

JUDICIAL COUNCIL
OF THE FIRST CIRCUIT

IN RE
COMPLAINT NOS. 01-16-90026, 01-16-90032

BEFORE
Howard, Chief Circuit Judge

ORDER

ENTERED: NOVEMBER 14, 2016

I. Complaints

Complainant, an attorney, filed a complaint of misconduct, under 28 U.S.C. § 351(a), against a First Circuit district judge and magistrate judge. The complainant alleges that the judges engaged in bias and other wrongdoing in connection with a miscellaneous proceeding several years ago that resulted in complainant's disbarment. The misconduct complaint is baseless and not cognizable.

The miscellaneous proceeding at issue in the complaint arose from an underlying civil matter in which complainant represented some of the plaintiffs. A number of complainant's clients in that proceeding filed objections concerning the propriety of complainant's deductions from the settlement proceeds. These objections were referred to the subject magistrate judge for investigation in the miscellaneous proceeding. The

magistrate judge held several evidentiary hearings and issued two reports and recommendations (R&Rs). In one R&R, the magistrate judge found that complainant had engaged in multiple, serious ethics violations and recommended further investigation and disciplinary proceedings leading to disbarment. In the other R&R, the magistrate judge recommended that, as a result of complainant's misconduct and demonstrated debts, the monies be distributed to petitioners and various third parties who had demonstrated an interest in the funds. The subject district judge adopted the R&Rs in full, held a final hearing that complainant failed to attend and ordered complainant disbarred. The Court subsequently rejected complainant's request for the magistrate judge's recusal and/or resignation. On appeal, the First Circuit Court of Appeals affirmed the District Court's orders on both the disbarment and the disbursement of disputed funds.

Complainant contends that, in presiding over the miscellaneous proceeding, the judges violated the Code of Conduct for United States Judges (Code of Conduct) and the Judicial Conduct and Disability Act. Complainant alleges that the Court was personally biased against him, as demonstrated, in part, by an "inquisitorial" tone, "excessive rudeness" and "humiliating sarcasm." Complainant contends that the magistrate judge also exhibited bias during an evidentiary hearing by nearly causing complainant to miss a flight and unreasonably denying his request for a recess to use the restroom.

Complainant maintains that the magistrate judge was "excessive[ly] suggestive[]" when questioning witnesses, while ignoring facts and statements that favored complainant.

Complainant contends that this personal bias motivated the judges' official actions and orders in the miscellaneous proceeding. Complainant asserts that the Court failed to provide him with adequate notice of either the allegations of ethics violations lodged against him or the scope of the proceeding, prejudicing his ability to mount an appropriate defense. Essentially, complainant maintains that he was not informed that his disbarment was at issue in the proceeding. He further contends that he was precluded from examining adverse witnesses, that the magistrate judge made multiple factual misrepresentations in the R&Rs and that the judges applied the wrong legal standard for disbarment.

Complainant also alleges that the magistrate judge's failure to recuse - and the district judge's failure to order the magistrate judge's recusal - constituted misconduct. Complainant continues that, by disbursing the disputed funds, the judges illegally seized and attached monies that belonged to him. Relatedly, he contends that the judges improperly denied his requests for emergency disbursements based on hardship. He further alleges that the judges failed to give full faith and credit to a local court decision.

Complainant next argues that he was prejudiced by a delay in the issuance of the two R&Rs, and that the magistrate judge engaged in improper ex parte communications in the course of the miscellaneous proceeding.

Finally, complainant contends that certain documents are missing from the docket and that the transcript of an evidentiary hearing omits a statement in which the magistrate judge allegedly directed complainant to "keep [his] mouth shut."

II. Inquiry and Analysis

Pursuant to Rule 11(b) of the Rules for Judicial-Conduct and Judicial-Disability Proceedings (Rules of Judicial-Conduct), a limited inquiry was conducted. A thorough review of the records of the relevant cases (including the dockets, pleadings, transcripts and court orders) provides no factual support for complainant's conclusory allegations of judicial wrongdoing.¹

As an initial matter, because the district judge has since retired from service and there are no "special circumstances in which the public interest justifie[s] proceeding with the complaint," the misconduct complaint against the district judge is dismissed as moot. See Lynch, C.C.J., Order, In Re: Judicial Misconduct Complaints Nos. 01-14-90008 and 01-14-90009, July 10, 2014, at 2, citing Boudin, C.C.J., Order, In Re: Judicial Misconduct Complaint No. 387, October 7, 2004, at 2. See also 28 U.S.C. § 352(b)(1)(A)(i); Rules of Judicial-Conduct, Rule 11(c)(1)(A).

Complainant's allegations of misconduct against the magistrate judge are, almost exclusively, another attempt to challenge the substance of judicial rulings, including his ultimate disbarment. Neither the voluminous complaint nor the lengthy record of the relevant proceedings contain any facts supporting the contention that the Court's orders were motivated by personal bias. Despite the complainant's contention to the contrary, the magistrate judge's allegedly "nasty" or "inquisitorial" tone, the length of a hearing

¹ A violation of the Code of Conduct may inform consideration of a judicial misconduct complaint, but a violation of the Code does not necessarily constitute judicial misconduct under the statute. See Rules of Judicial-Conduct, Commentary on Rule 3.

(that allegedly almost caused complainant to miss a flight) and the denial of his request to use the restroom do not evidence improper judicial motive. See Howard, C.C.J., Order, In Re Complaint No. 01-15-90012, October 7, 2015, at 4, citing Boudin, C.C.J., Order, In Re Complaint No. 429, June 12, 2006, at 4 ("A judge must exercise reasonable discretion of his or her courtroom environment."); Judicial Conference Committee on Codes of Conduct, Advisory Opinion No. 66, June 2009 ("[E]xpressions of impatience, dissatisfaction, annoyance and even anger directed to an attorney or a party should not be confused with judicial bias.").

Where, as here, there is no evidence of bias, challenges to the substance of a court's rulings are not cognizable. See Rules of Judicial-Conduct, Rule 3(h)(3)(a) ("Cognizable misconduct . . . does not include . . . an allegation that is directly related to the merits of a decision or procedural ruling. An allegation that calls into question the correctness of a judge's ruling, including a failure to recuse, without more, is merits-related."). This includes complainant's objections to the Court's rulings on the adequacy of notice (concerning both the substance and scope of the ethics complaints filed against him and the miscellaneous proceeding). The Court found, the Court of Appeals affirmed, and the uncontroverted record confirms that the entire record was available to complainant, that he had reviewed its contents and that he had been given sufficient notice of the proceeding.

Similarly, complainant's contention that he was not provided with an opportunity to examine adverse witnesses has been addressed and dismissed by the courts. The

district judge and the Court of Appeals reviewed this issue and dismissed complainant's allegation as baseless.

Complainant's argument on the legal standard governing disbarment proceedings was also repeatedly rejected, as were complainant's claims that the magistrate judge improperly disbursed the funds and denied complainant's requests for financial relief. Additionally, both the District Court and the Court of Appeals expressly rejected complainant's argument that the courts were required to give full faith and credit to a decision from a local court.

Complainant offers no information in the instant complaint that suggests that the magistrate judge harbored an improper motive in issuing any of these orders, in denying complainant's motion for recusal, or otherwise in presiding over the proceeding.² Accordingly, these allegations are dismissed as not cognizable, pursuant to 28 U.S.C. § 352(b)(1)(A)(ii). See also Rules of Judicial-Conduct, Rule 11(c)(1)(B). As these same allegations are also either conclusively refuted or wholly unsupported by the reviewed record, they are also dismissed pursuant to 28 U.S.C. § 352(b)(1)(B). See also Rules of Judicial-Conduct, Rule 11(c)(1)(D).

Complainant's remaining claims are equally without merit. The allegation that the magistrate judge delayed in issuing the two R&Rs is not cognizable. See Rules of

² "Conceivably, there may be situations where a ruling is so extraordinary a departure from the usual course of judicial proceedings that it might, in conjunction with other more direct evidence, suggest that the judge was engaged in judicial misconduct." Boudin, C.C.J., Order, In re: Judicial Misconduct Complaint No. 309, October 17, 2001, at 7. Here, there is nothing remarkable about the Court's orders, nor is there any other evidence - direct or otherwise - of bias or other judicial misconduct.

Judicial-Conduct, Rule 3(h)(3)(B); see also id. Commentary on Rule 3 ("[A] complaint of delay in a single case is excluded as merits-related."). As there is no evidence of any improper motive, this allegation is dismissed pursuant to 28 U.S.C. § 352(b)(1)(A)(ii). See also Rules of Judicial-Conduct, Rule 11(c)(1)(B).

To the extent that complainant's multiple assertions of improper *ex parte* communications by the magistrate judge are decipherable, complainant seemingly alleges that the magistrate judge engaged in improper *ex parte* communication with two former clients and one former employee of complainant's.

With regard to the former clients, the record demonstrates that the magistrate judge heard testimony from these individuals outside of complainant's presence. The first client requested that the magistrate judge hear from him in private concerning his difficulties with complainant's representation. The other witness was ordered to appear concerning complainant's representation in an unrelated matter. In both cases, the magistrate judge clearly detailed the substance of the individuals' testimonies in an R&R. Nowhere in his lengthy objection to the R&R did complainant identify either individual or dispute the substance of their testimonies. Nor did complainant appear at the final hearing before the district judge, where he also might have objected to the alleged *ex parte* communications and/or to the substance of these witnesses' testimonies.

"Although the presumption is against *ex parte* proceedings, exceptions have been regularly approved where circumstances so warrant." Boudin, C.C.J., Order, In re: Judicial Misconduct Complaint No. 309, October 17, 2001, at 6, citing United States v.

Innamaroti, 996 F.2d 456, 487 (1st Cir. 1993). Here, 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]" and provided complainant with multiple opportunities to respond to the testimonies of these witnesses. See Code of Conduct, Canon 3A(4)(b). Also, in accordance with the Code of Conduct, the magistrate judge "promptly notif[ied] the parties of the subject matter of the communication and allow[ed complainant] an opportunity to respond[.]" Id. Canon 3(a)(4). See also Lynch, C.C.J., Order, In Re Complaint No. 01-12-90015, July 11, 2012, at 10, citing In re: Judicial Misconduct Complaint No. 309, supra, at 5. On these facts, the magistrate judge's communications with the two witnesses did not amount to a violation of the Code of Conduct, let alone misconduct. Accordingly, these allegations are dismissed pursuant to 28 U.S.C. § 352(b)(1)(A)(i). See Rules of Judicial-Conduct, Rule 11(c)(1)(A). See also id. Rule 3(h)(1)(C) ("Misconduct includes . . . having improper discussions with parties or counsel for one side in a case[.]") (emphasis added).

Furthermore, 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.'" See In Re Judicial Misconduct Complaint No. 01-13-90015, supra, at 11, quoting In Re: Judicial Misconduct Complaint No. 309, supra, at 7. Accordingly, complainant's allegations of misconduct arising from the ex parte communications with complainant's two former clients are dismissed as merits-related,

pursuant to 28 U.S.C. § 352(b)(1)(A)(ii). See also Rules of Judicial-Conduct, Rule 11(c)(1)(B).

With regard to complainant's vague claim of improper ex parte communication with complainant's former employee, the Court heard from this witness during an evidentiary hearing. The record suggests that complainant was present and was provided with an opportunity to file an objection to the witness's testimony. As the record is devoid of evidence of ex parte communication with this witness, this claim is dismissed as unfounded, pursuant to 28 U.S.C. § 352(b)(1)(B). See also Rules of Judicial-Conduct, Rule 11(c)(1)(D).

Complainant's claim of docketing errors is not indicative of misconduct by the magistrate judge. Such errors or omissions, if any, would not be attributable to the presiding judge or indicative of misconduct. See, e.g., In Re Judicial Misconduct Complaint No. 01-13-90015, supra, at 3-4, citing Boudin, C.C.J., Amended Order, In Re Judicial Misconduct Complaint No. 406, Sept. 5, 2005, at 3. Accordingly, this allegation is dismissed pursuant to 28 U.S.C. § 352(b)(1)(A)(i). See also Rules of Judicial-Conduct, Rule 11(c)(1)(A).

Lastly, complainant's allegation concerning a missing comment from a transcript also fails. According to complainant, the magistrate judge told complainant to "keep [his] mouth shut" during the fourth day of evidentiary hearings. The hearing transcripts demonstrate that the magistrate judge gave complainant ample opportunity to participate and to respond. On this record, the comment, if made as alleged, would not constitute

misconduct. See supra, at 5. Accordingly, this claim is dismissed pursuant to 28 U.S.C. § 352(b)(1)(A)(i). See also Rules of Judicial-Conduct, Rule 11(c)(1)(A).

III. Conclusion

For the reasons stated, Complaint Nos. 01-16-90026 and 01-16-90032 are dismissed, pursuant to 28 U.S.C. §§ 352(b)(1)(A)(i), 352(b)(1)(A)(ii) and 352(b)(1)(B). See also Rules of Judicial-Conduct, Rules 11(c)(1)(A), 11(c)(1)(B) and 11(c)(1)(D), respectively.

11/14/2016

Date



Chief Judge Howard