hearing, the witnesses testified consistently that at least one *ex parte* discussion occurred. Specifically, the Subject Judge testified that he discussed the Appeal during a brief and informal conversation with at least four individuals on the first day of the Judicial Conference. According to the Subject Judge, the conversation included Attorney A and Witness I, among others. See Special Committee Hrg. Tr., Nov. 16, 2012, at 252-54; id. at 281. Complainant also testified that she was aware of a conversation that took place between the Subject Judge, Attorney A, and Witness I (in which Complainant did not participate). Special Committee Hrg. Tr., Nov. 7, 2012, at 50. Although Witness I recalled that there were two conversations – one between the Subject Judge and Attorney A, and a subsequent one that included himself – he also testified that the conversations were brief and took place within minutes of each other

[14] The Subject Judge clarified at the hearing before the Special Committee that, by "concluded," he meant to indicate that Case I had gone to verdict. Special Committee Hrg. Tr., Nov. 16, 2012, at 257.

during the same informal pre-dinner social hour at the Judicial Conference. Id. at 179-80; 194. And later in his testimony, Witness I doubted his recollections, explaining that "I just don't remember how that whole chronology played out. It was very fast. You know, we were moving into the dinner room, and that's where it happened and I just don't remember this many years down the road." Id. at 205.

In any event, the Subject Judge testified that, during the short pre-dinner conversation or conversations with Witness I and Attorney A, he discussed the Appeal, including his recollection that the Daubert hearing had been waived. Id. at 254. When questioned about this, Witness I similarly recalled the Subject Judge making such a statement. Special Committee Hrg. Tr., Nov. 7, 2012, at 198.

The Subject Judge testified that, when he spoke to Witness I and Attorney A, he did not say "I'll have to write." Special Committee Hrg. Tr., Nov. 16, 2012, at 267-68. He also categorically denied making direct or indirect threats of any kind. Id. at 291. Witness I testified that, "I think he [the Subject Judge] said I can write. But he's a judge and judges write opinions." Special Committee Hrg. Tr., Nov. 7, 2012, at 203. Witness I further testified that this conversation was not threatening. Id. at 202.

The Subject Judge also testified that he did not indicate to Attorney A and Witness I that he wanted Complainant to drop part of the Appeal, or that he directed anyone to contact Complainant on his behalf. Special Committee Hrg. Tr., Nov. 16, 2012, at 254-55, 257. He stated that he never spoke to Complainant about anything substantive during the Judicial Conference. Id. at 280. Witness I, however, testified that

the Subject Judge indicated that he would like to talk to Complainant and later did so, Special Committee Hrg. Tr., Nov. 7, 2012, at 181-82, and Complainant testified that the Subject Judge spoke to her on two occasions. Id. at 50-52.

Complainant testified that her first conversation with the Subject Judge was similar in substance to the conversation between the Subject Judge, Witness I, and Attorney A, "about the fact that he [the Subject Judge] thought it was inappropriate that I had appealed his ruling on the testimony of my experts. And that it was not smart to have done so because it would force him to write an opinion that would be negative towards my next case." Id. at 52-53. Complainant testified that, during this conversation, "I informed [the Subject Judge] that I understood what his position was and that I, of course, would have to talk to my client about dismissing a portion of his appeal. And I did subsequently."[15] Id. at 53. Witness I testified that he overheard part of this conversation between the Subject Judge and Complainant, which is when the Subject Judge allegedly said he "could write" and "[i]t wouldn't be helpful to those experts." Id. at 182. According to Witness I, Complainant later told him that the Subject Judge also had asked her to withdraw the Appeal during this conversation, but Witness I did not hear that statement himself. Id.

[15] In a deposition taken during the recusal proceedings, the client testified that Complainant contacted him by telephone at some point, and "was notified by her that [the Subject Judge] had a concern about me filing an appeal and that it probably would have been best if an appeal wasn't filed. . . and if we had gone forward with the appeal – if I had gone forward with the appeal, it probably would not have put my attorney in a good light with the judge."

Complainant testified that she called her client about the Appeal and, after she spoke to her client, spoke with the Subject Judge a second time. Complainant testified, "he said, has your client agreed to dismiss the appeal? I informed him that he would not." Special Committee Hrg. Tr., Nov. 7, 2012, at 54. In a deposition taken prior to the recusal hearing, Complainant previously had testified that Witness I was present for this conversation. See Special Committee Hrg. Tr., Nov. 7, 2012, at 93-94 (discussing deposition testimony). At the hearing, however, Witness I did not testify to participating in this conversation.

With regard to the claim that the discussions were intended to be threatening, Witness I testified that he did not feel that the Subject Judge had threatened him, or that the discussions were threatening in any manner. Id. at 187, 202. Complainant, in contrast, stated, "I thought I had been threatened, yes." Special Committee Hrg. Tr., Nov. 7, 2012, at 54.

4. Findings and Conclusions

The Subject Judge acknowledges that he engaged in a discussion or discussions with Complainant's colleagues concerning the Appeal shortly after he had issued an order directing the plaintiff in Case I to file a "Statement of Matters Complained of on Appeal." We conclude, however, that the discussion or discussions do not rise to the level of "conduct prejudicial to the effective and expeditious administration of the business of the courts." Rule 3(h)(1).

We note some reliability concerns with regard to the testimony provided by both Complainant and Witness I. Complainant testified, for instance, that Witness I's employment was terminated due to his incompetence and dishonesty, and she stated that there were multiple occasions on which Witness I made false statements in court documents and to clients. Special Committee Hrg. Tr., Nov. 7, 2012, at 70, 90-91. Complainant also attested that Witness I "has some honesty problems" and that she harbors doubts about all the information he has recounted to her. Id. at 129. For his part, Witness I testified that Complainant has invented numerous "crazy" and "wild" allegations about him, as part of a personal vendetta to "take him out" and prevent him from competing with her law practice. Id. at 136-39, 238. He stated that Complainant's claims against him, which she has submitted in court filings, are "absolutely a lie." Id. at 191. In addition, Witness I testified that Complainant's efforts to recuse the Subject Judge were similarly an effort to "take out" the Subject Judge, and that her filings – including the misconduct complaint – are "manipulations" on Complainant's part. Id. at 238-39, 242.

In light of our concerns about the reliability of Complainant's and Witness I's testimony, we find there is no credible evidence that the Subject Judge engaged in any discussions with the intent to threaten or intimidate counsel with respect to the Appeal or any other matter. See Rule 20(b)(1)(A)(iii) (allegations may be dismissed by the Judicial Council because "the facts on which the complaint is based have not been established"). In any event, regardless of the differing perspectives, the alleged "threat" was merely to

put in writing the reasons for a judicial decision that he had already made. Accordingly, the allegations are dismissed.

To be sure, any discussions with counsel about the Appeal should not have taken place. See Canon 3A(4), Code of Conduct for United States Judges ("[A] judge should not initiate, permit, or consider ex parte communications or consider other communications concerning a pending or impending matter that are made outside the presence of the parties or their lawyers.").[16] Although a judgment had been entered in Case I at the time of the discussions, there was an open appeal and the Subject Judge had not yet issued the post-judgment opinion providing the reasons for excluding certain expert testimony. Accordingly, the matter remained pending.

While these were short and informal conversations that took place in a social context, substantive discussions with counsel about a pending matter were ill-advised. Nevertheless, the circumstances here do not constitute conduct prejudicial to the effective and expeditious administration of the business of the courts. See Rule 3(h)(1). During the hearing, the Subject Judge expressed that he has learned from this process, and will take greater care in the future when engaging in informal conversations with attorneys. See Special Committee Hrg. Tr., Nov. 16, 2012, at 285.

[16] While the Code of Conduct for United States Judges is designed to provide guidance to judges, it is aspirational in nature and is not a set of disciplinary rules. "Ultimately, the responsibility for determining what constitutes misconduct under the statute is the province of the judicial council of the circuit subject to such review and limitations as are ordained by the statute and by these Rules." Commentary on Rule 3.

C. Section III(C): "[The Subject Judge] has repeatedly treated [Complainant] in an abusive and hostile manner."

The cornerstone of Complainant's hostility claim is that the Subject Judge "has made it his pattern and practice" of treating her "in an abusive and hostile manner." Compl. at 5. In her complaint, she alleges:

> At hearings and trials, and particularly during [the Case II] trial and thereafter, [the Subject Judge] has made it his pattern and practice of treating me in an abusive and hostile manner. . . .
>
> Additionally, after the recusal motions were filed [the Subject Judge's] treatment of me has only gotten worse, and he has issued orders that I believe were in direct retaliation for my filing the recusal motions, including holding me in contempt without affording me basic due-process protections, statutory-hearing rights, or the right to a hearing *de novo*. I request an investigation into whether [the Subject Judge's] hostile and abusive treatment of me amounts to misconduct. . . .

Id.

Furthermore, in the "Affirmation of Complainant" attached to her complaint, Complainant alleges that:

> I will never forget the *ex parte* conversation that [the Subject Judge] had with me in which he told me that I had problems dealing with men in general and especially those in authority …. I tried to explain to him that I have nothing against men…. His response was that he intended to teach me to respect authority.

Complainant's Affirmation at ¶¶ 14, 16.

In his response to the complaint, the Subject Judge states that he, "treated her no differently than any other attorney who practices before me." Response at 4. In addition, he relies on the memorandum opinion he wrote denying Complainant's recusal motions

for a discussion of the interactions between himself and Complainant. Id. (attaching copy of opinion). The Subject Judge asserts that:

> Any actions taken by me during the course of judicial proceedings were in response to inappropriate and unprofessional conduct on [Complainant's] part as more fully described in the memorandum opinion. All rulings were made in accordance with the rules of evidence and procedure, not on the basis of any personal feelings for or against [Complainant], her office, her clients or anyone else.

Id. The Subject Judge goes on to deny Complainant's claim that "I had told her that she had problems with men and that I 'intended to teach [her] to respect authority'. . . . There was no such statement made nor is it one that I would make under any circumstances." Id. at 4-5. The Subject Judge also denied making these statements at the hearing before the Special Committee. Special Committee Hrg. Tr., Nov. 16, 2012, at 288-289.

Complainant's hostile treatment allegations are subject to dismissal under Rule 20(b)(1)(A)(ii) and (iii). Three panels of the Court of Appeals have rejected claims related to Complainant's allegations of "abusive and hostile treatment" by the Subject Judge. First, Complainant's allegations concerning the Subject Judge's hostile treatment of her during the trial of Case II were rejected by a panel of this Court on direct appeal. The panel in that matter reviewed the record and found that, "Although the District Judge was at times emphatic with [defendant's] counsel, he was never disparaging" and displayed "an appropriate equanimity." The panel also rejected Complainant's contention that the Subject Judge repeatedly interrupted her opening statement as evidence of bias:

> The transcript reveals that the interruptions to the opening were caused by opposing counsel, who objected repeatedly to [defendant's] counsel's opening statement. The District Judge simply ruled on these objections.

Second, Complainant relies on the Subject Judge's contempt order as an example of his hostility towards her. Compl. at 5. However, a panel of the Court issued a published opinion reversing and remanding the Subject Judge's contempt order on procedural grounds only. The panel ruled that the procedure the Subject Judge followed violated the procedural requirements set forth in 28 U.S.C. § 636(e)(6), but did not – as Complainant requested in the event the Court reversed and remanded the contempt issue – instruct that "in no event should the Subject Judge conduct the hearing *de novo* to avoid the appearance of impropriety . . . ." Rather, the case was remanded "so that the Magistrate Judge and District Judge can proceed in accordance with the requirements of 28 U.S.C. § 636(e)(6)." Thus, the Court found no need for the case to be remanded for contempt proceedings before a different judge.

Third, Complainant already raised allegations of abusive and hostile treatment in her unsuccessful mandamus petitions. Complainant filed the mandamus petitions a few weeks prior to her complaint of judicial misconduct in order to seek review of the Subject Judge's refusal to recuse himself.[17] For example, she alleged that her relationship with

[17] The Subject Judge denied the recusal motions, concluding, "[t]he effort here goes beyond seeking recusal. It is an attempt to impugn the character and the reputation of a judicial officer. It makes serious charges of judicial misconduct. The extreme allegations are false. They are not merely misleading. They are contrived." The Subject Judge found that Complainant presented "no objective evidence of settled animosity or

the Subject Judge "turned sour" after she refused to withdraw an issue in the Appeal. She further alleged that "the Subject Judge's animosity towards Complainant came to a head during the . . . trial [of Case II]" and listed examples where the Subject Judge had allegedly interrupted her and "demeaned or disrespected her in front of the jury." Id. at 5-6. Complainant also cited to the testimony of the witnesses who testified regarding the Subject Judge's putative hostility during the recusal hearings. Id. at 6, 13. As noted above, all of these petitions were denied. Thus, another panel of the Court has already rejected Complainant's allegations concerning the Subject Judge's putative hostility.

Accordingly, we agree with the Special Committee that to the extent Complainant seeks essentially to re-litigate arguments concerning the Subject Judge's putative hostility towards her in these administrative proceedings, the complaint is subject to dismissal as merits-related under Rule 20(b)(1)(A)(ii). See also Rule 3(h)(3) ("An allegation that calls into question the correctness of a judge's ruling, including a failure to recuse, without more, is merits-related."); Rule 11(c)(1)(B). In addition, given that the Court has repeatedly rejected claims related to Complainant's allegations of "abusive and hostile" treatment by the Subject Judge, we conclude that her allegations are also subject to dismissal under Rule 20(b)(1)(A)(iii) (facts on which the complaint is based have not been established).

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bias against Complainant or her clients." In addition, the opinion concluded Complainant manipulated witnesses and engaged in "duplicity and recklessness."

Finally, as recommended by the Special Committee, we find that Complainant's allegations in her Affirmation concerning the Subject Judge's putative statements have not been established. Accordingly, these allegations are dismissed under Rule 20(b)(1)(A)(iii).

D. Section III(A): "[The Subject Judge] coerced settlements."

According to Section III(A) of the complaint, Complainant represented parties in cases in which the Subject Judge allegedly used inappropriate techniques to compel settlements. See Compl. at 3-4. Complainant specifies two instances in which she alleges that the Subject Judge acted improperly.

On the first occasion, in an unspecified case, the Subject Judge allegedly "told [Complainant] he was going to grant summary judgment against my client if she didn't settle." Id. at 3. On the second occasion, in Case III, the Subject Judge allegedly showed Complainant "a signed, unfiled summary-judgment order" and stated, "'[y]our client' is going to 'lose summary judgment, but don't worry, I will get it settled.'"[18] Compl. at 3. Complainant argues that these alleged events show that the Subject Judge "deprived [her] clients of the right to be heard through his coercive settlement tactics in violation of Rule 3(h)(1)(G) and the ABA's Model Code of Judicial Conduct Rule 2.6(B)." Compl. at 4.

[18] At the time of the settlement conference in Case III, a motion for summary judgment was pending.

Although Complainant did not raise allegations of settlement coercion in the recusal motions, Complainant testified during the recusal hearing in a manner consistent with Section III(A) of the misconduct complaint. See Recusal Hrg. Tr., Vol. II, at 377.

Apart from this testimony, however, there is no record evidence concerning the Subject Judge's conduct at settlement hearings. Accordingly, in conducting the limited inquiry pursuant to Rule 11(b), Judge Sloviter requested the Subject Judge to respond in writing to Complainant's allegations.

In the response, the Subject Judge stated that, during the settlement conference in Case III, he "explained the relative strengths and weaknesses of the party's case in a candid manner – a common settlement technique." Response at 6. The Subject Judge further stated that he "explained to [Complainant] that [the plaintiff] did not appear to have a strong case on liability and there was an outstanding summary judgment motion. I suggested that she evaluate her case in light of the weaknesses. I had not made a decision on the pending motion." Id. The Subject Judge stated that he did not prepare a draft summary judgment order prior to the settlement conference, and that "[h]ad I already expended the time necessary to decide a summary judgment motion and write an opinion, I would not have conducted the settlement conference." Id. Finally, the Subject Judge stated that he employed the same settlement techniques in Case III as in other cases. Id.

The Commentary on the Code of Conduct for United States Judges provides that "[a] judge may encourage and seek to facilitate settlement but should not act in a manner that coerces any party into surrendering the right to have the controversy resolved by the

courts." Commentary on Canon 3A(4), Code of Conduct for United States Judges. We conclude that, even accepting Complainant's allegations as true solely for purposes of this investigation, the Subject Judge's alleged statements during the two settlement conferences do not establish conduct amounting to coercion.

Notably, Complainant does not meaningfully allege, nor is there evidence to support, that the plaintiff in Case III or any other client was forced to cede the right to have their controversies resolved by the court. Moreover, there is ample evidence that the plaintiff in Case III entered into settlement willingly and was satisfied with that outcome. For instance, Complainant testified at the recusal hearing that her client expressly directed her, "I want my case settled; I want my money. And I'll take whatever settlement you get me, and I want to talk settlement." Recusal Hrg. Tr., Vol. II, at 380. Complainant further acknowledged that the Case III settlement was "[f]or a good deal of money," id. at 377, and another Complainant client, testified that the client in Case III was "happy" with the outcome. Id. at 293-94. Although the client's satisfaction with the settlement is not necessarily determinative as to the propriety of the Subject Judge's conduct, it clearly undermines the claim that the client felt she was a victim of judicial coercion.

"[I]f it is clear that the conduct or disability alleged, even if true, is not cognizable under these Rules, the complaint should be dismissed." Commentary on Rule 11. The allegations do not establish that the Subject Judge engaged in conduct crossing the line

from acceptable facilitation of settlement, as permitted by the Rules and by the Code of Conduct, into the realm of improper coercion.

In addition, the record does not reflect that the Subject Judge coerced settlements in Complainant's cases. In Complainant's motion to recuse the Subject Judge (which Complainant did not file in Case III), Complainant claimed, "[the Subject Judge] is refusing to conduct settlement conferences in any case in which [Complainant] is counsel, despite his practice to conduct settlement conferences in all other cases."[19] Mot. for Recusal at 14. In his response, the Subject Judge similarly noted: "Curiously, long after the [Case III] settlement conference, [Complainant] sought to have me conduct settlement conferences in other cases. When I did not schedule them, she complained. Her conduct after the [Case III] conference is inconsistent with her current position that I used inappropriate aggressive tactics to compel settlement in [Case III]." Response at 6. We find that Complainant's claim that her clients suffered harm because the Subject Judge refused to conduct their settlement conferences is inconsistent with her subsequent claim that her other clients suffered harm because the Subject Judge did conduct their settlement conferences.

Based upon the allegations of the complaint, the Subject Judge's response, and the evidence of record, the Special Committee recommended that this claim be dismissed. The Judicial Council adopts the Special Committee's Report. The conduct alleged is not

[19] Complainant raised a similar claim in the petition for a writ of mandamus that the Court of Appeals denied on the merits.

prejudicial to the effective and expeditious administration of the business of the courts, and the facts on which the complaint is based are not established. See Rules 20(b)(1)(A)(i), (iii); see also Rules 11(c)(1)(A), (D).

E. Section III(E): "[The Subject Judge] routinely gives [a Magistrate Judge] . . . *ex parte* instructions despite their appellate relationship."

In Section III(E) of the complaint, Complainant alleges that the Subject Judge "routinely" provides inappropriate *ex parte* instructions to a Magistrate Judge despite their appellate relationship. Specifically, she cites two instances in which the Magistrate Judge stated that he was acting pursuant to the Subject Judge's instructions. In the first, during a pre-trial proceeding, the Magistrate Judge allegedly stated that the Subject Judge "provided him with off-record instructions regarding the scope of *Voir Dire*." Compl. at 7. In the second, during a deposition in anticipation of the recusal hearing, the Magistrate Judge allegedly stated that the Subject Judge gave him instructions about how to respond to certain types of objections. Id.

Complainant claims these alleged *ex parte* instructions violate ABA Model Code Rule 2.9, Comment 5, which provides: "A judge may consult with other judges on pending matters, but must avoid ex parte discussions of a case . . . with judges who have appellate jurisdiction over the matter."[20] Although the Code of Conduct for United States Judges does not contain the provision on which Complainant relies, the Code of Conduct does provide that "a judge should not initiate, permit or consider ex parte

[20] As noted above, the ABA Model Code is not relied on or referenced in the Rules.

communications or consider other communications concerning a pending or impeding matter that are made outside the presence of the parties or their lawyers." Canon 3A(4), Code of Conduct for United States Judges. The Commentary on the Code of Conduct also provides that "[a] judge may consult with other judges or with court personnel whose function is to aid the judge in carrying out adjudicative responsibilities." Commentary on Canon 3A(4), Code of Conduct for United States Judges.

The allegations do not suggest a violation of either standard. Complainant's allegations reasonably establish that the Subject Judge provided the Magistrate Judge guidance on procedural issues. This is the sort of aid with adjudicative responsibility that is contemplated by Canon 3(A)(4) and is conduct in which many judges typically and permissibly engage. The allegations do not remotely suggest or imply that the Subject Judge exercised any undue influence over the Magistrate Judge's actions.

Complainant presented this claim as the basis for a misconduct complaint against the Magistrate Judge as well, for having received the allegedly improper guidance from the Subject Judge. Acting as Chief Judge, Judge Sloviter dismissed the claim, concluding that the "allegations demonstrate only that [the Magistrate Judge] may have received guidance on procedural matters from [the Subject Judge]. Even assuming *arguendo* that they occurred, such consultations and discussions among judicial colleagues are commonplace and appropriate and, without more, do not create cause for concern." J.C. Nos. 03-11-90139, 03-11-90140, Mem. Op. at 6. Judge Sloviter went on to find that "[t]here is no indication that [the Subject Judge] provided procedural guidance for any

improper purpose; consequently, there is no indication that [the Magistrate Judge] engaged in misconduct solely by virtue of having received that guidance." Id. Judge Sloviter therefore dismissed the claim against the Magistrate Judge pursuant to 28 U.S.C. § 352(b)(1)(A)(iii) and Rule 11(c)(1)(D), because the allegations lacked sufficient evidence to raise an inference that misconduct occurred.

The Judicial Council adopts the Special Committee's Report as to these allegations. For largely the same reasons discussed by Judge Sloviter, the allegations against the Subject Judge are dismissed. Section III(E) of the complaint does not allege conduct prejudicial to the effective and expeditious administration of the business of the courts. See Rule 20(b)(1)(A)(i); see also Rule 11(c)(1)(D).

F. Sections III(F) & (G): "[The Subject Judge] has received *ex parte* information of a derogatory nature and has failed to disclose receipt of that information" and "A staff member of [a Magistrate Judge] has sent disparaging and inappropriate e-mails to the visiting judges, including [the Subject Judge], who failed to disclose these e-mails on the record."

In Sections III(F) and (G), Complainant raises related claims concerning the Subject Judge's supposed duty to disclose his receipt of "derogatory" and "disparaging" information. First, in Section III(F), Complainant alleges that she "believe[s]" the Subject Judge was told by a Magistrate Judge that Complainant "had problems with authority figures and men in authority." Compl. at 7. Second, Complainant claims the Subject Judge "falsely accused [her] of 'baiting defense counsel'" and since the Subject Judge "had never seen [her] in trial those accusations had to be a result of *ex parte*

discussions that were undisclosed." Id. at 8. Finally, Complainant alleges in both Sections III(F) and (G) of the complaint that the Subject Judge engaged in misconduct by "fail[ing] to disclose" a "poison email" sent by a Magistrate Judge's assistant. Id. at 8.

The first two allegations are vague and insubstantial. These types of exchanges are not "ex parte" communications, nor do they give rise to any "duty to disclose." Because Complainant does not allege any conduct prejudicial to the effective and expeditious administration of the business of the courts, the allegations are dismissed. Rule 20(b)(1)(A)(i).

Addressing the final allegation, Complainant raised similar claims of misconduct against the Magistrate Judge and a District Judge for failure to disclose this so-called "poison email." The message in question, a July 2011 email from a Judicial Assistant to five visiting District Judges, states that Complainant lied to the District Court in a case pending before one of the District Judges (but not the Subject Judge) concerning an inability to locate an expert witness.

In response to that email message, the presiding District Judge in that matter issued an order directing Complainant to show cause why sanctions should not be imposed for "allegedly inaccurate statements" to the District Court. The email message was filed on the public docket as part of the show cause proceeding, and Complainant filed a response to the show cause order. That District Judge ultimately sanctioned Complainant under Fed. R. Civ. P. 11 for failure to conduct an adequate investigation into her representations to the District Court.

Complainant claimed that the Magistrate Judge and a District Judge engaged in judicial misconduct because they "failed to investigate or take appropriate actions concerning the [judicial assistant's] conduct." Judge Sloviter, acting as Chief Judge, dismissed the claims as unsupported by evidence that would give rise to an inference that misconduct occurred. J.C. Nos. 03-11-90139, 03-11-90140, Mem. Op. at 3-4; see also Rule 3(h)(1), Rule 11(c)(1)(D).

Complainant also alleges that the Subject Judge "failed to disclose" the email message. Even apart from the fact that the email does not appear to be relevant to any proceeding that was pending before the Subject Judge at the time, as a factual matter, the presiding District Judge attached it to the Show Cause Order directed to Complainant within days of when it was originally sent. Thus, the email message was publicly available and there can be no basis for claiming an instance of judicial misconduct for an alleged "failure to disclose" the email in question. These allegations are dismissed because the facts are not established and the conduct alleged is not prejudicial to the effective and expeditious administration of the business of the courts.[21] See Rules 20(b)(1)(A)(i), (iii); see also Rule 11(c)(1)(D).

[21] In addition, to the extent Complainant speculates that the Subject Judge withheld "other derogatory *ex parte* conversations . . . which he failed to disclose," Compl. at 8, the allegations similarly are dismissed. There is no evidence of any such conversations and no duty on the part of the Subject Judge to inform Complainant of them in any event.

G. Section III(H): "[The Subject Judge] expressly disclaimed that the ABA's Model Code of Judicial Conduct applies to him."

Finally, Complainant alleges that the Subject Judge engaged in misconduct because he "disclaimed" that a rule from the American Bar Association's Model Code of Judicial Conduct applied to him. The Special Committee recommended dismissal of this claim as merits-related because it seeks to directly attack the Subject Judge's rejection of an argument raised in a recusal motion. Rule 20(b)(1)(A)(ii).

In her recusal motions, Complainant contended that the Subject Judge was required to disqualify himself under Rule 2.11 of the ABA Model Code. Complainant maintained that the ABA Model Code "provides a binding standard for the disqualification of judges" in the District Court. Mot. for Recusal at 1 (citing a Local Rule of Civil Procedure). In his Memorandum Opinion denying the recusal motions, the Subject Judge stated in a footnote, "The motion also relies upon Rule 2.11 of the American Bar Associations Model Code of Judicial Conduct. The model rules are inapplicable."

In the instant administrative proceedings, Complainant states that, "The District Judge affirmatively disclaimed in his September 1, 2011 Memorandum opinion denying the various motions to recuse – without citing any authority or providing any reason why – that the ABA's Model Code of Judicial Conduct, and specifically Rule 2.11, did not apply to him." Compl. at 9-10. Complainant further demands an investigation into

whether the Subject Judge's "refusal to be personally bound by the ABA's Model Code is, in-and-of-itself, misconduct." Id. at 10.

It is clear, therefore, that Complainant seeks to collaterally attack the Subject Judge's ruling that the ABA Model Code of Judicial Conduct was inapplicable to the recusal motions. We agree with the Special Committee that this argument is directly related to the merits of the Subject Judge's recusal decision and subject to dismissal under Rule 20(b)(1)(A)(ii). See also 28 U.S.C. § 352(b)(1)(A)(ii); Rules 3(h)(3)(A), 11(c)(1)(B).

Even assuming *arguendo* that Complainant could collaterally attack the Subject Judge's determination that the ABA Model Code was "inapplicable", her claim of misconduct nonetheless fails. At the time in question, by its own terms, the applicable local rule was "subject to such modifications as may be required by federal statute . . . ." Recusal proceedings in federal court are governed by federal statute, not the ABA Model Code. See 28 U.S.C. § 455. Thus, the Subject Judge's determination that the local rule in question was "inapplicable" to a recusal motion filed in district court pursuant to a federal statute was not misconduct. Complainant's claim is, therefore, also subject to dismissal under Rule 20(b)(1)(A)(iii).

IV. CONCLUSION

Having considered the Special Committee's Report and the record of this proceeding, the Judicial Council adopts the Special Committee's Report and unanimously

accepts the Special Committee's recommendations. Having found no violation of the Judicial Conduct and Disability Act, the complaint is dismissed pursuant to 28 U.S.C. § 354(a)(1)(B) and Rules 20(b)(1)(A)(i),(ii),(iii).

/s/ Dolores K. Sloviter
Circuit Judge

Dated: March 19, 2013

JUDICIAL COUNCIL OF THE THIRD CIRCUIT

J.C. No. 03-11-90141

IN RE: COMPLAINT OF JUDICIAL MISCONDUCT
OR DISABILITY

ORIGINAL PROCEEDINGS UNDER 28 U.S.C. § 351

ORDER

(Filed: March 19, 2013)

PRESENT: SLOVITER, RENDELL, AMBRO, FUENTES, KANE, SLEET, LANCASTER, JOYNER, SIMANDLE, Members of the Judicial Council

SLOVITER, Circuit Judge.[1]

After consideration of the Report of the Special Committee and the record and on the basis of the foregoing memorandum opinion entered on this date, it is ORDERED AND ADJUDGED that the Special Committee's Report is adopted and the complaint filed pursuant to 28 U.S.C. § 351 is hereby dismissed pursuant to 28 U.S.C. § 354(a)(1)(B) and Rules 20(b)(1)(A)(i), (ii), and (iii) of the Rules for Judicial-Conduct and Judicial-Disability Proceedings.

[1] Judge Sloviter, the most-senior active circuit judge not disqualified, presided over this matter pursuant to Rule 25(f) of the Rules for Judicial-Conduct and Judicial-Disability Proceedings. Pursuant to Rule 25(a), Chief Judge McKee and Judge Scirica did not participate in consideration of this matter.

Complainant and the Subject Judge are notified that this order constitutes the final order of the Judicial Council under 28 U.S.C. § 354 and is conclusive and not subject to further review by the Judicial Council. In addition, this order is not judicially reviewable on appeal or otherwise except as provided by 28 U.S.C. § 357(a) and Rule 21 of the Rules for Judicial-Conduct and Judicial-Disability Proceedings. In accordance with 28 U.S.C. § 357(a), "[a] complainant or judge aggrieved by an action of the judicial council under section 354 may petition the Judicial Conference of the United States for review thereof." The procedure for seeking such review by the Judicial Conference is specified in Rules 21 and 22 of the Rules for Judicial-Conduct and Judicial-Disability Proceedings.

The full text of the Rules for Judicial-Conduct and Judicial-Disability Proceedings is available from the Circuit Executive's Office for the Third Circuit and on the Court of Appeals' internet site, www.ca3.uscourts.gov.

/s/ Dolores K. Sloviter
Circuit Judge

Dated: March 19, 2013