

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT

NOV 27 2017

David J. Smith
Clerk

CONFIDENTIAL

**BEFORE THE CHIEF JUDGE
OF THE ELEVENTH JUDICIAL CIRCUIT**

Judicial Complaint No. 11-17-90031

IN THE MATTER OF A COMPLAINT FILED BY _____

IN RE: The Complaint of _____ against _____, U.S. Magistrate Judge
for the U.S. District Court for the _____ District of _____, under the
Judicial Conduct and Disability Act of 1980, Chapter 16 of Title 28 U.S.C.
§§ 351-364.

ORDER

_____ (“Complainant”) has filed this Complaint against United States
Magistrate Judge _____ (the “Subject Judge”), pursuant to Chapter 16 of Title 28
U.S.C. § 351(a) and the Rules for Judicial-Conduct and Judicial-Disability Proceedings of
the Judicial Conference of the United States (“JCDR”).

Background

The record shows that in 2007 a plaintiff, who was represented by Complainant
and another attorney, filed in state court a lawsuit against multiple defendants, and the
case was removed to federal court. The plaintiff later filed an amended complaint, and
the defendants filed a motion for summary judgment. The record shows that the Subject
Judge issued multiple orders on various discovery-related motions in the case. In a June
2008 order, the Subject Judge found that, in light of Complainant’s unreasonable
behavior in conducting discovery, the defendants were entitled to costs and expenses
incurred in responding to certain motions. A few months later, the Subject Judge entered
an order directing Complainant to pay more than \$1,400 in costs to the defendants. The
district judge later affirmed the order imposing sanctions.

In March 2009 the district judge granted the defendants’ motion for summary
judgment. This Court later issued an opinion in which it, among other things, affirmed
the district court’s grant of summary judgment in favor of the defendants and affirmed
the imposition of sanctions against Complainant. In April 2009 the defendants filed a
motion seeking attorney’s fees pursuant to a state statute and fees against the plaintiff and
Complainant for unreasonably and vexatiously multiplying the proceedings, pursuant to
28 U.S.C. § 1927. After various proceedings, in June 2011 the plaintiff, through
Complainant, filed a motion for Rule 11 sanctions, arguing that the defendants had made
misrepresentations in a memorandum in support of their motion for fees.

In February 2012 the Subject Judge issued an order and report in which she, among other things, recommended that: (1) the defendants' motion for attorney's fees under the state statute be granted; (2) the defendants' motion for fees be denied to the extent it sought sanctions under § 1927; (3) the plaintiff's motion for Rule 11 sanctions be denied; and (4) the district court award attorney's fees to the defendants for expenses incurred in defending against the meritless Rule 11 motion. In the order, the Subject Judge also addressed what she deemed to be an allegation of judicial misconduct by Complainant, stating that the court would not address the "fantastic, wholly unsupported—and unsupportable—accusations, other than to state that the fact [Complainant] would feel free to make such wild assertions reflects, at the very least, a shocking lack of professional judgment, self-restraint, and discretion." Also, in examining whether attorney's fees were appropriate, the Subject Judge found that Complainant had engaged in "deplorable" conduct that reflected "poorly on [his] professionalism," but that his conduct did not demonstrate evidence of bad faith.

The plaintiff, through Complainant, filed objections to the report and recommendation, stating that the report made "a number of damaging allegations against Plaintiff's counsel, bearing on professionalism, character, integrity." In March 2012 the district judge adopted the Subject Judge's report and recommendation. In January 2013 the Subject Judge issued a second report, recommending that the plaintiff be directed to pay more than \$53,000 in attorney's fees and that Complainant be directed to pay more than \$5,000 for the defendants' costs incurred in opposing the Rule 11 motion. Over the plaintiff's objections, the district judge adopted the second report and recommendation. This Court affirmed that judgment, concluding, among other things, that the district court did not err in determining that Complainant, as plaintiff's counsel, "filed the Rule 11 motion at least in part as an improper combative tool."

Complaint

In his Complaint of Judicial Misconduct or Disability, Complainant states that his Complaint arises from the Subject Judge "having ghostwritten an unsuccessful _____ Bar complaint" against him, and her "concealment of her role in making the complaint." Complainant states that in September 2015 he "accepted an invitation from the Federal Judicial Nominating Commission [("JNC")] of _____ to submit written comments" regarding the Subject Judge's application for a district court judgeship. He states, "I had endured about ten years of bad experience with [the Subject Judge] in a long-running case in which she targeted and abused me at nearly every opportunity. So I addressed mostly that and added a couple of other matters." Complainant states that the Subject Judge did not make the "final cut and, apparently, assigned at least partial blame to [Complainant] for her not being nominated."

Complainant states that in July 2016 the Subject Judge's "mentor," United States District Judge _____, "filed an ethics complaint against [Complainant] with the

_____ Bar because of [his] statement” to the JNC. Complainant notes that the Subject Judge received a copy of his statement and was questioned about it in her interview with the JNC. He states that the Subject Judge “obviously” provided a copy of his statement to Judge _____.

Complainant states, “When the Bar complaint against me came in from Judge _____, I recognized immediately that [the Subject Judge] was the real author, not Judge _____.” Complainant states that the bar complaint mostly challenged assertions he made in his statement to the JNC about the Subject Judge’s conduct and remarks in the civil case. Complainant contends that “[t]here are only two people on planet Earth who know that record well enough to have summoned the level of esoteric detail included in the Bar complaint and in the reply to my response to the Bar complaint. Those two are [the Subject Judge] and me.” Complainant also asserts that “the Bar complaint contained many of [the Subject Judge’s] characteristic styles of expression and strengths and weaknesses in reasoning and knowledge.” He then states, “Something else my counsel and I discovered in considering computer-based author identification was that Judge _____ had not written anything of sufficient length to serve as a proper baseline comparison document in more than 15 years. He could not be the author.”

Complainant reports that his attorney called Judge _____, “capture[d]” his answers by typing quickly, and reported them to Complainant as follows. When asked about whether the bar complaint and reply were written by him, Judge _____ stated, “What does it matter who prepared the complaint?” and, “It should be accepted as my work.” When asked whether the Subject Judge had prepared the complaint, Judge _____ stated, “Who types or who contributes to the complaint should not matter.” When asked if he was willing to say whether the Subject Judge had drafted the complaint, Judge _____ stated, “I am not willing to discuss it with you at all.” Complainant states that the Subject Judge “declined to accept or return a call on the subject.”

Complainant contends that there are many situations where “ghostwriting by judges and lawyers is simply not acceptable,” and that ghostwriting a bar complaint falls in this category. He states that the Subject Judge “could not be seriously considered” for a district judge position “if she had retaliated against a lawyer/citizen for answering the Nominating Commission’s call to provide information to inform the Commission’s decision.” He also states that the Commission “could never trust an applicant’s submissions and representations if that applicant had a known history of filing Bar complaints or taking other reprisals in an effort to silence citizens from informing the Commission about applicants for lifetime appointment.”

Complainant contends that, while a bar complaint signed by the Subject Judge would be merely self-serving, a complaint written by the Subject Judge but signed by Judge _____ “carries not only judicial imprimatur but an appearance of impartiality, objectivity, and professional detachment. That is deception that runs afoul of the Canons

of Judicial Conduct.” He asserts that the Subject Judge’s “use of Judge _____ as a front for her complaint against me leaves her appearing ‘clean’ to apply for a future vacancy, adds the weight and credibility of impartiality to a vindictive charge, and perpetrates a deception that dishonors the federal judiciary.”

Complainant attached various documents to his Complaint, including a June 2016 complaint to the _____ Bar filed against him by Judge _____. In that bar complaint, Judge _____ generally took issue with the statements Complainant made in a letter to the JNC regarding the Subject Judge, and specifically alleged that he violated the rules regulating the _____ Bar by making statements he knew were false or with reckless disregard as to their truth or falsity concerning the qualifications or integrity of a judge, and by unfairly undermining public confidence in the administration of justice. Judge _____ stated that Complainant’s comments may have significantly interfered with the Subject Judge’s opportunity to be fairly considered for appointment to the district court.

Complainant also attached a September 2015 cover letter and “Statement in Opposition to Judicial Appointment” addressed to the JNC in which he generally opposed the nomination of the Subject Judge for a district judge position. In those documents, Complainant primarily discussed the proceedings in the civil case, essentially attempting to relitigate that case on the merits. In relation to that case, he alleged that the Subject Judge: (1) was not fair or impartial, showed favoritism to defense counsel, and has “concern . . . uniformly in favor of wealth and power”; (2) “harshly and incorrectly criticized” him for his legal arguments, attacked him in a “reckless and false” manner, and “went looking for dirt” on him; and (3) made misrepresentations.¹

In his statement to the JNC, Complainant neglected to explain why this Court had affirmed the district court’s judgment, which in turn had adopted findings made in the Subject Judge’s reports and recommendations. In affirming that judgment, this Court stated:

[Quotation redacted.]

[Citations redacted.] This Court upheld the district court’s judgment awarding attorney’s fees to the defendants-appellees for the expenses they had incurred opposing the plaintiff’s Rule 11 motion, concluding that Complainant had, at least in part, filed that motion as “as an improper combative tool.” Finally, this Court concluded that the district court acted within its discretion in denying the plaintiff leave to pursue fees under 28

¹ He also alleged that the Subject Judge had brought a divorce proceeding in an “unlawful venue.”

U.S.C. § 1927. This Court's decision and opinion in the case are inconsistent with the factual and legal premises of Complainant's filing in the JNC against the Subject Judge.

Discussion

Rule 3(h)(3)(A) of the Rules for Judicial-Conduct and Judicial-Disability Proceedings of the Judicial Conference of the United States provides that cognizable misconduct does not include "an allegation that is directly related to the merits of a decision or procedural ruling." The Rule provides that "[a]n allegation that calls into question the correctness of a judge's ruling, including a failure to recuse, without more, is merits-related." Id. The "Commentary on Rule 3" states in part:

Rule 3(h)(3)(A) tracks the Act, 28 U.S.C. § 352(b)(1)(A)(ii), in excluding from the definition of misconduct allegations "[d]irectly related to the merits of a decision or procedural ruling." This exclusion preserves the independence of judges in the exercise of judicial power by ensuring that the complaint procedure is not used to collaterally attack the substance of a judge's ruling. Any allegation that calls into question the correctness of an official action of a judge—without more—is merits-related.

Furthermore, "[a] complaint must be dismissed in whole or in part to the extent that it "alleges conduct that, even if true, is not prejudicial to the effective and expeditious administration of the business of the courts." JCDR 11(c)(1)(A).

The bulk of Complainant's allegations concern the substance of the Subject Judge's official actions, findings, rulings, and orders in the civil case where Complainant was acting as attorney for the plaintiff, and the allegations are directly related to the merits of the Subject Judge's decisions or procedural rulings. Additionally, even if the Subject Judge did participate in Judge _____ drafting of a bar complaint against Complainant, that would not be conduct prejudicial to the effective and expeditious administration of the business of the courts and would not be misconduct. See id.

Judges are not only free to file bar complaints against lawyers whom they believe have violated rules of professional conduct, but they also have a duty to take action in those circumstances. Canon 3B(5) of the Code of Conduct for United States Judges requires that a judge "should take appropriate action upon learning of reliable evidence indicating the likelihood that . . . a lawyer violated applicable rules of professional conduct." Fulfilment of that duty does not mean that the judge is biased against the lawyer. For example, when a judge files a complaint of unprofessional conduct against a lawyer, and the lawyer appears before the judge as counsel in the case in which the lawyer behaved unprofessionally, or in a later case, the judge is not required to recuse on

the grounds of bias or prejudice just because she filed the complaint. JCUS Committee on Codes of Conduct, Advisory Opinion 66 (2009).

Complainant has pointed to no authority suggesting that it would be improper for two judges to have collaborated on a bar complaint that one of the judges filed against a lawyer, and there is no reason that one judge's writing the complaint and the other filing it would be impermissible or improper. Instead, whoever writes or signs it, the filing of a bar complaint is an appropriate action to take based on evidence indicating the possibility that a lawyer violated applicable rules of professional conduct. And just as a filing judge may base a bar complaint on information supplied by a reliable source, including another judge, a judge may supply information to be used in such a complaint.

Complainant's claims are based on allegations lacking sufficient evidence to raise an inference that the Subject Judge engaged in any misconduct related to the bar complaint that Judge _____ filed against Complainant. Nor is there sufficient evidence to raise an inference that the Subject Judge retaliated against Complainant, violated the Code of Conduct for United States Judges, or otherwise engaged in misconduct.

The allegations of this Complaint are "directly related to the merits of a decision or procedural ruling," JCDR 11(c)(1)(B), and the Complaint "is based on allegations lacking sufficient evidence to raise an inference that misconduct has occurred or that a disability exists," JCDR 11(c)(1)(D). For those reasons, pursuant to Chapter 16 of Title 28 U.S.C. § 352(b)(1)(A)(ii) and (iii), and Rule 11(c)(1)(B) and (D) of the Rules for Judicial-Conduct and Judicial-Disability Proceedings of the Judicial Conference of the United States, this Complaint is **DISMISSED**.



Chief Judge