

JUDICIAL COUNCIL
OF THE FIRST CIRCUIT

IN RE
COMPLAINT NO. 01-12-90015

BEFORE
Lynch, Chief Circuit Judge

ORDER

ENTERED: JULY 11, 2012

Complainant, an attorney, filed a complaint against a district judge alleging a violation of the Judicial Conduct and Disability Act, 28 U.S.C. § 351 (a). Complainant alleges that the judge engaged in misconduct while presiding over two cases in which complainant appeared as counsel.

First, complainant alleges that the judge treated complainant in a "demonstrably egregious and hostile manner" by including criticisms of counsel in a published order that the judge issued in a recent post-conviction petition. Complainant contends that the judge's opinion "derided and attacked the professionalism" of complainant, in violation of Rule 3(h)(1)(D) of the Rules for Judicial-Conduct and Judicial-Disability Proceedings (Rules of Judicial-Conduct) ("Cognizable misconduct . . . includes . . . treating litigants

or attorneys in a demonstrably egregious and hostile manner . . .").

The complainant secondly alleges that, well over a decade ago, the judge engaged in ex parte communication with an individual who was represented by complainant, which complainant alleges was improper. Complainant contends that this meeting, held in response to a motion that the defendant filed pro se after his conviction but before sentencing, and in the presence of a stenographer and standby counsel for the defendant, violated "basic norms of judicial conduct," and Rule 3(h)(1)(C) of the Rules of Judicial-Conduct ("Cognizable misconduct . . . includes . . . having improper discussions with parties or counsel for one side in a case . . ."). Although complainant has known about this second matter for years, this is the first time he has complained it was misconduct.

Pursuant to Rule 11(b) of the Rules of Judicial-Conduct, I have conducted a limited inquiry into the allegations. This inquiry has included a thorough review of the misconduct complaint, as well as the dockets, pleadings, transcripts and court orders in both of the relevant cases. I have also requested and reviewed a written response from the subject judge to the allegations contained in the misconduct complaint. See 28 U.S.C. § 352(a)(2), and Rules of Judicial-Conduct, Rule 11(b).

For the reasons explained below, I dismiss the misconduct complaint as to both matters. Neither the published order issued in the civil case nor the judge's communication with the defendant in the criminal matter some years ago constitute misconduct under the statute. See 28 U.S.C. § 352(b)(1)(A)(i). See also Rules of

Judicial-Conduct, Rules 11(c)(1)(A), and Commentary on Rule 11 (Dismissal is appropriate where "a limited inquiry shows that the allegations do not constitute misconduct . . .").

Judicial Hostility

Complainant's primary allegation is that the judge wrongfully "attacked" complainant's professionalism when, in a published opinion, the judge chastised complainant for using a rancorous tone of voice, leading questions, and a generally combative demeanor in examining two witnesses during an evidentiary hearing in a proceeding on the petition. Complainant concludes that the judge "manipulat[ed the] record to suit [the judge's] interests."

In the hearing in which complainant represented the petitioner, complainant contended that petitioner's former trial counsel had interfered with petitioner's right to testify at a criminal trial conducted almost six years earlier. The complainant's examination during the hearing of two witnesses, one of whom had been the petitioner's trial counsel, precipitated the judge's rebuke of the complainant's conduct. In the published order, the judge cautioned complainant to maintain civility and professionalism, admonished the complainant for relying on leading questions despite the court's orders to the contrary, and observed that the complainant had improperly and unnecessarily impugned the integrity of two professional colleagues.

While an audio recording of the hearing is not available, the written transcript of the proceeding demonstrates that the judge was well within the bounds of propriety in the commentary. The transcript demonstrates that, although the court denied complainant's request to treat trial counsel as a "hostile" witness, complainant persisted in doing so, asking almost only leading questions for close to two hours. Complainant's contention that the transcript of the hearing is "totally devoid of any objection . . . concerning [complainant's] tone of voice" is contradicted by the transcript. In fact, opposing counsel objected many times to complainant's "argumentative" tone in questioning petitioner's former trial counsel. The court sustained all but one of these objections. The complainant, to his credit, apologized on the record after one such objection was sustained.

The same held true for the examination of the other witness. The judge sustained multiple objections by opposing counsel to complainant's repeated attempts to discredit the witness' testimony on the grounds that the questions were both repetitive and argumentative.

The judge's comments in the cited opinion concerning complainant's conduct are neither "egregious," nor "hostile." See Rules of Judicial Conduct, Rule 3(h)(1)(D) ("Cognizable misconduct . . . includes . . . treating litigants or attorneys in a demonstrably egregious and hostile manner . . ."). They reflect the judge's view that complainant was inappropriately argumentative, combative, disrespectful to the

witnesses, and noncompliant with the court's orders in examining the two witnesses.

Judges are required to keep control of their courtrooms. See Boudin, C.C.J., Order, In Re: Judicial Misconduct Complaint No. 429, June 12, 2006, at 4 ("A judge must exercise reasonable discretion over his or her courtroom environment."). In so doing, judges commonly express views based upon the record, both in court and in written opinions, and they are permitted "leeway in the crafting of judicial opinions." In Re: Complaint of Jane Doe, 640 F.3d 861, 863 (Judicial Council of the Eighth Circuit, February 24, 2011). See also Boudin, C.C.J., Order, In Re: Judicial Misconduct Complaint No. 444, January 23, 2007, at 4 (The expression of views by a judge, based on the record, and the tone maintained by a judge do not alone provide a basis for a finding of judicial misconduct.).

Complainant's assertion that the judge's comments were intended to serve some unstated "interests" is utterly unsubstantiated. As purported evidence that the judge manipulates case records to suit personal interests, complainant provides a segment of a transcript of a sentencing hearing in an unrelated criminal proceeding. This transcript segment contains a statement in which the judge uses the word "manipulate" to describe the court's handling of the proceeding. Complainant takes this sentence completely out of context. The judge was responding to defense counsel's request for a reduced sentence and used the phrase to describe the court's previous procedural rulings that had been advantageous to the defense. The assertion that this isolated statement would somehow support complainant's claim of improper judicial motivation in the present matter is

untenable. The judge's criticisms derived exclusively from complainant's examination of the two witnesses at the hearing, and do not even approach "the sort of 'deep-seated unequivocal antagonism' that may constitute misconduct." In Re: Jane Doe, 640 F.3d at 863, *citing* Liteky v. U.S. 510 U.S. 540, 556, 114 S.Ct. 1147 (1994) (Judge's "efforts at courtroom administration" are not alone indicative of bias or partiality).

The public dissemination of criticisms of an attorney in a written opinion raises somewhat different concerns. Attorneys clearly have an important interest in their professional reputations and those reputations can be influenced by the words of a judge. Nonetheless, this too is an area in which the judge has wide discretion. See Jane Doe, 640 F.3d at 863, in which the Judicial Council of the Eighth Circuit determined that a published opinion in which the court titled a section of a published opinion "[Complainant] Strikes Back" did not, based on the record, suggest that "the district judge disparaged, attacked or ridiculed complainant or otherwise treated [complainant] with hostility." In this matter, I find it was within the judge's discretion to include in the published opinion criticisms of counsel's conduct. While the judge could have chosen not to do so, this was itself a judgment call and is not a basis for a misconduct finding.

In short, the judge's comments on the complainant's handling of the proceeding were well within the judge's discretion and certainly do not rise to the level of misconduct. Accordingly, the claim to that effect is dismissed as not indicative of misconduct. See 28 U.S.C. § 352(b)(1)(A)(i). See also Rules of Judicial-Conduct, Rules

11(c)(1)(A). I express my hope that the judge and the complainant, both of whom are respected, will be able to put this matter behind them.

Improper Communication

I turn now to the claim that the judge engaged in an "improper discussion" with complainant's client.¹ The claim is dismissed because the ex parte hearing at issue did not constitute misconduct. Nor does it provide any support for the claim just dismissed. The reviewed record demonstrates that the defendant in the case at issue was convicted after a lengthy jury trial on a number of money laundering, conspiracy and other charges. The defendant was one of many tried and convicted in the case. Several months after the defendant's conviction and while awaiting sentencing, the defendant filed a pro se sealed motion with the court. This motion was not filed ex parte. The record indicates that the defendant sent a copy to the United States Attorney. Defendant did not, however, inform his appellate counsel, the complainant in this matter, of the motion.²

There is no need here to disclose the contents of the pro se letter, which remains a

¹Complainant states that, though he learned of this matter from his client at the time, he elected not to file a misconduct complaint because his client's sentencing was pending and complainant "wanted to avoid reprisals." The sentencing was completed some 12 years before this complaint was filed. It is obvious that well over a decade has passed since defendant's sentencing during which time complainant did not elect to raise the matter. Still delay is not the basis for the dismissal of the claim. See Rules of Judicial-Conduct, Commentary on Rule 11.

²The defendant's trial counsel had terminated their representation after defendant's conviction. Complainant was thereafter retained as appellate counsel and had filed an appearance with the court roughly two months before the defendant filed the pro se sealed motion at issue.

sealed document. The defendant requested that it be kept by the court from his counsel of record. I stress that the motion did not, however, concern any problem between the defendant and his appellate counsel, the complainant. In response to the motion, the judge immediately appointed stand-by counsel and held a hearing with the defendant, standby counsel and the stenographer at the prison in which the defendant was awaiting sentencing. The hearing was transcribed and the transcript was affixed to the court's sealed order appointing stand-by counsel.

The transcript(s)³ of the hearing demonstrate that the judge recounted the substance of the defendant's motion. The motion did not concern and the court did not address any substantive matter concerning the defendant's conviction, sentence, or the merits of the case. On the advice of stand-by counsel, the defendant decided to inform his appellate attorney (complainant) of the issue raised in the motion. The court did not take any action on the motion.

The Code of Conduct for United States Judges (Code of Conduct) provides informative guidelines for the analysis of claims of misconduct, see Rules of Judicial-Conduct, Commentary on Rule 3. There was no violation of the Code of Conduct. Further, a violation of the Code of Conduct does not necessarily constitute misconduct under the statute. See Rules of Judicial-Conduct, Commentary on Rule 3.

³There were two transcripts produced - one the day after the hearing and one a number of years later during one of the defendant's appeals. Complainant does not state when he received the transcript but the one submitted with the misconduct complaint was produced in 2005.

Canon 3A(4) of the Code of Conduct provides, in part:

A judge should accord to every person who has a legal interest in a proceeding, and that person's lawyer, the full right to be heard according to law. Except as set out below, 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. If a judge receives an unauthorized ex parte communication bearing on the substance of a matter, the judge should promptly notify the parties of the subject matter of the communication and allow the parties an opportunity to respond, if requested. A judge may:

(a) initiate, permit, or consider ex parte communications as authorized by law;

(b) when circumstances require it, permit ex parte communication for scheduling, administrative, or emergency purposes, but only if the ex parte 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 of the ex parte communication

Code of Conduct, Canon 3A(4).

First, the defendant's motion was not filed ex parte; the government was copied.

While the government was not invited to attend the hearing on the motion, the proceeding falls squarely within subsection (b) of Canon 3A(4). The ex parte hearing, held in response to the defendant's pro se motion, did not address a substantive matter or the merits of the case. The judge held the hearing on an emergency basis in response to a request from the defendant for prompt court intervention and defendant's explicit request that his counsel of record not be notified. The judge employed multiple safeguards, including the appointment of stand-by counsel, placing the defendant under oath, and preserving an official transcription of the hearing. The court also took no action on the

underlying motion and complainant was subsequently notified of the motion. The judge explicitly stated that the defendant could tell his attorney about the sealed motion, the hearing, and the availability of a transcript for counsel's review. It was agreed at the conclusion of the hearing that the defendant would do just that.

The record establishes that the court endeavored to ensure that "no party [would] gain a procedural, substantive, or tactical advantage as a result of the [hearing] . . ." Code of Conduct, Canon 3A(4)(b), and complainant offers no evidence to the contrary. See also Boudin, C.C.J., Order, In Re: Judicial Misconduct Complaint No. 309, October 17, 2001, at 5 (Ex parte communication does not necessarily constitute judicial misconduct.).

Finally, the location of the hearing does not make the hearing unethical or indicative of wrongdoing. In light of the (incarcerated) defendant's request that his attorney not be informed of the motion, the apparent publicity surrounding the case, and the substance of the motion itself, the judge reasonably concluded that an in-court hearing to address the issue was not a viable option. Accordingly, the complainant's claim concerning the ex parte hearing is dismissed as not indicative of misconduct, pursuant to 28 U.S.C. §§ 352(b)(1)(A)(i). See also Rules of Judicial-Conduct, Rule 11(c)(1)(A), and Judicial Misconduct Complaint No. 309, *supra*, at 6, in which then Chief Judge Boudin, noting that multiple circumstances may warrant ex parte proceedings, dismissed a misconduct claim against a judge who ruled on defense counsel's ex parte motion as not indicative of misconduct. In that matter, unlike the present, both the motion and the

hearing occurred ex parte, the hearing was not transcribed, and the court ruled on the motion. See id.

Complainant fails to identify any improper motivation on the part of the judge, or provide any facts in support of this contention. The reviewed record likewise contains no information whatsoever suggesting that the judge was biased or improperly motivated in deciding to hold the hearing at issue. "Any allegation that calls into question the correctness of an official action of a judge - without more - is merits related." Rules of Judicial-Conduct, Commentary on Rule 3. Where, as here, there is no evidence of improper judicial motivation, whether an ex parte communication is "authorized by law," under subsection (a) of Canon 3A(4), or is otherwise improper, is "an issue related to the merits which is not cognizable under the judicial misconduct statute." In Re: Judicial Misconduct Complaint No. 309, *supra*, at 7. Accordingly, the claim that the judge's decision to hold the hearing constituted misconduct, and the related assertion that the court did so without jurisdiction, are dismissed as merits-related, pursuant to 28 U.S.C. § 352(b)(1)(A)(ii). See also Rules of Judicial-Conduct, Rules 11(c)(1)(B).

For the reasons stated, Complaint No. 01-12-90015 is dismissed, pursuant to 28 U.S.C. §§ 352(b)(1)(A)(i), and 352(b)(1)(A)(ii). See also Rules of Judicial-Conduct, Rules 11(c)(1)(A), and 11(c)(1)(B).

7/11/12
Date

Sandra L. Lynch
Chief Judge Lynch