

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

September 10, 2012

FRANK H. EASTERBROOK
Chief Judge

No. 07-12-90061

IN RE COMPLAINT AGAINST A JUDICIAL OFFICER

MEMORANDUM

Complainant, a member of the district court's bar, represented the plaintiff in a civil suit. The complaint concerns the conduct of the district judge during a settlement conference.

The complaint alleges that the judge excluded the litigants from the conference, accused counsel of being "dishonest" in responding to questions, and after raising his voice and becoming flustered commanded: "you are not being honest with the court, get out." Complainant alleges that she felt humiliated.

I asked the subject judge for a response and have received one. The conference was neither recorded nor transcribed, so I also asked the other lawyers who attended to tell me what was said, and in what tone of voice. The four lawyers who sent responses substantially agreed on what took place.

The judge was annoyed when complainant brought her client to the conference, even though the judge had told all lawyers, in open court, that this would be a counsel-only conference. After the conference got under way, the judge asked counsel about their current positions on settlement and told complainant that plaintiff's demand seemed absurdly high and that the parties needed to be realistic.

Next the judge asked complainant whether a particular issue had been raised in state-court litigation that preceded the federal suit. Counsel refused to give a yes or no

answer, even though the judge repeatedly asked for one and told complainant that she was “not being frank with the court.” After counsel began to conduct what to the other lawyers present seemed akin to a filibuster, the judge turned to complainant’s co-counsel, who without hesitation gave the yes-or-no answer the judge sought. (Complainant easily could have done the same, following up with an explanation about why counsel thought the short answer misleading.)

During this series of requests for a yes-or-no answer, the judge began to raise his voice—though none of the lawyers present remembers the judge shouting or becoming discourteous toward counsel, and several remember that complainant became discourteous toward the judge. After complainant had refused several times to give a yes-or-no answer, the judge stood up when repeating his request. After complainant still did not give a short answer, the judge told her that she “could leave” or “may leave”. Complainant did not immediately depart, however. She stood in the doorway and attempted to argue with the judge in a manner that other lawyers called disrespectful. Although another lawyer remained in the room to represent plaintiff after complainant’s departure, the judge called off the conference. (The case has since been settled.)

Counsel other than complainant agree that the judge raised his voice but did not shout, that the judge stood up, that the judge “became agitated” during the conference, that the judge ordered complainant out of the room (by telling her that she “may leave”), and that the conference then ended. No one other than complainant recalls that the judge told her to “get out” rather than “you may leave.” No one other than complainant recalls that the judge used a word such as “dishonest” or “not being honest” (not being “frank” means not being forthcoming; perhaps complainant has confused this with an accusation of dishonesty). One lawyer thought that the judge behaved in the settlement conference much as he does on the bench: gruff and direct.

A chief judge conducting a preliminary inquiry under the Judicial Conduct and Disability Act is not entitled to make findings of fact “about any matter that is reasonably in dispute.” 28 U.S.C. §352(a). The basics are not in dispute—all agree that the judge became agitated, raised his voice (but did not shout), and stood up—although there is some disagreement about what words the judge used (i.e., “get out” versus “you may leave,” and “not being frank” versus “being dishonest”).

The appropriate characterization of the judge’s conduct is open to question. Should it be called agitated? Impolite? Rude? All judges try to avoid these attitudes, but they are part of the human condition and cannot be extirpated no matter how hard judges may try. When faced with disobedience (the judge told complainant not to bring her client, yet she did) and unwillingness to answer questions (complainant refused to give a yes or no answer), judges are bound to become impatient. They will experience greater or lesser degrees of success in controlling that impatience.

Canon 3.A(3) of the Code of Conduct for United States Judges provides: “A judge should be patient, dignified, respectful, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity.” Since I cannot find facts, I must assume that a reasonable person might conclude that the district judge violated that canon. But failure to live up to all aspirational norms in the Code of Conduct is not “misconduct” under the Judicial Conduct and Disability Act of 1980. See the commentary to Rule 3 of the Rules for Judicial-Conduct and Judicial-Disability Proceedings.

Complainant does not contend that the judge is generally unable to control his temper, or that he regularly violates Canon 3.A(3). Complainant does not allege that the judge has abused the power of the office. Judges are entitled to call off unproductive settlement conferences—and the sooner the better, to save everyone’s time. Complainant casts her charge in the language of Rule 3(h)(1)(D), which says that it is misconduct for a judge to “treat[] litigants or attorneys in a demonstrably egregious and hostile manner.” But neither the facts in the complaint, nor the narratives supplied by the other lawyers who attended the conference, meet that standard. Taken in the light most favorable to complainant, they would support an inference that complainant’s intransigence led to a flare of temper by the judge. Such behavior is not misconduct under the 1980 Act, so I dismiss the complaint.