JUDICIAL COUNCIL OF THE THIRD CIRCUIT

J.C. No. 03-15-90106

IN RE: COMPLAINT OF JUDICIAL MISCONDUCT
OR DISABILITY

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

MEMORANDUM OPINION

(Filed: June 3, 2016)

PRESENT: McKEE, Chief Judge.

This complaint is filed under the Judicial Conduct and Disability Act, 28 U.S.C. §§ 351-64, against a United States District Judge (the "Subject Judge"). For the reasons discussed below, the complaint will be dismissed.

The Judicial Conduct and Disability Act provides a remedy if a federal judge "has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts." 28 U.S.C. § 351(a). A chief judge may dismiss a complaint if, after review, he or she finds it is not cognizable under the statute, is directly related to the merits of a decision or procedural ruling, or is frivolous or lacks sufficient evidence to raise an inference of misconduct. 28 U.S.C. §§ 352(b)(1)(A)(i)-(iii).

I.

Complainant, a licensed attorney with more than three decades of experience, appeared as privately retained counsel in a criminal proceeding before the Subject Judge.

Complainant's client ("Defendant") faced charges of participation in a drug trafficking conspiracy. Complainant filed a number of pretrial motions on Defendant's behalf, including a motion to suppress evidence.

During the pretrial period, the government sought and the Subject Judge granted a protective order intended to prevent Defendant and his co-defendants from circulating discovery documents within the prison. The discovery documents contained information about the identity of witnesses who were cooperating with the government and disclosure of that information within the prison could give rise to serious safety risks for those witnesses.

Claiming that the protective order had been violated and that discovery documents had been left with Defendant in his prison cell, the government filed a motion for an order to show cause why Complainant and a second attorney (the "Second Attorney"), who had been appearing in court with Complainant but who had not entered an appearance on Defendant's behalf, should not be held in contempt. The Subject Judge issued the order to show cause. Complainant filed a response arguing that only the Second Attorney had violated the protective order and that Complainant should be dismissed from the contempt proceeding. The Subject Judge scheduled a show cause hearing. The day before the hearing, Complainant moved to withdraw as counsel for Defendant.

At the first day of the show cause hearing, it became apparent that Complainant had not informed Defendant of the motion to withdraw as counsel prior to filing the motion and had not attempted to locate substitute counsel on Defendant's behalf. In addition, the

Subject Judge raised concerns that Defendant's attorney-client privilege and other rights might not be adequately protected in the hearing. Accordingly, the Subject Judge adjourned the hearing and ordered that substitute counsel be appointed on Defendant's behalf.

The hearing reconvened approximately one month later. Defendant was represented by substitute counsel. The Second Attorney also retained counsel, while Complainant appeared pro se. After some discussion with the parties, the Subject Judge determined that an evidentiary hearing was necessary. Complainant was called as the first witness. He testified that he and the Second Attorney did not work at the same law firm or otherwise have a formal professional affiliation, and that the Second Attorney's role in Defendant's case was limited to that of brief-writer.[1] Complainant also testified to his awareness of the protective order and to having informed the Second Attorney of the protective order. At the conclusion of Complainant's cross-examination, the Subject Judge recessed for the day and directed the parties to return approximately one week later.

On day three, the Second Attorney was called as a witness. The Second Attorney acknowledged responsibility for violating the protective order and apologized to the Court. Among other things, his addressed his role in the case, testifying that, "maybe our role got confused along the way, but I never intended, it was never contemplated that I would ever be co-chair or co-counsel in this matter." In addition, he provided his personal opinion that Complainant had not been adequately representing Defendant. After

[1] The documents drafted by the Second Attorney were signed and filed by Complainant.

Complainant conducted a cross-examination of the Second Attorney, the parties indicated that additional questions remained, so the Subject Judge scheduled a fourth hearing day, again about a week later.

When the hearing reconvened, retained counsel entered an appearance on behalf of Complainant and conducted a lengthy cross-examination of the Second Attorney. The Subject Judge limited some lines of questioning and cautioned, "I frankly don't see how the mudslinging between the lawyers helps either one of them. . . ." She also advised that the issues being limited could be re-visited later if necessary. At the conclusion of the evidentiary portion of the hearing, the Subject Judge inquired whether the parties wished to submit supplemental written argument and present closing statements. The parties indicated they would like to do so, and the Subject Judge therefore scheduled a fifth hearing day one month later. Shortly thereafter, the Subject Judge issued a written order formally granting Complainant's motion to withdraw as counsel for Defendant and appointing substitute counsel.

The parties filed written argument and reconvened for the fifth day. The parties declined to present closing statements and the Subject Judge issued her ruling. She found that the Second Attorney had violated the protective order. She therefore held him in contempt and ordered him to pay a substantial fine. With regard to Complainant, the Subject Judge found that the government did not prove by clear and convincing evidence that he violated the protective order. The Subject Judge also indicated that she felt duty-bound to report both Complainant and the Second Attorney to the state bar authority.

The criminal proceeding resumed. Defendant, represented by substitute counsel, pleaded guilty and the Subject Judge sentenced him to a lengthy term of imprisonment. He did not file an appeal. Subsequently, because the Subject Judge had sealed the transcripts and written submissions relating to the contempt issue, Defendant filed a motion to unseal, which Complainant opposed. Complainant moved for the Subject Judge to recuse from deciding the motion to unseal.

The Subject Judge conducted a hearing. She declined to recuse, denied a request by Complainant to stay the District Court proceeding pending his pursuit of a petition for a writ of mandamus in the Court of Appeals, partially granted the motion to unseal the contempt hearing transcripts and the related briefing, and directed the government to review and redact the transcripts to remove references to any cooperating witness.[2] The Subject Judge later ordered that the transcripts be unsealed subject to redactions.

II.

In this complaint of judicial misconduct, Complainant claims the Subject Judge's actions during the contempt proceeding reflect "bias and animus" against him. Broadly, Complainant enumerates five allegations to support his claim. According to Complainant:

(1) "[T]he Judge completely lost all focus with regard to the purpose of the hearing, and intentionally turned the hearings into a 'lawyer vs. lawyer' battle, despite the fact that one of the lawyers [the Second Attorney] admitted the conduct alleged by the Government at the first hearing." Complainant argues, for instance, that the Subject Judge and the

[2] Despite stating that he intended to file a petition for a writ of mandamus in the Court of Appeals, it does not appear that Complainant filed such a petition.

government "target[ed]" Complainant and the Second Attorney rather than questioning Defendant as to how he obtained the protected discovery materials.

(2) "[T]he Judge intentionally and knowingly permitted the Government to prosecute [Complainant] despite the lack of any allegation and complete lack of any evidence against [Complainant]." Complainant claims that, in a written response filed prior to the hearing and in live testimony provided on the first hearing day, he "evidenced that I did not, in any way, violate the underlying protective order" but he was nevertheless "forced to defend myself from the civil contempt charges" in violation of his "due process right to be dismissed. . . ."

(3) "[W]hen it became apparent that there was no evidence against [Complainant], rather than conclude the hearing, [the Subject Judge] made rulings that expended the scope of the matter, in an [*sic*] misguided effort to prosecute [Complainant] for any ethical violation possible."

(4) "[W]hen after four hearings there was still no evidence of any misconduct against [Complainant] and it became clear that . . . [the Second Attorney] had and would continue to perjure himself on the witness stand, the [Subject] Judge abruptly terminated his appearance on the witness stand, in an apparent attempt to safeguard him against himself." Complainant further argues that, over his objection, the Subject Judge permitted the Second Attorney to present testimony and an affidavit disparaging Complainant's professional competence and "consist[ing] of inadmissible hearsay and improper opinion testimony." Complainant contends the allegations by the Second Attorney "were never

challenged via the adversarial process" and the Subject Judge instead merely accepted the Second Attorney's claims.

(5) "[H]aving accomplished whatever goals envisioned by the Court, [the Subject Judge] went in the back room, purposefully excluded [Complainant] and his lawyer from a conference wherein she crafted two Orders, spoke ex parte with the lawyers and [the Second Attorney] and reappeared with a decision that 'sealed' [the Second Attorney]'s wrongdoing while referring [Complainant] without explanation to the Disciplinary Board." Complainant surmises that the Second Attorney must have spoken with the Subject Judge concerning Complainant's culpability during that alleged ex parte conference, because the Subject Judge rendered a decision shortly thereafter and thanked the Second Attorney for his "candor."

Pursuant to Rule 11(b), Rules for Judicial-Conduct and Judicial-Disability Proceedings, I asked the Subject Judge to respond in writing to Complainant's allegations. The Subject Judge provided a detailed response and included copies of relevant documents and hearing transcripts. The complaint is now ripe for disposition.

III.

As an initial matter, several of Complainant's allegations concern actions by a government attorney, including the decision to "target" Complainant by moving for an order to show cause why Complainant should not be held in contempt for violating the protective order. Such allegations will not be addressed in this opinion. Government attorneys are not covered by the Judicial Conduct and Disability Act. Any alleged

misconduct on the part of a government attorney is therefore beyond the scope of this proceeding. See 28 U.S.C. §§ 351, 352(b)(1)(A)(i); Rule 4, Rules for Judicial-Conduct and Judicial-Disability Proceedings.

With respect to the Subject Judge, the vast majority of the allegations of this complaint challenge the decisions and rulings that the Subject Judge rendered during the contempt proceeding. Among other things, Complainant contends that the Subject Judge incorrectly decided to issue the order to show cause against him, erred by declining to dismiss him from the contempt proceeding prior to the hearing, wrongly expanded the scope of the hearing by permitting certain lines of questioning (including the "lawyer vs. lawyer" questions which, notably, both Complainant and his counsel vigorously pursued at great length[3]), and improperly failed to recuse. Clearly, all of these allegations are merits-related. Rule 3(h)(3)(A), Rules for Judicial-Conduct and Judicial-Disability Proceedings ("An allegation that calls into question the correctness of a judge's ruling, including a failure to recuse, without more, is merits-related."). Merits-related allegations are not cognizable as judicial misconduct. 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. The "misconduct procedure [under the Act] is not designed as a substitute for, or supplement to, appeals or motions for reconsideration. Nor is it designed to provide an

[3] For instance, Complainant chose to pursue at length a line of questioning aimed to distance himself from the actions of the Second Attorney, arguing that the questions were intended ". . . to portray the role of [the Second Attorney] as full co-counsel and partner and not in a subservient role to myself with all the wherewithal of a full member of the bar to investigate and be held accountable for violating the protective order."

avenue for collateral attacks or other challenges to judges' rulings." In re Memorandum of Decision of Judicial Conference Committee on Judicial Conduct and Disability, 517 F.3d 558, 561 (U.S. Jud. Conf. 2008). Accordingly, these allegations are subject to dismissal.

Turning next to Complainant's allegations that the Subject Judge "safeguarded [the Second Attorney] against himself" by ending his testimony and that she improperly accepted the Second Attorney's opinion testimony and affidavit criticizing Complainant, these allegations also are largely merits-related and are therefore subject to dismissal on that basis. 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. Indeed, Complainant presented the allegations concerning the Second Attorney's opinion testimony and affidavit in his motion to recuse the Subject Judge, which the Subject Judge denied. With respect to those allegations, the Subject Judge concluded that there was no grounds for a reasonable person to question her impartiality, noting that the record did not reflect that the Subject Judge considered the affidavit and that Complainant had ample opportunity to cross-examine the Second Attorney. The Subject Judge's conclusions in the recusal decision are not subject to collateral attack in this administrative proceeding. See Rule 3(h)(3)(A), Rules for Judicial-Conduct and Judicial-Disability Proceedings (an allegation challenging a failure to recuse is merits-related).

To the extent these allegations are intended to demonstrate that the Subject Judge demonstrated an improper preference for the Second Attorney, the allegations are baseless

and unsupported by the record. Complainant alleges, for instance, that he "did not even have the opportunity to review that affidavit until mid-way through the [second day of the] hearing." Yet, after the Second Attorney attempted to submit the affidavit, three additional hearing days followed, during one of which Complainant was given an extensive opportunity to cross-examine the Second Attorney. Thus, the claim that the Second Attorney's affidavit testimony "remained untested by the adversarial process" is entirely unjustified. Moreover, the Subject Judge confirmed in her response to the complaint that she never acted on the Second Attorney's motion to submit the affidavit and never reviewed or considered the affidavit itself.

Regarding Complainant's claim that the Subject Judge "abruptly terminated" the Second Attorney's testimony in order to "safeguard him against himself," the record reveals that, in reality, the Second Attorney was permitted to testify at great length for several hours over the course of two days of the hearing. It further reflects that each of the participating lawyers confirmed that they had no further questions for him. Thus, the allegations is unfounded.

Next, as further evidence of alleged bias, Complainant complains of a statement by the Subject Judge at the conclusion of the hearing. After holding the Second Attorney in contempt and stating that she would refer both attorneys to the state bar authority, the Subject Judge stated, "I leave rhetorically out there the question of whether [Defendant] would be motivated to try and get a return of the fees that he paid, but that's for him to pursue, not for the Court to become involved in." It appears Complainant is particularly

incensed by this statement because Defendant's substitute counsel has indicated that Defendant does plan to seek a return of the retainer fee paid to Complainant, which is apparently what prompted Defendant to move to unseal the record of the contempt proceeding.

Once again, the Subject Judge's statement does not support a claim of personal animus or bias and does not otherwise rise to the level of judicial misconduct. The observation that fee recovery might become an issue was self-evident based on the testimony of both lawyers during the contempt proceeding, as they spent substantial portions of their testimony maligning one another's conduct in the course of representing Defendant.

Indeed, thorough review of the record of the contempt proceeding reveals no support for Complainant's allegations of bias and animus on the part of the Subject Judge. Throughout the five days of hearings, the Subject Judge's demeanor toward all parties, including Complainant, consistently remained calm, professional, and appropriate. Complainant was permitted ample time to present his arguments and ask questions of witnesses, and the Subject Judge treated him with a suitable degree of respect. Indeed, it was not the Subject Judge but Complainant (who describes himself as "an extremely volatile individual") who became upset and emotional at times during the proceedings, interrupting the court and complaining that the proceeding was "bad for me physically, bad for me emotionally and bad for me mentally." The Subject Judge responded to

Complainant's outbursts with sympathy, acknowledging that the issue was a "serious matter" to be "tread carefully for everyone's benefit."

Moreover, even if the Subject Judge had lost patience with Complainant, "expressions of impatience, dissatisfaction, annoyance, and even anger" arising during ordinary efforts at courtroom administration do not establish bias or partiality, unless they reveal such a high degree of antagonism or favoritism as to make fair judgment impossible. See Liteky v. United States, 510 U.S. 540, 555 (1994); see also United States v. Wecht, 484 F.3d 194, 220 (3d Cir. 2007) (same). The record reveals no evidence of antagonism or favoritism, and discloses no actions on the part of the Subject Judge that could rise to the level of demonstrably egregious and hostile treatment constituting judicial misconduct under Rule 3(h)(1)(D), Rules for Judicial-Conduct and Judicial-Disability Proceedings. Accordingly, Complainant's allegations of bias and animus are dismissed as frivolous and unsupported by 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.

Next, Complainant refers to an ex parte meeting between the Subject Judge and counsel for the Second Attorney and Defendant, which occurred shortly prior to the final day of the contempt hearing. Complainant argues that he and his counsel were inappropriately excluded from the meeting, and surmises that the Subject Judge must have discussed substantive matters with the Second Attorney during that time.

In her response to the complaint, the Subject Judge confirms that a meeting lasting approximately ten minutes did occur shortly before the hearing and outside the presence of Complainant and his counsel. She explains, however, that the meeting was requested by the Second Attorney and the government as a courtesy, so they could advise the Court that they had resolved their dispute. Specifically, the Second Attorney informed the Subject Judge that he was withdrawing his opposition to the government's contempt motion and that the parties had agreed that the Second Attorney would pay a substantial monetary fine. The Subject Judge's response confirms that Complainant was not mentioned during this meeting, and her written order memorializing the outcome specifically refers to this meeting: "At today's in-Chambers meeting at which counsel for the United States and [the Second Attorney] were present, [the Second Attorney's] attorney admitted that [the Second Attorney] had violated the Protective Order."

Without more, the Subject Judge's meeting with interested parties concerning a proposed settlement between those parties does not provide support for a claim of judicial misconduct. Under appropriate circumstances, a judge is authorized to initiate ex parte communication, so long as the communication "does not address substantive matters and the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result. . . ." Canon 3(A)(4), Code of Conduct for United States Judges.[4]

[4] I note that the Code of Conduct for United States Judges is designed to provide guidance to judges, but 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

Indeed, the Commentary to the Code of Conduct expressly acknowledges that a judge "may encourage and seek to facilitate settlement. . . ." Accordingly, these allegations do not give rise to an inference that judicial misconduct has occurred. 28 U.S.C. § 352(b)(1)(A)(iii); Rule 11(c)(1)(D), Rules for Judicial-Conduct and Judicial-Disability Proceedings.

Complainant also attempts to find something nefarious in the Subject Judge giving thanks to the Second Attorney for his "candor" at the conclusion of the contempt proceeding. Complainant argues that this phrase supports his belief that the Subject Judge spoke ex parte with the Second Attorney about Complainant's professional integrity and accepted the Second Attorney's personal opinions concerning the quality of Complainant's work.

These allegations are not only mere speculation and conjecture, they are an unreasonable interpretation of the Subject Judge's statement. When rendering her ruling that the Second Attorney had violated the protective order and should be held in contempt, the Subject Judge stated, "I appreciate the candor with which you have testified, and I understand that you regret what has happened." This statement does not indicate any reliance upon ex parte statements or personal opinions. Rather, it expresses an appreciation for the Second Attorney's sworn testimony, during which he admitted his culpability. That testimony had been subject to Complainant's extensive cross-examination during the previous days of the hearing. Thus, the Subject Judge's phrasing

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and by these Rules." Commentary on Rule 3, Rules for Judicial-Conduct and Judicial-Disability Proceedings.

does not provide any support whatsoever for Complainant's claims of inappropriate ex parte communication or of judicial bias. The allegations are therefore dismissed as patently frivolous and unsupported by 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.

Finally, Complainant contends that the Subject Judge's decision to refer him to the state bar authority indicates bias and animus. This allegation is both frivolous and unsupported by the record. As the only counsel of record, Complainant had an obligation to ensure adherence to the court's protective order and to protect Defendant's rights, including the attorney client privilege. During the course of Complainant's testimony in the contempt proceeding, the Subject Judge raised appropriate questions as to whether Complainant was continuing to meet those obligations. She repeatedly reminded Complainant of the applicable rule of professional conduct concerning the revelation of client confidences.

When a judge learns of reliable evidence that a lawyer has violated applicable rules of professional conduct, the judge should take appropriate action. See Canon 3(B)(5), Code of Conduct for United States Judges. Because there is ample record support for the Subject Judge's concern that Complainant may have violated the rules of professional conduct in the course of defending himself against the contempt charge, there is no basis for a claim that the Subject Judge acted without cause or made the referral merely due to personal dislike for Complainant. These allegations are therefore subject to dismissal. 28

U.S.C. § 352(b)(1)(A)(iii); Rule 11(c)(1)(C), (D), Rules for Judicial-Conduct and Judicial-Disability Proceedings.

IV.

For all of the foregoing reasons, this complaint of judicial misconduct is dismissed pursuant to 28 U.S.C. §§ 352(b)(1)(A)(i), (ii), and (iii).

s/ Theodore A. McKee
Chief Judge

JUDICIAL COUNCIL OF THE THIRD CIRCUIT

J.C. No. 03-15-90106

IN RE: COMPLAINT OF JUDICIAL MISCONDUCT
OR DISABILITY

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

ORDER

(Filed: June 3, 2016)

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)(i), (ii), and (iii).

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.
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> Rule 18(b) Time. A petition for review must be filed in the Office of the Circuit Executive within **42 days** after the date of the chief judge's order.
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> 18(b) Form. The petition should be in letter form, addressed to the Circuit Executive, 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 and on the Court of Appeals' internet site, www.ca3.uscourts.gov.

s/ Theodore A. McKee
Chief Judge

Dated: June 3, 2016