JUDICIAL COUNCIL OF THE EIGHTH CIRCUIT

JCP No. 08-14-90031

In re Complaint of John Doe[1]

This is a judicial complaint filed on October 8, 2014, by an attorney against the bankruptcy judge who presided over a debtor's bankruptcy. Complainant began representing the debtor's attorney and the debtor's attorney's firm after the debtor complained about her attorney's performance. Ignoring the virtue of brevity and our five-page complaint maximum, see E.C. Rule 2(b), complainant submitted fifty-seven pages of allegations professing the judge's bias against complainant and his clients. Such volume does not necessarily improve the judicial complaint or its likelihood of success. Although I have considered the entire complaint, I will not address every quibble; rather, I will focus on complainant's most significant allegations and more prominent challenged incidents.

First, the debtor, pro se at the time, filed an adversary complaint against one creditor, alleging she, as debtor, had missed a deadline in her main bankruptcy case because her attorney (complainant's client) would not respond to her communications. On a motion to dismiss, the judge agreed with the creditor that the debtor was actually alleging misconduct against her attorney and her attorney's law firm, clarifying for the debtor that to pursue her allegations, she would need to file a complaint against her attorney, not her creditor. The judge identified some of the basic procedural requirements for doing this. The debtor thereafter filed a letter complaint against her attorney with the handwritten heading "Amended Complaint,"

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[1]Under Rule 4(f)(1) of the Rules Governing Complaints of Judicial Misconduct and Disability of the Eighth Circuit (E.C.), the names of the complainant and the judge complained about are to remain confidential, except in special circumstances not present here.

using the original adversary case's docket number. The court clerk initially filed this document as an amended complaint on the docket of the adversary case, but the judge had the document redocketed to the main bankruptcy case, construing it as a letter motion to disgorge attorney fees and for related costs and relief. Complainant alleges that throughout this episode, the judge took on the role of advocate for the debtor, misrepresented the nature of the "Amended Complaint," and redocketed the document to enable jurisdiction. According to complainant, the judge did all this to put complainant's clients out of business.[2]

In reality, the judge did what all judges do: the bankruptcy judge explained why he agreed with the creditor's argument, identified the proper procedure for a pro se litigant, and (apparently realizing the debtor's allegations belonged in the main bankruptcy case and did not belong in an adversary proceeding) construed the pro se debtor's filing liberally to effectuate the gist of her request. The judge explained that he looked beyond the "procedural mechanism employed" by the pro se debtor and gave effect to her "clearest request": disgorgement of attorney fees. The judge also reasoned this approach spared everyone involved the time and effort of formally dismissing the debtor's amended complaint, only to have the debtor file a motion to disgorge attorney fees in her main bankruptcy case.

Second, complainant alleges the judge exhibited bias by sanctioning his clients $1,000 per day—"a draconian sum"—for each day they failed to produce discovery. After complainant's clients had accumulated over $30,000 in sanctions, complainant asserts the judge attempted to "bribe or extort" his clients by informing the clients that the judge would lift the sanctions only if the clients terminated complainant's representation of them and promised never again to employ complainant to represent them in the judge's court.

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[2]Complainant alleges the judge bears a grudge against complainant's clients stemming from the judge's time as a United States Trustee.

The record shows, by the time the judge entered the $1,000-per-day sanction, the clients (through complainant) had failed for over two months to comply with the debtor's discovery requests. Despite having never objected to the discovery requests, complainant filed multiple motions to quash, which the judge found to be "frivolous," and complainant then produced only partial responses, declaring his clients were only obligated to produce those documents which complainant and the clients did not unilaterally find objectionable. The clients stated through complainant that they would not comply with the request unless an order to compel were issued. The judge entered an order to compel and gave complainant's clients seven days to comply before the $1,000-per-day sanction began to accumulate. The judge also warned complainant specifically:

> [T]he Court is exhausted [with complainant's] unprofessional and disrespectful demeanor in the courtroom, which appears to be part of an ill-conceived strategy of delay and obfuscation. At status conferences over the course of the past month, [complainant] has been belligerent, bombastic, bellicose and prevaricating (often complemented with being misguided, misleading, or simply incorrect). In any future court proceeding in this matter, if [complainant] so much as raises his voice above the level necessary for civil discourse and argument, or employs a disrespectful tone with the Court, other counsel, or any party, for any reason, such behavior will be immediately sanctionable in the amount of $100.00 for each such incident, charged to [complainant] personally.

Despite the judge's repeated warnings that further failure to comply with discovery requests would result in additional sanctions, the clients failed to comply. After over a month of accumulating sanctions, the judge stopped the accrual, ordered the clients held in contempt, and made the accrued sanctions due for payment. The clients continued their noncompliance despite the judge advising them that they could purge these sanctions by simply producing discovery. After two more months, the judge offered the clients another option: "file under seal certain information regarding

the ownership structure and employees of [the client-law firm] (to clarify how the Respondents are related); file a letter of apology for their contempt and admit that they made, through their attorney, false representations; agree to attend continuing legal education; and agree not to be represented again by, or serve as co-counsel with, [complainant] before this Court (to ensure that the improprieties that occurred in this matter would not be repeated)."

Third, after filing a lawsuit against the judge, complainant moved for recusal in the bankruptcy case under 28 U.S.C. §§ 144 and 455. The judge denied the motion. Complainant contends the judge improperly denied the recusal motion himself despite § 144's requirement that the motion be ruled upon by a different judge. Section 144 applies "[w]henever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice." The judge did not ignore complainant's contention and ruled on the motion only after reasoning that "[b]y the plain language of the statute, § 144 applies only to a district court judge," citing to numerous authorities agreeing with this conclusion.

Fourth, when the judge ultimately granted the debtor's motion to disgorge, he produced a 102-page memorandum thoroughly explaining the proceedings from the judge's vantage point and providing the judge's reasoning for various rulings (including his decision to suspend both complainant and complainant's clients from practicing in the bankruptcy court of that district). The judge attached a copy of the debtor's letter complaint which the judge had previously deemed to be a letter motion to disgorge attorney fees. Complainant now alleges the judge "purposefully with malice" altered the document by attaching a scanned copy of the letter which cut off most of the debtor's handwritten indication that the document was an "Amended Complaint." Complainant speculates that the judge was altering the record to protect his rulings on appeal.

The judge did not completely omit the handwritten portion, and the complete version of the document was easily accessible on the docket. The reason the judge used this scanned-in version of the document (rather than the docketed one) apparently was because the court had numbered each line of the text for ease of precise citation. The document was attached for the reader's reference. Furthermore, the judge *quoted* and explained in his order all of the handwritten information (stating "a document captioned 'amended complaint'") which complainant now alleges the judge attempted to hide.

Fifth, complainant points out that after he and his clients appealed the case, they filed motions to stay pending appeal of the order suspending them from practicing in the bankruptcy court. Complainant alleges the judge intentionally delayed ruling on the stay for over thirty days to harm the practices of complainant and complainant's clients. The judge denied the stay motions and explained that the motions to stay "were not brought on an emergency basis" nor did complainant or his clients "seek expedited consideration or request an expedited hearing"—"[i]n fact, the Movants did not request a hearing at all." After complainant and his clients filed emergency motions for stay with the district court, the bankruptcy judge promptly denied the pending motions in the bankruptcy court, noting this was the first indication he received that the motion was urgent. I find no indication in the record that would have alerted the judge to any urgent nature of the motions. A judge generally cannot reasonably be expected to parse the substance of every motion filed to determine whether a particular motion contains time sensitive requests. The burden is on the party to alert the judge when a request is urgent by filing an emergency motion or requesting expedited resolution.

Complainant's allegations are numerous, but his contentions mirror those made in the bankruptcy court. Many of his allegations are "directly related to the merits" of the bankruptcy court's rulings, see Judicial-Conduct and Judicial-Disability Proceedings of the Judicial Conference of the United States (J.C.U.S.) Rule

3(h)(3)(A) (defining this phrase), and are currently on appeal before the district court. "[J]udicial rulings alone almost never constitute a valid basis for a bias or partiality motion. . . . Almost invariably, they are proper grounds for appeal, not for recusal." Liteky v. United States, 510 U.S. 540, 555 (1994). Complainant's allegations must be dismissed, as they only are challengeable on appeal—not through the judicial complaint process. See 28 U.S.C. § 352(b)(1)(A)(ii); J.C.U.S. Rule 11(c)(1)(B); E.C. Rule 4(c)(2).

To the extent complainant's allegations are not related to the merits of his pending actions, the allegations must be dismissed as "frivolous [and] lacking sufficient evidence to raise an inference that misconduct has occurred." 28 U.S.C. § 352(b)(1)(A)(iii); see also J.C.U.S. Rule 11(c)(1)(C), (D); E.C. Rule 4(c)(3).

The complaint is dismissed.

January 20, 2015

William Jay Riley, Chief Judge
Eighth Circuit