

**FILED**

January 10, 2022

Lyle W. Cayce  
Clerk

# Judicial Council for the Fifth Circuit

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Complaint Number: 05-22-90026

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## MEMORANDUM

Complainant, an attorney, has filed a complaint alleging misconduct by the subject United States Bankruptcy Judge in two adversary proceedings.

### *Background*

Bank X filed suit in state court against a business for amounts due under a promissory note. The bank named as additional defendants Mr. A (a principal owner of the business) and Mrs. A who allegedly personally guaranteed the amount due under the promissory note. Bank X also sought a declaratory judgment recognizing and maintaining its first-ranking security interest in certain shares owned by Mr. A which were pledged as collateral for the loan. Bank Y moved to intervene, claiming that Mr. A had pledged the same shares as collateral for loans made to his other businesses. Represented by Complainant, the defendants filed a counterclaim against Bank X.

Bank X filed an involuntary Chapter 7 petition against the business and simultaneously removed the pending state case to federal court where a United States District Judge referred the matter to the bankruptcy court for adjudication (Adversary Proceeding 1). Complainant continued to represent Mr. A and Mrs. A in adversary proceedings.

At the time of removal, several defense motions were pending before the state court, including motions for leave to assert a third-party demand against Bank X and an investigator, for leave to file an additional counterclaim

for defamation against counsel for Bank X, and to disqualify counsel for Bank X. Of relevance to the instant complaint, prior to his judicial appointment, the subject bankruptcy judge was a partner at the same firm as Bank X's counsel.

*Allegations: Adversary Proceeding 1*

— *August 2020 hearing*

Complainant recounts that prior to an August 2020 hearing, the judge determined that a statement about Mr. A's claims made in a state court pleading constituted a judicial admission that "transformed [his] claim for defamation [against the investigator and Bank X's counsel] into an asset of [bankruptcy debtor]." He alleges that the judge's "outlandish" and "illogical" finding was intended as "a defense for the judge's former law partner and Bank X.

The assertion that the judge "developed a defense for his former partner [and the plaintiff]" is construed as implying the judge had a conflict of interest and should have disqualified himself sua sponte. Canon 3(C)(1) of the Code of Conduct for United States Judges provides:

A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances in which:

...

(b) the judge served as a lawyer *in the matter* in controversy, or a lawyer with whom the judge previously practiced law *served during such association as a lawyer concerning the matter*.

[Emphasis added.]

The judge took the bench nine months before the underlying state court proceeding was filed. Complainant offers no evidence that the judge or

Bank X’s counsel could have worked on the state court litigation prior to the judge’s taking the bench, or that there was any other basis for the judge to consider sua sponte disqualification, or that Canon 3(C)(1)(b) required the judge to discuss remittal with the parties’ counsel.

To the extent that these allegations relate directly to merits of decisions or procedural rulings, including the judge’s implied decision not to disqualify himself, they are subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(ii). In other respects, any assertion of bias in favor of the plaintiff and plaintiff’s counsel appears entirely derivative of the merits-related charges, but to the extent the allegation is separate, it is wholly unsupported, and is therefore subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(iii) as “lacking sufficient evidence to raise an inference that misconduct has occurred.”

— *Hearing 1: January 2021*

Complainant further complains that during a January 2021 motions hearing, the judge “attacked and berated [me] for work done on behalf of a client.” He reports that the judge “demanded an argument on one sentence in the opposition to [Bank Y’s] motion for summary judgment that had been filed before an agreement was reached between the parties.” Complainant states that the argument at issue “was whether a security interest could be avoided or nullified for error” and he submits that, “[i]n light of the agreement for a consent judgment, there was no reason to prepare an argument on [the] issue, [and] I therefore informed [the judge] that I was not prepared to argue that point.” He also complains that the judge “became very angry” and “began to rant” about complainant’s perceived lack of respect for the institution of the Court and “compared me to the terrorists who invaded the Capitol on January 6.”

A review of the full transcript shows that complainant has mischaracterized the legal argument that the judge wanted him to clarify. At the commencement of the hearing, he judge stated that chambers had been

notified that the parties had reached a resolution but, before discussing the resolution, he wanted to question complainant about the argument made in opposition to the Motion for Partial Summary Judgment. The judge noted that in reviewing the pleading he had to serve as complainant's law clerk because complainant had failed to cite the legal authority for his argument. Complainant responded that he was "not prepared to argue that at all right now" and, when pressed further, stated that he didn't cite any authority for the argument because he "expected to lose the Motion for Summary Judgment." The judge remarked that complainant could not "file placeholder legal pleadings" while the parties negotiated a resolution, and was required to "have a good faith belief in the facts and the law" before making a statement in a pleading filed in the district court. Despite being asked repeatedly, complainant never addressed the judge's analysis that the argument was legally untenable.

To the extent that these allegations relate directly to the merits of decisions or procedural rulings, they are subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(ii).

To the extent that complainant is complaining that the judge "berated" him for declining to answer questions about his legal argument and expressed negative opinions of complainant's conduct before the court, the Supreme Court of the United States has held that judicial bias is not established by a judge's "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." *Liteky v. U.S.*, 510 U.S. 540, 555-556 (1994). Similarly, the Supreme Court held that "[t]he judge who presides at a trial may, upon completion of the evidence, be exceedingly ill disposed towards [a participant] . . . . But the judge is not thereby recusable for bias or prejudice, since his knowledge and the opinion it produced were properly and necessarily acquired in the course of the proceedings . . . ." *Id.*, at 550-551.

Clearly, the civil unrest that occurred the previous day was fresh in the judge's mind and it might have been prudent not to compare complainant's insufficient legal argument and refusal to answer the court's questions to the attack on the United States Capitol Complex. Nonetheless, there appears to be ample evidence in the record that the judge's negative opinion was in direct response to complainant's conduct in the proceeding, and this aspect of the complaint is therefore subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(iii).

— *Hearing 2: January 2021*

Complainant complains that even though he promptly complied with the court's order to file a motion to withdraw the unsupported statement,<sup>1</sup> the judge "demanded argument on that point" during the continuation of the hearing the following day. He recounts that the judge "became frustrated over my refusal to [present the requested argument] . . . and encouraged other parties in the proceeding to file Rule 11 complaints against me."

It is evident from the transcript that the judge was extremely frustrated by complainant's filing a further pleading that did not meet the standards required under Rule 8(a), and by his refusal to answer the court's questions. However, a review of the record indicates that complainant's claims are not only inaccurate, but they are self-serving. The judge did not "encourage" counsel to "file Rule 11 complaints against" complainant. Rather he instructed all counsel to file a motion under FED. R. CIV. P. 11 if they noticed a party had filed a pleading that did not comply with the requirements of Rule 8(a). This instruction was preceded by the judge's

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<sup>1</sup> In his complaint, complainant states that "[t]he sentence that inflamed the court's rhetoric was withdrawn from the pleading," again mischaracterizing the court's concerns about the inadequacy of his legal argument.

discussion of the pleading standards under FED. R. CIV. P. 8(a) and relevant Supreme Court precedent.<sup>2</sup>

To the extent that these allegations relate directly to merits of decisions or procedural rulings, they are subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(ii). In other respects, any assertion of animus towards complainant appears entirely derivative of the merits-related charges, but to the extent the allegation is separate, it is wholly unsupported, and is therefore subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(iii) as “lacking sufficient evidence to raise an inference that misconduct has occurred.”

*Allegations: Adversary Proceeding 2*

In concluding the complaint, complainant submits that an additional adversary proceeding pending before the subject judge “should be remanded” to state court “because there is no federal jurisdiction.” He submits that if the case is not remanded, “it has been prejudged.”

A review of the docket indicates that at the time complainant filed the instant complaint, a motion to dismiss for lack of jurisdiction had been pending for three days. Ultimately, the judge denied the motion.

To the extent that complainant’s (speculative) allegation relates directly to the merits of the judge’s (ultimate) decision, it is subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(ii). In other respects, any assertion of prejudgment appears entirely derivative of the merits-related charge, but to the extent the allegation is separate, it is wholly unsupported, and is therefore subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(iii) as “lacking sufficient evidence to raise an inference that misconduct has occurred.”

Judicial misconduct proceedings are not a substitute for the normal appellate review process, nor may they be used to obtain reversal of a decision or a new trial.

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<sup>2</sup> A review of the record shows that the court had previously addressed complainant’s failure to meet those pleading standards in two prior hearings.

Extensive record review was required to evaluate complainant's vague and conclusory allegations. He mischaracterized certain pleadings and failed to acknowledge the context in which the remarks and rulings complained of were made. As an attorney who has practiced law for "more than forty-seven years," complainant should know "the standards for stating a viable claim of judicial misconduct," and should also be "well aware that any court filing must be based on good faith and a proper factual foundation." *See In re Complaint of Judicial Misconduct*, 550 F.3d 769 (9th Cir. 2008). Complainant's complaint, which contains numerous self-serving misrepresentations, falls well short of these standards.

An order dismissing the complaint is entered simultaneously herewith.



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Priscilla R. Owen  
Chief United States Circuit Judge

January 5, 2022