

JUDICIAL COUNCIL
OF THE DISTRICT OF COLUMBIA CIRCUIT

In the Matter of
A Complaint of Judicial
Misconduct or Disability

Complaint No. DC-22-90009

Before: Srinivasan, Chief Judge

ORDER

Upon consideration of the complaint herein, filed against a judge of the United States Bankruptcy Court for the District of Columbia, it is

ORDERED that the complaint be dismissed for the reasons stated in the attached Memorandum.

The Circuit Executive is directed to send copies of this Order and accompanying Memorandum to the complainant, the subject judge, and the Judicial Conference Committee on Judicial Conduct and Disability. See 28 U.S.C. § 352(b); JUD. CONF. U.S., RULES FOR JUDICIAL-CONDUCT AND JUDICIAL-DISABILITY PROCEEDINGS (2019), RULE 11(g)(2).


Sri Srinivasan, Chief Judge

Date: March 8, 2023

MEMORANDUM

The complainant has filed a complaint of judicial misconduct against a judge of the United States Bankruptcy Court for the District of Columbia. For the following reasons, the misconduct complaint will be dismissed.

The complainant was a counsel to the Defendant in a case brought in the District Court for the District of Columbia. The parties in the case agreed to voluntary mediation, and the district judge referred the case to mediation before the subject judge.

At the first mediation session, Defendant offered to pay \$23,000 for the substantive claims and \$35,000 for attorney's fees. The parties did not reach an agreement in that session. Through the subject judge, the parties then engaged in discussions about what informal discovery would be appropriate to resolve their dispute over the amount of attorney's fees. The subject judge set a second mediation session for April 19, 2022. One of Defendant's counsel subsequently emailed the subject judge a settlement offer to be sent to Plaintiff's counsel. The next day, the subject judge forwarded Defendant's settlement offer to Plaintiff's counsel, including the full email chain between Defendant's counsel and the subject judge. Plaintiff's counsel emailed a counteroffer of \$25,000 for the substantive claims and \$74,000 for attorney's fees, stating that, "[p]reviously, during mediation, Defendant offered [Plaintiff] \$25,000" for the substantive claims "and [Plaintiff] will not accept anything less than that."

On the morning of April 19, 2022, the subject judge began what he thought was the prescheduled Zoom session, but Defendant's counsel did not join until requested to do by court

staff. When Defendant's counsel noted that the Defendant was unavailable until the afternoon, the mediation was continued until the afternoon. That afternoon, one of Defendant's counsel sent an email to the subject judge stating that "Defendant cannot continue with the current mediation process. Defendant has observed several instances of conduct by your Honor that appear to be inconsistent with the legal and ethical obligations of a neutral in this process and that have prejudiced our client's good faith participation in a fair settlement conference. Accordingly, Defendant respectfully requests that your Honor withdraw from presiding over this process and enter an order reassigning this matter for settlement conference presided over by a magistrate judge." The subject judge responded to the email, stating that he was "unaware of any 'instances of conduct'" that were improper.

Subsequently, the subject judge entered an order concluding the mediation, noting that the parties did not reach a settlement. The district court then rejected Plaintiff's request to refer the matter to a new judge for mediation. Plaintiff's counsel later entered a stipulation of dismissal with prejudice.

After the conclusion of the mediation before the subject judge, while the case remained pending before the district court, the complainant filed a judicial misconduct complaint against the subject judge concerning his handling of the mediation. The complaint contains six allegations of misconduct. The Rules for Judicial-Conduct and Judicial-Disability Proceedings allow for a chief judge to "conduct a limited inquiry" when reviewing a complaint. JUD. CONF. RULES FOR JUDICIAL-CONDUCT AND JUDICIAL-DISABILITY PROCEEDINGS (2019), Rule 11(b). Acting pursuant to that authorization, I asked the subject judge to respond to the allegations in the

complaint. Each of the six allegations will be addressed in turn.

In his first allegation, the complainant states that, before the first mediation session, the subject judge communicated to both counsel that his “practice was to run the draft communication of a party’s position by the party, and then with their approval he would send it to all counsel.” The complainant further claims that, at the first mediation session, the subject judge “indicated that anything said to him by a party would be treated as confidential unless the party expressly gave him permission to share it with the other side.” Despite these assurances, the complainant argues, the subject judge failed to copy the complainant on email communications to Plaintiff’s counsel about Defendant’s position, thus allegedly engaging in improper ex parte communications with Plaintiff’s counsel and indicating an appearance of bias. The subject judge, for his part, denies that he had any correspondence with Plaintiff’s counsel about Defendant’s position in which he failed to copy Defendant’s counsel.

Even assuming the subject judge had ex parte communications with Plaintiff’s counsel about Defendant’s position, such communications would not suggest any misconduct. It is inherent in the conduct of a mediation that the mediator would have private communications with each side. Consequently, it is “not inappropriate for a settlement judge to have ex parte communications, in order to facilitate an agreement between the parties.” *In re Complaint of Jud. Misconduct*, 647 F.3d 1181, 1181-82 (9th Cir. 2011); *see also In re Complaint of Jud. Misconduct*, 838 F.3d 1030, 1030 (9th Cir. 2016); Canon 3(A)(4)(d) (“A judge may with the consent of the parties, confer separately with the parties and their counsel in an effort to mediate or settle pending matters.”). Accordingly, this allegation “lack[s] sufficient evidence

to raise an inference that misconduct has occurred.” JUDICIAL-CONDUCT PROCEEDINGS RULE 11(c)(1)(D).

Second, the complainant asserts that the subject judge breached his duty of confidentiality and displayed apparent bias when he sent an email to Plaintiff’s counsel conveying Defendant’s “final” settlement offer. The email forwarded, not just the terms of the final offer, but also most of Defendant’s counsel’s email to the subject judge containing the offer as well as the entire email chain between the subject judge and Defendant’s counsel leading up to the offer. The complainant alleges, that by sharing the entire email chain, the subject judge “effectively poison[ed] the water making rejection of such an offer by Plaintiff more likely.” The subject judge acknowledges that he “accidentally” and “inadvertently forwarded to [Plaintiff’s counsel], as part of my email, [Defendant’s counsel’s] entire April 14 email (including the entire chain of emails preceding the April 14 email).”

The subject judge did forward Defendant’s counsel’s comments to the judge that Plaintiff and her counsel had “used this [mediation] process to create a discovery dispute” and had made “unreasonable demands,” but those sorts of statements are often made by parties directly to one another, including previously in this case. Otherwise, the forwarded email chain consists essentially of an uncontroversial recounting of the parties’ respective conditions and requests. Additionally, upon learning of his mistake in forwarding the full email chain, the subject judge immediately apologized for the error on a Zoom call. The subject judge has also expressed that he “regret[s]” his inadvertent forwarding of the full email chain and “will take more precautions in relaying emailed information that is a portion of a longer chain to avoid

any collateral controversies or disputes.”

In these circumstances, the subject judge’s mistaken forwarding of the full email chain, while unfortunate, does not amount to misconduct. The judge’s mistake does not rise to the level of conduct “prejudicial to the effective and expeditious administration of the business of the courts.” JUDICIAL-CONDUCT PROCEEDINGS RULE 4(a) (“Cognizable misconduct is conduct prejudicial to the effective and expeditious administration of the business of the courts.”); *see* JUDICIAL-CONDUCT PROCEEDINGS RULE 4 Commentary ¶ 2 (explaining that not every “inadvertent, minor violation of . . . the[] rules . . . rise[s] to the level of misconduct under the Act”); *cf.* JUDICIAL-CONDUCT PROCEEDINGS RULE 11 Commentary ¶ 17 (providing that “apology” or “pledge to refrain from similar conduct in the future” is “appropriate corrective action”). Accordingly, this allegation will be dismissed.

Third, the complainant alleges that the subject judge failed to provide Defendant with adequate notice that the April 19th mediation session was proceeding, thereby ostensibly creating an appearance of bias. Any confusion about whether that session would proceed as scheduled, however, does not suggest any appearance of bias.

The record reflects that, on April 15, 2022, the subject judge sent an email to Plaintiff’s counsel, copying Defendant’s counsel, noting “[t]he mediation is scheduled to resume next Tuesday, April 19, 2022. Please let me and the defendants’ counsel know by 4:00 p.m. on Monday afternoon, April 18, 2022, whether your client is willing to accept the defendant’s offer, and whether, if not, you wish to have me treat the mediation as concluded at this juncture.” On April 18, 2022, Plaintiff’s counsel sent an email to the subject judge, copying

Defendant's counsel, with a counteroffer. That communication made apparent that Plaintiff's counsel did not wish for the subject judge to conclude the mediation. While Defendant's counsel nonetheless evidently believed that the April 19th mediation session would not go forward, when counsel did not appear on the Zoom, the subject judge instructed court staff to ask them to join. And when Defendant's counsel indicated that their client would be unavailable until the afternoon, the session was postponed until the afternoon.

This allegation is devoid of evidence indicating any bias or inappropriate conduct by the subject judge in connection with the scheduling and handling of the April 19th mediation session. *See In re Complaint of Jud. Misconduct*, 552 F.3d 1146, 1147 (9th Cir. 2009) (dismissing allegations of judicial bias, discrimination, and conspiracy on the ground that complainant failed to provide "objectively verifiable proof" to "raise an inference that misconduct occurred"). Therefore, this allegation must be dismissed as "lacking sufficient evidence to raise an inference that misconduct has occurred." JUDICIAL-CONDUCT PROCEEDINGS RULE 11(c)(1)(D).

In his fourth allegation, the complainant contends that the subject judge made an "unauthorized disclosure" of private discussions between Defendant and his counsel about the amount Defendant would offer Plaintiff to settle the dispute. The complainant relies on an email from Plaintiff's counsel to the subject judge and Defendant's counsel stating that, "[p]reviously, during the mediation, Defendant offered [Plaintiff] \$25,000 to settle" the dispute. In fact, the complainant alleges, while Defendant and his counsel had privately discussed increasing their offer from \$23,000 to \$25,000, they had not communicated the latter figure to

Plaintiff or Plaintiff's counsel. As a result, the complainant contends, "unauthorized disclosure" of that figure must have come from the subject judge. The subject judge, however, has no recollection of any discussion with Defendant's counsel about a possible \$25,000 offer. The subject judge states, though, that "[a]lthough I am careful in relaying offers, it is possible that in relaying the Defendant's offer to [Plaintiff's counsel] . . . I misspoke and referred to \$25,000" instead of \$23,000.

Even assuming a breach of confidentiality in that regard did occur, any such breach would not rise to the level of misconduct. The complainant does not claim (or provide any evidence indicating) that any disclosure of a possible \$25,000 settlement offer was intentional. The subject judge acknowledges that in relaying the Defendant's offer it is "possible" that he "misspoke and referred to \$25,000." And even if the subject did misspeak to that effect, there is no indication that it caused cognizable prejudice in the voluntary mediation. Indeed, the complaint acknowledges that Plaintiff's counsel stated that the \$25,000 offer "may have been made in passing or impulsively." Thus, any alleged breach of confidentiality would not amount to conduct "prejudicial to the effective and expeditious administration of the business of the courts." JUDICIAL-CONDUCT PROCEEDINGS RULE 4(a); *see* JUDICIAL-CONDUCT PROCEEDINGS RULE 4 Commentary ¶ 2 (explaining that not every "inadvertent, minor violation of . . . the[] rules . . . rise[s] to the level of misconduct under the Act"). Accordingly, this allegation will be dismissed.

In his fifth allegation, the complainant alleges that the subject judge acted in an unprofessional manner when he twice told Defendant's counsel to "produce the damn

documents” sought by Plaintiff in the mediation. The subject judge acknowledges making these statements, observing that “[t]he use of the language ‘damn documents’ was intended to connote that the failure to produce the documents was a matter unnecessarily frustrating the goal of getting to a settlement.”

That language does not rise to the level of “treating litigants . . . in a demonstrably egregious and hostile manner.” JUDICIAL-CONDUCT PROCEEDINGS RULE 4(a)(2)(B). To “move[] into the sphere of cognizable misconduct,” the conduct at issue must “transcend[] the expected rough-and-tumble of litigation.” Judicial Conduct & Disability Act Study Comm., *Implementation of the Judicial Conduct and Disability Act of 1980: A Report to the Chief Justice*, 239 F.R.D. 116, 239 (West 2006); *cf. Liteky v. United States*, 510 U.S. 540, 555-56 (1994) (explaining that “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,” do not establish bias or partiality). In this case, there is no evidence that the subject judge treated Defendant’s counsel in a demonstrably egregious or hostile manner, and the statements at issue are not so serious that they threaten the integrity and proper functioning of the judiciary. Accordingly, this allegation will be dismissed as failing to raise an inference that misconduct has occurred. JUDICIAL-CONDUCT PROCEEDINGS RULE 11(c)(1)(D).

Sixth, and last, the complainant claims that the subject judge improperly failed to disclose a prior relationship with Plaintiff’s counsel. Specifically, the complainant alleges that Plaintiff’s counsel previously had “on behalf of his firm brought a breach of contract action

against two members of a former client that his firm had represented in a bankruptcy before [the subject judge].”

That prior interaction between the subject judge and Plaintiff’s counsel raises no cognizable questions about the subject judge’s impartiality in the mediation in this case. While Plaintiff’s law firm had represented a party before the subject judge, there is no indication or allegation that Plaintiff’s counsel appeared as counsel in that case. Moreover, while Plaintiff’s counsel did appear as counsel in a subsequent civil action in which Plaintiff’s counsel’s law firm sued the two guarantors who had apparently guaranteed the law firm’s fees in the bankruptcy case, that case was not before the subject judge. The subject judge’s limited interaction with Plaintiff’s counsel and his law firm is not grounds for questioning the subject judge’s impartiality, and the subject judge had no obligation to disclose the prior interaction with Plaintiff’s counsel and his law firm. Accordingly, this allegation does not raise an inference that misconduct has occurred. JUDICIAL-CONDUCT PROCEEDINGS RULE 11(c)(1)(D).

Accordingly, for the reasons explained above, the complaint will be dismissed. JUDICIAL-CONDUCT PROCEEDINGS RULE 4(a), 11(c)(1)(D); see 28 U.S.C. § 352(b)(1)(A)(i) & (iii).¹

¹ Pursuant to 28 U.S.C. § 352(c) and JUDICIAL-CONDUCT PROCEEDINGS RULE 18(a), the complainant may file a petition for review by the Judicial Council for the District of Columbia Circuit. Any petition must be filed in the Office of the Circuit Executive for the D.C. Circuit within 42 days after the date of the dismissal order. JUDICIAL-CONDUCT PROCEEDINGS RULE 18(b).