

FILED

October 3, 2024

Lyle W. Cayce
Clerk

Judicial Council for the Fifth Circuit

Complaint Number: 05-22-90058

REVISED MEMORANDUM

The memorandum entered May 20, 2022, dismissing the above-referenced complaint, has been remanded to me by an Appellate Review Panel of the Judicial Council for further review under Rule 11(b), Rules for Judicial-Conduct and Judicial-Disability Proceedings. That memorandum is VACATED, and is replaced by this revised memorandum.

Complainants, an attorney and his two clients, have filed a complaint alleging misconduct by the subject United States District Judge in a civil proceeding in which the client-complainants were plaintiffs and the United States was a defendant.

Complainants report that in chambers settlement conferences, the judge stated his opinions as to the maximum damages that he was likely to award and urged the client-complainants to settle for approximately those amounts. Complainants assert that the judge's expressed opinions as to the value of the case constituted "unfair judicial coercion" resulting in the client-complainants being "coerced . . . into settling [their] case for far below its value." Complainants further argue that those opinions, as well as various pretrial legal rulings in defendants' favor which had the effect of limiting the client-complainants' allowable recovery, are evidence of the judge's bias – either because the client-complainants are Native American, or because the judge is a former United States Army Judge Advocate General's Corps

officer and therefore biased in favor of the defendant-United States. Complainants offer no evidence of bias other than the judge’s allegedly improper rulings and statements of opinion as to damages.

To the extent that the allegations relate directly to the merits of decisions or procedural rulings, they are subject to dismissed under 28 U.S.C. § 352(b)(1)(A)(ii). In other respects, any assertions of racial bias against the client-complainants or bias in favor of the United States appear entirely derivative of the merits-related charges, but to the extent the allegations are separate, they are wholly unsupported, and are 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.”

As to the judge’s allegedly improper statements of opinion as to damages during settlement proceedings, Canon 3A(4)(d) of the Code of Conduct for United States Judges specifically allows a judge to “confer separately with the parties and their counsel in an effort to mediate or settle pending matters.”¹

The Committee on Codes of Conduct Advisory Opinion No. 95: Judges Acting in a Settlement Capacity² opines that:

- “a trial judge’s participation in settlement efforts is not inherently improper under the Code”;
- in a nonjury case (as here), the judge “may be involved in settlement discussions, probe the parties’ assessments of the value of the case, review the parties’ settlement offers (and perhaps suggest to them specific settlement amounts)”;
- “there is no *per se* impropriety in a judge’s participation in settlement discussions or in a judge’s conduct of a trial following participation in settlement talks”; and,

¹ Guide to Judiciary Policy, Vol. 2, Pt. A., Ch. 2, at 6.

² Guide to Judiciary Policy, Vol. 2B, Ch. 2, § 220, at 164-166.

— “whether ethical concerns arise in a particular proceeding is a specific determination that depends on the nature of the judge’s actions and whether the judge’s impartiality might reasonably be questioned,” i.e., whether “comments a judge makes in the course of settlement discussions . . . create an appearance of bias.”³

Notwithstanding the above, a judge should avoid even the appearance of impropriety by referring settlement discussions to another judge or magistrate judge in any matter where the judge may later preside over a trial of that matter -- especially a non-jury trial -- or issue dispositive rulings. I have conferred with the subject judge. The judge has acknowledged these concerns, and has agreed that he will no longer conduct settlement discussions in matters where he may issue dispositive rulings or preside over a trial. I therefore find that with respect to this part of the complaint, appropriate corrective action has been taken. This aspect of the complaint will therefore be concluded pursuant to 28 U.S.C. § 352(b)(2) and Rule 11(d)(2).

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.

An order dismissing the complaint in part and concluding it in part is entered simultaneously herewith.



Priscilla Richman
Chief United States Circuit Judge

October 3, 2024

³ *Id.*, at 165.