

JUDICIAL COUNCIL OF THE THIRD CIRCUIT

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J.C. No. 03-14-90040

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IN RE: COMPLAINT OF JUDICIAL MISCONDUCT  
OR DISABILITY

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

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MEMORANDUM OPINION

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Filed: June 1, 2015

PRESENT: McKEE, Chief Judge.

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 Bankruptcy Judge (hereinafter “Subject Judge”). I conducted a limited inquiry in this matter under 28 U.S.C. § 352(a) and requested that the Subject Judge file a response to the complaint. See also Rule 11(b), Rules for Judicial-Conduct and Judicial-Disability Proceedings.<sup>1</sup> Available transcripts of the relevant proceedings at issue have been reviewed, as well as various filings and opinions from Complainant’s bankruptcy cases and the attorney discipline proceedings regarding Complainant. As discussed further below, Complainant alleges conduct that, even if true, is not prejudicial to the effective and expeditious administration of the

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<sup>1</sup> In accordance with 28 U.S.C. § 352(a), neither a copy of this response nor the Subject Judge’s subsequent supplements thereto were provided to Complainant.

business of the courts. Many of Complainants' allegations, moreover, are directly related to the merits of decisions or procedural rulings.

Complainant's central allegations are that the Subject Judge made "biased remarks demonstrating both an utter disregard for the fundamental judicial standard of impartiality and [a] lack of judicial temperament." Complainant's allegations of bias are based on comments made by the Subject Judge in the course of hearings, including an "off the record" comment made during a hearing held for the purpose of investigating the need for attorney discipline proceedings against Complainant. Complainant further alleges that the Subject Judge made unfounded accusations of malpractice.

The transcripts of the comments at issue have been reviewed.<sup>2</sup> Although the Subject Judge did use strong and critical language, I conclude that, under the circumstances presented here, his comments are not evidence of bias and do not constitute conduct prejudicial to the effective and expeditious administration of the business of the courts. Rule 3(h)(1), Rules of Judicial-Conduct and Judicial-Disability (defining types of cognizable misconduct). The United States Supreme Court's language in Liteky v. United States, 510 U.S. 540, 555-556 (1994) (considering the recusal standard under 28 U.S.C.

§ 455(a)) (internal citation omitted) is instructive:

opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment

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<sup>2</sup> There is, of course, no transcript of the off the record comment, but the Subject Judge acknowledges that the remark was made and I am, for purposes of this analysis, assuming *arguendo* that the remark occurred.

impossible. Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge . . . . *Not* establishing bias or partiality, however, are expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display. A judge’s ordinary efforts at courtroom administration – even a stern and short-tempered judge’s ordinary efforts at courtroom administration – remain immune.

Similarly, the Subject Judge’s remarks about Complainant’s actions – although highly critical and disapproving – do not support Complainant’s “bias or partiality” challenge. Accordingly, Complainant’s allegations are subject to dismissal on the grounds that the comments at issue, even if true, do not constitute conduct that is “prejudicial to the effective and expeditious administration of the business of the courts . . . .” Rule 11(c)(1)(A), Rules for Judicial-Conduct and Judicial-Disability Proceedings.

In dismissing these allegations, I am mindful that the Subject Judge’s critical comments were made in the context of a pattern of actions and practices on the part of Complainant that ultimately led to the commencement of attorney discipline proceedings. Indeed, about a month prior to the filing of Complainant’s complaint of judicial misconduct, the Chief Judge of the Bankruptcy Court issued an order assigning the Subject Judge to “determine whether a more severe disciplinary measure beyond monetary sanction, such as suspending [Complainant] from practice” was appropriate in view of the Bankruptcy Court’s concerns regarding Complainant’s practice before the Court. The Subject Judge thereafter issued an order to show cause directing Complainant to respond to allegations related to overbilling, fee reporting, the sale of his law practice,

and the indiscriminate pursuit of loss mitigation cases, among other things. The attorney discipline proceeding has been on-going and the docket reflects that a consent motion, agreed to by Complainant and appointed disciplinary counsel, has been filed requesting disbarment on consent.<sup>3</sup>

In addition, at the time the instant complaint of judicial misconduct was filed, Complainant was already the subject of an unrelated state attorney discipline proceeding. Subsequent to the filing of his complaint of judicial misconduct, Complainant was suspended on consent for a period of three years by the state disciplinary authority because Complainant failed to hold client funds separate from his own property, among other things. Reciprocal discipline has since been imposed in the District Court.

In brief, in the face of such a serious pattern of ongoing alleged professional lapses, I conclude that the Subject Judge's critical comments do not constitute evidence of bias, nor do I think they are evidence of a "demonstrably egregious and hostile manner" within the meaning of Rule 3(h)(1)(D), Rules of Judicial-Conduct and Judicial-Disability (defining cognizable misconduct as including treating litigants or attorneys in a demonstrably egregious and hostile manner). As a matter of judicial decorum, however, the Subject Judge may wish to be more circumspect in his choice of words going forward.

Moreover, Complainant's allegations of bias and impartiality are subject to dismissal as merits-related because they were also raised in a nearly contemporaneous

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<sup>3</sup> Another miscellaneous proceeding also remains pending in the Bankruptcy Court regarding a motion seeking an order authorizing the substitution of another attorney for Complainant on an omnibus basis.

recusal motion.<sup>4</sup> As noted above, the Subject Judge was directed by the Chief Judge of the Bankruptcy Court to conduct an inquiry into whether attorney discipline should be imposed with respect to Complainant's putative actions. Complainant filed a recusal motion in two miscellaneous matters (the attorney discipline proceeding and a separate proceeding related to the sale of Complainant's law practice) arguing that the Subject Judge was biased against him in view of the comments he had made at various hearings and because he had issued a large number of orders to show cause in his cases. The Subject Judge granted the recusal motion as a matter of discretion with respect to those two matters, even though he denied manifesting any improper bias concerning Complainant. The Subject Judge explained that he had decided to recuse himself to dispel any question of bias or prejudice against Complainant. The Subject Judge refused, however, to recuse himself from the all pending matters where Complainant was an attorney of record because the recusal motions were only filed in the two miscellaneous proceedings.<sup>5</sup> Complainant appealed the recusal decision on the grounds that the Subject Judge should have recused himself from all of the cases pending before him where Complainant was attorney of record. Complainant, however, failed to prosecute the

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<sup>4</sup> Complainant filed the instant complaint of judicial misconduct just prior to filing his motion to recuse the Subject Judge. The Subject Judge entered his Memorandum and Order regarding the recusal motion before receiving a copy of the instant complaint of judicial misconduct.

<sup>5</sup> Complainant was directed that, if he wished to seek recusal in any other matter, he must seek relief separately in each individual case after consulting with his clients.

appeal and it was dismissed with prejudice by the District Court after Complainant failed to respond to an order to show cause.<sup>6</sup>

Complainant cannot use these administrative proceedings as an alternative forum in which to seek the recusal of the Subject Judge. To the extent Complainant is using these administrative proceedings as a collateral avenue for his efforts to seek recusal, the complaint is subject to dismissal as merits-related. See 28 U.S.C. § 352(b)(1)(A)(ii) (chief judge may dismiss a complaint if he or she finds that it is directly related to the merits of a decision or procedural ruling); Rule 3(h)(3)(A), Rules for Judicial-Conduct and Judicial-Disability Proceedings (“[a]n 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), Rules for Judicial-Conduct and Judicial-Disability Proceedings (a complaint must be dismissed in whole or in part to the extent that the chief judge concludes that the complaint is directly related to the merits of a decision or procedural ruling). See also In re Memorandum of Decision of Judicial Conference Committee on Judicial Conduct and Disability, 517 F.3d 558, 561 (U.S. Jud. Conf. 2008) (the “misconduct procedure [under the Act] is not designed as a substitute for, or supplement to, appeals or motions for

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<sup>6</sup> The District Court observed that the Subject Judge had “provided an extensive explanation in his decision as to why he was recusing in only those two miscellaneous matters.” The District Court further noted that, as explained by the Subject Judge, Complainant had appeared before the Subject Judge in over a hundred matters subsequent to a disciplinary hearing before him, but had “not sought his recusal in any of those individual actions.” The District Court dismissed a related appeal due to lack of jurisdiction.

reconsideration. Nor is it designed to provide an avenue for collateral attacks or other challenges to judges' rulings.”).

Complainant also complains about the Subject Judge's issuance of “contradictory rulings” and his putative failure to follow the rules established by the Loss Mitigation Program regarding payment of attorneys' fees. Complainant disputes the Subject Judge's application of the Program's procedures and critiques alleged inconsistencies with the Program's requirements. In addition, Complainant complains that the Subject Judge issued “many” Rule to Show Cause Orders. These allegations are plainly merits-related and subject to dismissal. See 28 U.S.C. § 352(b)(1)(A)(ii); Rules 3(h)(3)(A), 11(c)(1)(B), Rules for Judicial-Conduct and Judicial-Disability Proceedings. In any event, Complainant's allegations do not support a complaint of misconduct against the Subject Judge. See 28 U.S.C. § 352(b)(1)(A)(iii).

Complainant alleges, moreover, that the Subject Judge improperly sent a letter “off the record” to the Chapter 13 Trustee informing the Trustee that Complainant had “abused” the Loss Mitigation Program. I have reviewed the letter and neither the Subject Judge's use of the term “abuse,” nor the act of sending the letter was improper. In the first instance, the letter in question was sent to the Chapter 13 Trustee, with a copy to Complainant and the Bankruptcy Judges, among others. Second, the letter was sent in furtherance of the implementation of a consent order issued in the course of the Bankruptcy Court proceeding investigating potential misconduct on the part of Complainant. The letter provided the Chapter 13 Trustee with a compilation of over two

hundred cases where Complainant's fees were denied. The consent order referenced "corrective action and remedies," as well as the "immediate, proactive, corrective steps" to be taken by Complainant. As part of the consent order, Complainant agreed to the appointment of an expert to investigate his practice and further agreed not to seek or receive any legal fees related to any Loss Mitigation Program services in the cases listed in the orders to show cause. The letter provided information to the Chapter 13 Trustee for the stated purpose of asking the Trustee to assure that "denied" fees were not being paid and to require Complainant to "self report" any cases where he has mistakenly received fees. Accordingly, Complainant's allegations regarding the letter are dismissed because they lack any factual foundation. 28 U.S.C. § 352(b)(1)(B).<sup>7</sup>

Complainant further alleges that he agreed to withdraw several appeals as part of the consent order "instead of subjecting himself to a complaint" that the Subject Judge threatened to file against him during an "off-record closed door meeting" with Complainant, his attorney, and others. Complainant alleges that this action did not promote public confidence in the judiciary. This allegation is likewise subject to dismissal. Complainant was represented by counsel during the hearing in question, as well as the off the record meeting. There is no evidence that, as Complainant appears to

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<sup>7</sup> I note further that a similar argument about the putative improper use of the word "abuse" was raised by Complainant in an unsuccessful motion for reconsideration seeking the recusal of all of the bankruptcy judges in the District. The argument was rejected by the Bankruptcy Court: "Because the Court must find 'cause' to deny the no-look fees, it is not unreasonable to conclude that an 'abuse' occurred when these otherwise presumptive fees are denied . . . Since this is a matter of record, the statements are not improper or unfairly prejudicial."

imply, the Subject Judge improperly pressured him to withdraw any appeals. As summarized in the consent order that Complainant and his attorney agreed to, during the hearing, the Subject Judge advised Complainant that he was troubled by his apparent mendacity and pattern of neglect and expressed concerns about other aspects of Complainant's practice. Complainant adopted a "conciliatory posture" during the hearing and, when the Court suggested it was considering a procedure for addressing the issues on a "comprehensive basis," Complainant "after consultation with his attorney, consented to that approach [i.e., the appointment of an outside investigator] in lieu of continued litigation on all the matters currently the subject of the pending Orders to Show Cause." The Consent Order further notes that it was entered "with the knowing and voluntary consent of [Complainant] after being afforded an opportunity to be heard and present evidence, following an extensive colloquy involving the Court, Complainant, and his Counsel . . . ." Notably, this consent order was never appealed. Accordingly, the allegation is dismissed as conclusively refuted by objective evidence. Id.<sup>8</sup>

Finally, Complainant states that the Subject Judge made comments about cases pending before him in violation of Canon 3A(6) of the Code of Conduct for United States Judges. This allegation is dismissed as frivolous. Canon 3A(6) explicitly provides that the "prohibition on public comment on the merits does not extend to public statements made in the course of the judge's official duties . . . ." The comments in question were made in the course of court hearings as part of the Subject Judge's "official duties." Thus,

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<sup>8</sup> Complainant's alleged professional misconduct continued after the entry of this consent order, ultimately leading to the disbarment proceedings discussed above.

the allegations are dismissed as frivolous and unsupported by any evidence that would raise an inference that misconduct has occurred. 28 U.S.C. § 352(b)(1)(A)(iii); Rule 11(c)(1)(C), (D), Rules for Judicial-Conduct and Judicial-Disability Proceedings.

For the foregoing reasons, the complaint is dismissed pursuant to 28 U.S.C. § 352(b)(1)(A)(ii) and (iii) and § 352(b)(1)(B).

s/ Theodore A. McKee  
Chief Judge

JUDICIAL COUNCIL OF THE THIRD CIRCUIT

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J.C. No. 03-14-90040

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IN RE: COMPLAINT OF JUDICIAL MISCONDUCT  
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ORIGINAL PROCEEDINGS UNDER 28 U.S.C. § 351

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ORDER

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Filed: June 1, 2015

PRESENT: McKEE, Chief Judge.

On the basis of the foregoing opinion entered on this date, it is ORDERED AND ADJUDGED that the written complaint brought pursuant to 28 U.S.C. § 351 is hereby dismissed under 28 U.S.C. § 352(b)(1)(A)(ii) and (iii) and § 352(b)(1)(B).

This order constitutes a final order under 28 U.S.C. § 352(c). Complainant is notified in accordance with Rules 11(g)(3) and 18, Rules for Judicial-Conduct and Judicial-Disability Proceedings, of the right to appeal this decision by the following procedure:

Rule 18(a) Petition. A complainant or subject judge may petition the Judicial Council of the Third Circuit for review.

Rule 18(b) Time. A petition for review must be filed in the office of the Circuit Executive of the Court of Appeals within **35 days** of the date on the letter informing the parties of the Chief Judge's order.

18(b) Form. The petition should be in letter form, addressed to the Circuit Executive of the Court of Appeals, and in an envelope marked “Misconduct Petition” or “Disability Petition.” The name of the subject judge must not be shown on the envelope. The letter should be typewritten or otherwise legible. It should begin with “I hereby petition the judicial council for review of . . .” and state the reasons why the petition should be granted. It must be signed. There is no need to enclose a copy of the original complaint.

The full text of the Rules for Judicial-Conduct and Judicial-Disability Proceedings is available from the Office of the Circuit Executive of the Court of Appeals for the Third Circuit and on the Court of Appeals’ internet site, [www.ca3.uscourts.gov](http://www.ca3.uscourts.gov).

s/ Theodore A. McKee  
Chief Judge

Dated: June 1, 2015