

THE JUDICIAL COUNCIL OF THE SEVENTH CIRCUIT
219 South Dearborn Street
Chicago, Illinois 60604

July 20, 2011

FRANK H. EASTERBROOK
Chief Judge

No. 07-11-90037

IN RE COMPLAINT AGAINST A JUDICIAL OFFICER

MEMORANDUM

Complainant, a creditor in her ex-husband's bankruptcy, asked the bankruptcy judge to rule that the former husband's debt under a property settlement in the state divorce litigation could not be discharged. The judge held a short trial and entered a judgment favorable to complainant. Twelve days later, the court amended the judgment. Complainant disagrees with the language that was added in this amendment and contends that it constitutes misconduct; she also accuses the judge of being intemperate and delaying the proceedings in retaliation for her conduct.

Any complaint that is "directly related to the merits of a decision or procedural ruling" must be dismissed. 28 U.S.C. §352(b)(1)(A)(ii). See also Rule 11(c)(1)(B) of the Rules for Judicial-Conduct and Judicial-Disability Proceedings. "Any allegation that calls into question the correctness of an official action of a judge ... is merits related." Standard 2 for Assessing Compliance with the Act, *Implementation of the Judicial Conduct and Disability Act of 1980: A Report to the Chief Justice* 145 (2006). The allegations of this complaint fit that description, to the extent that complainant objects to the language in the amended judgment. The appropriate way to obtain review of the judgment's language would have been an appeal to the district court. Complainant did not appeal, however, and cannot obtain collateral review from the Judicial Council, which is an administrative rather than a judicial body.

Complainant's other allegations are outside the scope of §352(b)(1)(A)(ii). I therefore conducted a limited inquiry, see 28 U.S.C. §352(a); Rule 11(b) of the Rules for Judicial-

Conduct and Judicial-Disability Proceedings, asking the subject judge for his response. I also asked for, and received, a transcript of the hearing at which complainant believes that the judge behaved inappropriately.

The transcript shows that the judge opened the pretrial conference by telling complainant that his secretary believed that complainant had been rude on the phone. Complainant called the judge's chambers to ask that the conference be postponed or cancelled. The phone call should never have occurred. Complainant, who was (and is) proceeding without the assistance of counsel, did not know that it is a violation of rules and ethical principles to ask for any relief through a procedure, either written or oral, that excludes the opposing litigant. The transcript and the subject judge's response to me show that the judge's secretary informed complainant of this and told her that she should file a written motion; complainant apparently did not welcome this advice, and an argument ensued. It is not possible to tell from the transcript, the complaint, or the subject judge's response, exactly what occurred. Ascertaining the underlying facts would require the appointment of a special committee, which would hold a hearing; the Chief Judge cannot make findings of fact. 28 U.S.C. §352(a). But the question I must resolve is not who said what on the phone, but whether the bankruptcy judge behaved appropriately at the hearing. And that issue can be decided on the basis of the transcript, allowing me to resolve the complaint under §352(b)(1)(A)(iii) because the record lacks "sufficient evidence to raise an inference that misconduct has occurred".

The judge's remarks about the phone call, at the beginning of the pretrial conference, span less than two pages. (The complaint states that the judge spent "the first ten minutes of the pretrial conference harassing me for a perceived slight to his secretary"; that statement is directly refuted by the transcript.) The judge expressed displeasure that complainant had been "indignant" over the phone when the judge's secretary tried to tell her how to proceed. The judge also explained what had concerned his secretary: complainant's statement, when informed how she should request a delay: "What do you do? Make this up as you go along?" (The complaint states that "it was never clear what the slight was"; that assertion is directly refuted by the transcript.)

After the judge had expressed his concern—and done so in an entirely civil manner—he devoted the next three pages of the transcript to telling complainant why it is important to make requests in writing (with notice to the opposing party), why a pretrial conference (the proceeding that complainant wanted cancelled) is helpful, and why neither his secretary nor his law clerk could provide a litigant with legal advice (complainant had asked the secretary how to proceed). Giving useful information to an unrepresented litigant is an important part of the judicial task, whether or not the litigant appreciates the advice and whether or not the litigant thinks the advice, like the hearing itself, a waste of time. No judicial misconduct occurred during this hearing.

The adversary proceeding in bankruptcy was initiated on November 3, 2010, The debtor answered the complaint on December 15, and the pretrial conference was held on February 8, 2011. The judge held a bench trial on March 17, 2011, and rendered his

decision the next day. Complainant asserts that by allowing 4½ months to pass between the filing of the complaint and the decision, the judge retaliated against her for being rude to the judge's secretary. That allegation is directly refuted by the record. The telephone call occurred on February 1, 2011, so none of the time between the complaint and the call can be attributed to any adverse response to the call. And the time between the call and the final decision was only six weeks. This was a swift decision, not a slow one. I appreciate complainant's belief that resolution should have come even faster, but bankruptcy judges must juggle thousands of cases. Complainant did not have any entitlement to jump the queue; she should be thankful that this adversary proceeding was resolved as quickly as it was.

Some concluding observations. The reason the judge amended the judgment (the first topic I discussed in this memorandum) is that, despite what the judge had told complainant in open court on February 8, 2011, about the impropriety of *ex parte* contacts, she called the judge's chambers *again* and asked that the judgment be amended. The conversation went badly. Ten minutes later complainant called a third time to chastise the secretary for what she considered the secretary's rudeness during the second call. The secretary hung up.

One reason the judge reacted in writing is that neither of these conversations should have occurred. Having been told by a federal judge to make requests in writing, with notice to the adversary, complainant had no business resorting to the telephone just because the change she wanted was in her view ministerial or undisputed, or because she thought that she was entitled to procedural advice. She should not expect a judicial secretary, or a judge's law clerk, to interpret or bend the rules on her behalf. It is unnecessary for me to know just what happened during those two phone calls, or to decide whether the additional language added to the judgment—which rebuked complainant for calling at all, and for being rude when doing so—was appropriate.

Perhaps the judge's language should have been in an order separate from the judgment. Perhaps the judge should have refrained from expressing the exasperation that is evident in the added language. As I explained above, the judgment's text was a potential subject for an appeal to the district judge and is not reviewable under the 1980 Act. But complainant must understand that, if she violates judicial instructions—and in open court she was instructed not to call the judge's chambers seeking relief or legal advice—the judge is going to respond. The amended judgment tells complainant that, if she calls again, she risks being held in contempt of court. Complainant should take that statement seriously. Giving that warning is not judicial misconduct.