

FILED

March 15, 2023

Lyle W. Cayce
Clerk

Judicial Council for the Fifth Circuit

Complaint Number: 05-22-90055

MEMORANDUM

Complainant, an attorney, has filed a complaint alleging misconduct by the subject United States Bankruptcy Judge in related bankruptcy and adversary proceedings. He alleges that the judge’s “egregious and hostile” conduct “could have a deleterious effect on public confidence in the courts,” and is part of a larger pattern of misconduct that is “reasonably likely to produce a substantial and widespread lowering of public confidence in the courts among reasonable people.”

Background

Complainant was the managing partner of an unsecured creditor in a bankruptcy proceeding, and he was a member and co-chair of the Official Committee of Unsecured Creditors.

The United States Department of Justice filed a federal criminal complaint alleging that complainant had committed securities fraud, wire fraud, extortion and bribery, and obstruction of justice in connection with the bankruptcy proceeding. Complainant ultimately entered a guilty plea to one count of bribery and extortion.

The bankruptcy proceeding garnered extensive media attention, including reports about complainant’s conduct and related hearings in both the bankruptcy and adversary proceedings, and about his subsequent criminal prosecution.

Allegations

Complainant alleges that during the bankruptcy and adversary proceedings, the judge violated Rules 4(a) and 4(a)(2)(B) of the Rules for Judicial-Conduct and Judicial-Disability Proceedings by engaging in conduct “prejudicial to the effective and expeditious administration of the business of the courts” by treating complainant, his attorney, and counsel for complainant’s company, “in a demonstrably egregious and hostile manner[.]” For example, complainant claims that even before “[I] engaged in conduct that was improper and illegal” in the bankruptcy proceeding, the judge “exhibited bias and hostility towards [the company] and [me],” “often employ[ing] vituperative, threatening and demeaning language[.]” He cites remarks made by the judge during hearings in three hearings, one of which was held prior to complainant’s fraudulent conduct.

A comprehensive review of the audio-recordings and transcripts of the three hearings, and the related pleadings and motions, demonstrates that complainant’s recitations of the judge’s remarks are, self-servingly, devoid of context. It is readily apparent that the judge did not shy away from sternly admonishing counsel and witnesses for conduct that, in his view, threatened the integrity of the bankruptcy process. The remarks about which complainant complains, while undeniably strong, do not appear to have been unwarranted when considered in context, and complainant offers no evidence to the contrary.¹

¹ In the light of complainant’s allegations, the transcripts and audio-recordings of twenty-two other hearings held in the bankruptcy and adversary proceedings were also reviewed. In general, the judge exhibited a collegial attitude towards counsel, and he often complimented counsel for their hard work. It is abundantly clear that the judge is fiercely protective of the integrity of the bankruptcy process, and he expects participants, especially lawyers, to be fully prepared to answer the court’s questions (or to promptly admit when they are not). He admonished counsel for various parties when they were unprepared or raised irrelevant arguments. Even when voicing strong negative opinions about the conduct of counsel or parties, including the remarks about which complainant complains, the judge maintained a calm—if sometimes very stern—demeanor.

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). In other respects, there is insufficient evidence to support a finding of judicial misconduct, and the allegations are subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(iii).

Complainant further complains that the judge made “personal attacks” on his character during the third hearing, some of which appear to have been based on information outside the record.

The record shows that the judge conveyed in excoriating terms the opinion that complainant’s violation of his fiduciary duty for personal gain and his abuse of the bankruptcy system were unacceptable. The judge’s remarks about complainant’s personal and professional life do suggest that he looked outside the record for that information, and perhaps it would have been more prudent not to make those remarks. However, given that the bankruptcy record was replete with evidence of complainant’s unprofessional conduct which had been widely reported in the media prior to the third hearing, these additional remarks are insufficient to support a finding that the judge treated complainant “in a demonstrably egregious and hostile manner” per Rule 4(a)(2)(B).

Complainant notes that media reports about the third hearing described the judge’s remarks as “plain threats” and “pre-meditated overkill,” and he contends that “there is good reason to fear” that the judge’s conduct and the related media coverage “could have a deleterious effect on public confidence in the courts.”

A review of the four reports complainant cites show that he has misquoted some of the statements made and has inaccurately characterized the reports as universally and stridently disapproving of the judge’s remarks. While two of the reports opined that the remarks were excessive in length and/or forcefulness, all four reports acknowledged that complainant’s conduct was highly improper and that it warranted judicial condemnation.

There is insufficient evidence to conclude that the media commentary about the judge’s scathing remarks about complainant’s character had “a deleterious effect on public confidence in the courts,” and this aspect of the complaint is therefore also subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(iii).

Complainant also submits that there is evidence establishing a pattern of this type of improper conduct by the judge which is “reasonably likely to produce a substantial and widespread lowering of public confidence in the courts among reasonable people.” In support of this assertion, complainant points to:

- A report discussed above which, complainant claims, “suggested such outbursts were not atypical.”

The report complainant cites neither stated nor implied that the judge’s remarks were “typical.”

- An interview the day after the third hearing in which, complainant submits, the judge made statements that “left open the possibility that [he] was admitting to a pattern of similar misconduct.”

The judge’s answer did not constitute an “admission” that he routinely treats those who appear before him “in a demonstrably egregious and hostile manner.”

- Four sets of inappropriate and/or intemperate remarks in three hearings in three other cases between September 2016 and November 2020.

A comprehensive review of the transcripts and audio-recordings of the hearings and associated pleadings and motions in each case indicates that, in three instances, complainant has excerpted the remarks from much longer statements and/or multiple statements separated by lengthy discussions between the court and counsel, thereby denuding the remarks of context. In each instance, the judge was admonishing—sometimes in very strong terms—

attorneys whose conduct did not, in his opinion, adhere to professional and ethical standards expected of officers of the Court, and which undermined the trust of the parties in the bankruptcy process and the trust between the Court and counsel. The records show that, in context, the judge's remarks were neither intemperate nor inappropriate.

In the fourth set of remarks, it appears that the judge was making a pop-cultural reference which might have been perplexing to counsel, but there is nothing in the record to suggest that counsel found it offensive.

— A preliminary version of an article written by a law professor which is critical of the judge's role in recent developments in Chapter 11 bankruptcy rules and practice, and the author's impliedly negative assessments of the judge's character.

However, nothing in that critique is pertinent to complainant's claim that the judge has an established pattern of making intemperate and inappropriate remarks sufficient to "lower public confidence in the courts."

Complainant has not presented sufficient evidence to establish "a pattern of misconduct" that "is reasonably likely to produce a substantial and widespread lowering of public confidence in the courts among reasonable people." This aspect of the complaint is therefore subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(iii).

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 is entered simultaneously herewith.

/s/ Priscilla Richman

Priscilla Richman

Chief United States Circuit Judge

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