21-90017-jm
January 10, 2022
Chief Judge

JUDICIAL COUNCIL OF THE SECOND CIRCUIT

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In re
CHARGE OF JUDICIAL MISCONDUCT Docket No. 21-90017-jm

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DEBRA ANN LIVINGSTON, *Chief Judge*:

Between March 26, 2021, and December 8, 2021, the Complainant filed a complaint and four supplemental complaints with the Clerk's Office of the United States Court of Appeals for the Second Circuit pursuant to the Judicial Conduct and Disability Act of 1980, 28 U.S.C. §§ 351–364 (the "Act"), and the Rules for Judicial-Conduct and Judicial-Disability Proceedings (the "Rules"), charging a senior district judge (the "Judge") of this Circuit with misconduct.

BACKGROUND

This complaint of judicial misconduct arises from the Judge's ownership of a condominium in Florida and his election to serve as a board member of the condominium association. The Complainant and the Judge own units in the same condominium complex, and the Complainant was, at the time of most of the events

in question, the board president. The following facts are drawn from the complaints and their various attachments, as well as from the Judge's written response and its attachments.

The Judge and his wife purchased the condominium in question more than six years ago. The building sustained damage during Hurricane Irma in 2017 and was otherwise in need of maintenance and repairs. At some point before the events at issue here, the board, on behalf of all unit owners, made an insurance claim for the hurricane damage, and retained various contractors and engineers to undertake the needed repairs. In the first half of 2020, the Judge was concerned about what he perceived to be undue construction delays and cost overruns; in July, August, and September 2020, he wrote four letters, on his judicial letterhead, to a group of board members (including the Complainant), two lawyers for the condominium associations, and the general manager of the condominium.

The letters, which indicated below the letterhead in bold and italics that they were "***PERSONAL & UNOFFICIAL***," complained of construction delays and what the Judge believed to be spiraling costs for maintenance and repairs; expressed concern that the contractors performing the work were not qualified to do so; and alleged that certain documents, including work orders and invoices,

had not been made available to unit owners, in violation of Florida law. By way of example, the Judge complained that the condominium association had paid more than $1 million to an engineering firm, but that the person from that firm who had performed most of the work was not an engineer. In October 2020, a lawyer for the association, who had been a recipient of the Judge's letters, wrote to the engineering firm to request that it stop communicating with the Judge, because the Judge was not (at the time) a board member and was not authorized to speak on behalf of the board or the condominium association.

In early December 2020, the board called a videoconference meeting, at least in part to address some of the concerns raised in the Judge's letters. During or after the meeting, it was agreed that the Judge would submit written questions to the property management company that the board had retained to manage the property, and that the questions, together with the managing agent's answers, would be distributed to all owners. On December 11, 2020, the Judge, apparently via email, sent a letter—this one was not on judicial letterhead—to a vice president of the property management company. The letter reiterated some of the concerns in the earlier letters regarding, for instance, cost overruns on an ongoing construction project; the qualifications of some of the contractors; and the general

worry that the board had incurred large debts that unit owners would eventually have to repay. The letter acknowledged that the board had made an insurance claim for damage related to Hurricane Irma, but expressed skepticism any insurance recovery would be sufficient to cover the cost overruns. This letter indicated that "Various Unit Owners" were copied, but did not indicate which owners.

A week later, on December 18, a representative of the property management company emailed all (or at least many) of the Judge's fellow unit owners. Apparently referring to the Judge's December 11 letter, the email stated that the owners had been subjected to "email blasts" from a "disgruntled owner" who had disparaged "the Association, its directors, the construction project, and its associated professionals." The email implied that the "disgruntled owner"—evidently, the Judge—had inappropriately obtained the unit owners' email addresses; it advised owners to "check and consider updating their computer's security and privacy settings"; and it advised owners to "contact the property manager if you would like to change your email address for obtaining **official** Association notices in the future" (emphasis in original). The email also alleged that the Judge's letter was inaccurate and misleading, and raised "serious privacy

and security concerns." The email was signed as if it had been sent by the "Board of Directors."

The Judge felt this email unfairly impugned him and, in consultation with lawyers from a firm that had been handling the Hurricane Irma-related insurance claim, he drafted a letter, with the intention that it be sent by the board to the unit owners, retracting the board's criticism of the Judge and apologizing. On or about December 27, the Judge met with the Complainant, who at the time was the board president, and asked him to send the letter on behalf of the board—in effect, to apologize, on behalf of the board, for impugning the Judge. The Complainant declined to do so.

The Judge then, on December 31, emailed, among others, the entire board, attaching the letter that he and the lawyers had drafted and asking the board as a whole—rather than just the Complainant—to decide whether to send it. He stated that the letter "was drafted by our insurance law firm," that he had "begrudgingly approved it," and that he had "no desire to take further action but, as you know, I have been terribly disrespected and arguably libeled since my reputation has been impugned. PLEASE do not put me in a situation where I will be compelled to take further action." The next day, a board member emailed one of the lawyers who

had assisted in drafting the letter, asking him to "please confirm the attached letter was drafted by your legal counsel as reported by" the Judge. An attorney responded, stating that the Judge had drafted a letter and "we"—the attorneys—had edited the letter and "suggested it over his original."

Six days later, on January 7, a lawyer retained by the Judge wrote to several board members alleging that the board had defamed the Judge in its December 18 email by accusing him of, among other things, committing computer-hacking offenses. The letter demanded that the board members "recant" their "defamatory statements" and threatened to commence litigation if they did not do so. Some board members either recanted or apologized, but others, including the Complainant, evidently did not. The Complainant then filed this complaint of judicial misconduct and, approximately two months after that, the Judge filed a federal lawsuit against the Complainant and others, asserting defamation and related claims. The lawsuit is pending.

While the events described above were unfolding, the Judge, apparently at the urging of other unit owners, decided first to run for a seat on the board for his tower's condominium association, and then for a seat on the board of the master association. In so doing, he sent his fellow unit owners candidate letters that, in

part, described his experience presiding over insurance and construction litigation as a federal judge. The Judge prevailed in both elections. It appears that, since the Judge was elected, the condominium association reached a settlement with the insurance carrier for the hurricane-related damage. The repairs and maintenance projects are ongoing.

Finally, in his late-April supplemental complaint, the Complainant identified an attorney who had been handling the Hurricane Irma-related insurance claim for the association and who had also worked with the Judge on the above-referenced demand letter as someone who "can provide corroborative evidence of the claim of judicial misconduct." Shortly thereafter, in an email discussing possible board approval of the insurance settlement, the Judge asked the lawyer to "please send me a copy of the letter" that the lawyer would be sending to this Judicial Council. In a reply email, the lawyer said (again after discussing the settlement first) that the lawyer did not wish to be affiliated with the complaint. Subsequently, through counsel, the lawyer wrote to the Judicial Council to state that he was "not aware of corroborative evidence of the claim of judicial misconduct."

With the facts summarized above as a backdrop, the misconduct complaint and supplements allege that the Judge committed misconduct by (1) writing letters to board members and others on his judicial letterhead, when his reasons for writing—concerns about construction delays, costs, and the like—related to his personal interests; (2) misusing judicial resources by using his government email account for this personal matter; (3) discussing construction-related matters with the condominium association's representatives, including attorneys and engineers, when he was not a board member; (4) falsely claiming that the late-December letter had been written by the board's lawyers when in fact he wrote it himself; (5) running for a seat on the board; (6) violating the confidentiality of judicial misconduct proceedings by emailing a lawyer whom the Complainant had identified as a potential witness to request a copy of any materials submitted in response to the complaint; (7) retaliating against the Complainant for filing this complaint by suing him for defamation; and (8) practicing law.

In response to the misconduct complaints, the Judge provided the following information. First, as relevant to the issue of using judicial letterhead for personal matters, the Judge states:

> Although I had written and signed these letters solely as a unit owner and had marked them PERSONAL and

> UNOFFICIAL, they were on my court station[e]ry. Even though the recipients knew I was a judge and the subject of the letters only related to my concerns as a unit owner to a construction project that had apparently gone awry, this was wrong and it will not happen again.
>
> While I have an explanation for how this happened, it is not an excuse and I take full responsibility. Since then, I took corrective action to ensure that no other writings bore that letterhead—and none have.

Second, the Judge states that although he believes his service on the board is consistent with the Codes of Conduct and he is uncomfortable resigning from the board mid-term given its important and ongoing work, he "will never again be a candidate for membership on a condo board" once his current term expires.

DISCUSSION

The complaint is dismissed as to all allegations except for those related to the Judge's use of judicial letterhead for a personal matter. As to that allegation, the complaint is concluded based on corrective action.

I. General Principles

The conduct at issue here is extrajudicial or extra-official in nature—i.e., it is conduct outside the performance of official duties. Under the Rules, a judge's extrajudicial conduct may constitute cognizable misconduct "*if* the conduct is reasonably likely to have a prejudicial effect on the administration of the business

of the courts, including a substantial and widespread lowering of public confidence in the courts among reasonable people." Rule 4(a)(7) (emphasis added).

The Code of Conduct for United States Judges ("Code") "sets forth behavior guidelines for judges," Rule 4 cmt., and may also "provide standards of conduct for application in" judicial misconduct proceedings under the Act, *see* Canon 1 cmt. However,

> not every violation of the Code should lead to disciplinary action. Whether disciplinary action is appropriate, and the degree of discipline, should be determined through a reasonable application of the text and should depend on such factors as the seriousness of the improper activity, the intent of the judge, whether there is a pattern of improper activity, and the effect of the improper activity on others or on the judicial system.

Id. The commentary to Rule 4 similarly provides:

> Even where specific, mandatory rules exist—for example, governing the receipt of gifts by judges, outside earned income, and financial disclosure obligations—the distinction between the misconduct statute and these specific, mandatory rules must be borne in mind. For example, an inadvertent, minor violation of any one of these rules, promptly remedied when called to the attention of the judge, might still be a violation but might not rise to the level of misconduct under the Act. By contrast, a pattern of such violations of the Code might well rise to the level of misconduct.

The principal Code provision arguably at issue here is Canon 2(B), which provides that a judge should not "lend the prestige of the judicial office to advance the private interests of the judge or others." *See also* Canon 2(B) commentary ("A judge should avoid lending the prestige of judicial office to advance the private interests of the judge or others"); *id.* ("A judge should be sensitive to possible abuse of the prestige of office."). The question thus becomes whether the Judge's extrajudicial conduct here violated Canon 2(B) and, if so, whether any violation rises to the level of misconduct under the Act. That is, whether any violation would be "reasonably likely to have a prejudicial effect on the administration of the business of the courts, including a substantial and widespread lowering of public confidence in the courts among reasonable people," Rule 4(a)(7), based on a "reasonable application of the text," and such factors as "seriousness," "intent," "pattern," and "effect" on others or on the judicial system, Canon 1 cmt.

Based on the record here, no reasonable person could view the Judge's conduct as approaching this standard.

II. Application

Before addressing each allegation in turn, it is helpful to consider the larger context. At the start, the conduct and allegations at issue here all revolve around:

(1) a heated dispute between the president of a condominium board (i.e., the Complainant) and a condominium owner (i.e., the Judge) over the management of the condominium association; and (2) a highly contested election to serve on the board that followed this dispute. These events took place more than one thousand miles away from where the Judge serves as a judge, and have nothing to do with the Judge's official duties as a judge.

It is also worth nothing what is not alleged here. Canon 2(B) provides that a judge should not "lend the prestige of the judicial office to advance the private interests of the judge or others." The meaning of "advanc[ing] the private interests of the judge or others" is not without ambiguity. But that said, a "reasonable application" of this text suggests that it does not apply to the general conduct at issue here. There is no plausible allegation or evidence that the Judge's conduct, including his desire to run for and serve on the board, was motivated by personal gain or enrichment, for himself or others. Instead, the record clearly suggests that the Judge was concerned by what he viewed as cost overruns on a construction project and difficulties associated with an insurance settlement involving his condominium association, and that he became involved in an effort to help resolve these problems. Any personal benefit to the Judge from such an endeavor is

ancillary and proportional to the benefit that all unit owners would receive. *See* Comm. on Codes of Conduct, Adv. Op. No. 29 (June 2009) (noting that activities associated with service on a condominium board, "although relating in part to residents other than the judge, are equivalent to those the judge would find necessary to undertake were the judge living in a privately owned, single-family residence," and that, even though such service "possesses certain commercial features that make it unlike a 'civic or charitable' activity, the service is "directed at the saving of expense and wise expenditure of funds rather than to the maximization of income").

The complaint in effect alleges that the Judge capitalized on the prestige of his position to win election to the condominium board, perhaps to the detriment of the Complainant's own service on that board. But at bottom, there is insufficient support in this record reasonably to conclude that the Judge's conduct, especially in light of the corrective action noted herein, constituted misconduct under the Act. To the extent there was any violation or improper activity, there is no allegation or evidence of a pattern of such activity. And, after considering a reasonable application of the relevant text, the Judge's motivation for getting involved, and the lack of any detrimental effect on others or on the judicial system,

no reasonable person would view this conduct as reasonably likely to have a "prejudicial effect on the administration of the business of the courts" or to result in a "substantial and widespread lowering of public confidence in the courts among reasonable people."

With this context in mind, we now turn to the specific allegations.

A. Use of Letterhead for Personal Matters

The Act, the Rules, and the Code do not provide specific guidance on the use of judicial letterhead, but some general principles are clear. As noted, a judge should not "lend the prestige of the judicial office to advance the private interests of the judge." Canon 2(B). Moreover, other persuasive authorities suggest that using judicial letterhead for personal matters is improper. For example, the commentary to Rule 1.3 of the ABA Model Code of Judicial Conduct states: "It is improper for a judge to use or attempt to use his or her position to gain personal advantage or deferential treatment of any kind. . . . *[A] judge must not use judicial letterhead to gain an advantage in conducting his or her personal business* (emphasis added)." Similarly, the New York State Commission on Judicial Conduct opines that using judicial stationery or letterhead for personal matters is inappropriate, and further that the words "personal and unofficial"—as the Judge wrote here—

"do[] not diminish the undeniable impact of such a letter." *See* http://www.scjc.state.ny.us/Policy.Statements/court_letterhead.html ("Where the assertion of judicial influence may be manifested in a letter on court stationery from the judge to the person or agency over which influence is sought, it makes no difference that the letter may be marked 'Personal & Unofficial.' That qualifying phrase cannot mask the identity of the sender as a judge.").

The record does not establish that the Judge intended to use his official letterhead to advance his private interests but, regardless of his intent, the use of judicial letterhead may have violated Canon 2(B) by lending the prestige of the judicial office to the Judge's personal matters. Nonetheless, the Judge has corrected any potential violation by acknowledging the impropriety and pledging to refrain from similar conduct in the future. Accordingly, the complaint proceeding as to this allegation is concluded because "the subject judge has taken appropriate voluntary corrective action that acknowledges and remedies the problems raised by the complaint." Rule 11(d)(2); *see also* 28 U.S.C. § 352(b)(2) (providing that chief judge may conclude the complaint proceeding upon finding that "appropriate corrective action has been taken or that action on the complaint is no longer necessary because of intervening events"); Rule 11 cmt. (providing

that "[t]erminating a complaint based on corrective action is premised on the implicit understanding that voluntary self-correction or redress of misconduct . . . is preferable to sanctions," and including an apology or "a pledge to refrain from similar conduct in the future" as examples of "appropriate corrective action").

B. Other Allegations

As to the remaining allegations, the complaint is dismissed as "lacking sufficient evidence to raise an inference that misconduct has occurred." Rule 11(c)(1)(D).

Use of personal judicial email account: The complaint alleges that the Judge committed misconduct by using his government email account for personal matters. The Committee on Codes of Conduct has opined that a judge, "to some extent . . . may properly use judicial resources in furtherance of the judge's permissible non-law-related activities." Comm. on Codes of Conduct, Adv. Op. No. 80 (June 2009). Limited use of judicial resources for non-judicial matters is permitted "as long as the activity does not interfere with the full and prompt performance of judicial duties." *Id.* Examples of appropriate use of judicial resources include "occasional telephone calls, scheduling, and storage of files, books, or equipment." Here, there is no allegation or indication that the Judge's use of his government email account for personal matters interfered with the

performance of his judicial duties. It may have been preferable for the Judge to use a personal email account for his personal matters, but occasional use of a judicial email account for non-judicial matters is comparable to occasional telephone calls and, without more, is not misconduct. Moreover, the Judge noted in his response to the complaint that he has recently activated a dormant personal account to avoid using his government email for condominium-related matters, and so has taken corrective action.

Discussing construction-related matters with the condominium association's representatives: The Complainant has not explained how the Judge engaged in misconduct by discussing construction-related matters with engineers and other professionals that the board retained, nor is this apparent based on the materials in the record here. The Judge, like any unit owner, is permitted to speak with contractors and other professionals retained to perform work on property in which he holds a personal interest.

Alleged retaliation: The complaint alleges that the Judge filed the federal defamation lawsuit against the Complainant in retaliation for the Complainant having filed this complaint of judicial misconduct. To be sure, "cognizable misconduct includes retaliating against complainants . . . for participating in this

complaint process." Rule 4(a)(4); *see also* Rule 4 cmt. ("[A] judge's efforts to retaliate against any person for reporting or disclosing misconduct, or otherwise participating in the complaint process constitute cognizable misconduct."). This allegation is nonetheless dismissed because no reasonable observer could interpret the Judge's actions as retaliatory.

The evidence establishes that the Judge was immediately offended and felt he had been defamed by the December 18 email. Within a few days, he drafted a response and took steps to attempt to secure an apology and retraction, including meeting with the Complainant. When those efforts proved unsuccessful, he (through his lawyer) threatened litigation against the Complainant and others in a letter dated January 7, 2021. This complaint of judicial misconduct was not filed until March 26. Thus, although the Judge did not file his lawsuit until after this judicial misconduct complaint had been filed, the evidence establishes that the lawsuit arises from the December 18 email and the threat of litigation in early January, not from retaliation against the complaint of judicial misconduct.

Authorship of late December letter: The Complainant alleges that the Judge committed misconduct by misrepresenting the author of the letter drafted in late December 2020, which the Judge intended for the Complainant to send on behalf

of the board to apologize for the December 18 email. The record shows that in response to the December 18 email, the Judge, on or about December 24, wrote a draft letter and emailed it to lawyers for their comments. The Judge's first draft was about 1.5 pages single-spaced; after he and the lawyers exchanged edits, a version that was about half of the original's length was delivered to the Complainant and, eventually, the other board members in late December. In the email attaching that letter, the Judge stated that the letter had been "drafted by our insurance law firm," and that he had "begrudgingly approved it." On January 1, another board member asked the lawyers whether they had drafted the letter "as reported by" the Judge, and a lawyer responded that the lawyers had edited the Judge's draft and "suggested it" over the original. The version that was presented to the board members was the result of collaboration, and the email describing its authorship was sent by a lawyer, not the Judge. But to the extent that the Judge "reported" that the lawyers, rather than he, had written the letter and that he had "begrudgingly" approved it, this was not a misrepresentation: the final version closely resembled the lawyers' edited version.

Confidentiality of proceedings: The Complainant next alleges that the Judge violated the confidentiality of these proceedings when he contacted a lawyer

whom the Complainant had identified as a potential corroborating witness and asked that lawyer to send him a copy of any letter he submitted in these proceedings.

Judicial misconduct proceedings are intended to be confidential; as the commentary to Rule 23 explains: "The Act applies a rule of confidentiality to 'papers, documents, and records of proceedings related to investigations conducted under this chapter' and states that they may not be disclosed 'by any person in any proceeding,' with enumerated exceptions." Rule 23 cmt. (quoting 28 U.S.C. § 360). One exception permits disclosure if "both the subject judge and the chief judge consent in writing." Rule 23(b)(7).

The Judge admits that he may have inadvertently violated Rule 23 by neglecting to obtain my consent before informing the lawyer that the Complainant had listed him as a witness. It appears that the Judge assumed that the lawyer already knew about the existence of the complaint because the Complainant expressly identified the lawyer as a witness who could "provide corroborative evidence of the claim of judicial misconduct." It is also worth noting that because the Complainant identified the lawyer as a witness, I could have communicated with the lawyer as part of my "limited inquiry" in determining what action to take

on the complaint, which obviously would have revealed the existence of the complaint to the witness. *See* Rule 11(a) (providing that chief judge "may communicate orally or in writing with the complainant, the subject judge, and any others who may have knowledge of the matter"). The allegation is therefore dismissed because, even if the Judge technically violated Rule 23, his actions do not rise to the level of misconduct under the Act. *See* Rule 4 cmt. (explaining that "an inadvertent, minor violation of any one of these rules, promptly remedied when called to the attention of the judge, might still be a violation but might not rise to the level of misconduct under the Act"); *see also id.* ("The formal procedures outlined in these Rules are intended to address serious issues of judicial misconduct and disability.").

Campaigning for and serving on the board: The Complainant alleges that the Judge's campaign for and service as a board member contravened Advisory Opinion 29 of the Committee on Codes of Conduct. That opinion states, in relevant part:

> [E]ach case depends on its facts. If the cooperative or condominium is not large or substantial, and if the duties of being an officer or director are routine and primarily internal (allocating responsibilities; employing maintenance, security, and essential personnel; providing for services; passing on prospective

> occupants; formulating occupancy rules; and the like), the activity would not appear to violate the provisions or spirit of the 1963 Resolution or the Code. If, however, the duties entail substantial or numerous business-type contacts with outside enterprises, particularly of the kind that could result in litigation, a judge's participation becomes questionable. The judge should then consider leaving those responsibilities to others. Throughout, the judge should keep in mind the basic requirements of Canon 2 (that the judge "should avoid impropriety and the appearance of impropriety in all activities") and Canon 3 (that "[t]he duties of judicial office take precedence over all other activities"). The judge must also bear in mind that positions held by a federal judge should not be so great in number as to jeopardize the performance of judicial duties.

Comm. on Codes of Conduct, Adv. Op. No. 29 (June 2009).

The available evidence suggests that the condominium complex is large and the Judge's duties as a board member are likely substantial. The allegation of misconduct is nonetheless dismissed for several reasons. First, to repeat, there is no plausible allegation or indication that the Judge was motivated to serve on the board for personal gain or another improper purpose; the record is instead consistent with the conclusion that he did so because he thought he could help resolve what he viewed as problems in the management of the condominium association. Any personal benefit to the Judge is ancillary and proportional to the benefit that all unit owners would receive. *See* Comm. on Codes of Conduct, Adv.

Op. No. 29 (June 2009) (noting that the activities associated with service on a condominium board, "although relating in part to residents other than the judge, are equivalent to those the judge would find necessary to undertake were the judge living in a privately owned, single-family residence," and that, even though such service "possesses certain commercial features that make it unlike a 'civic or charitable' activity, the service is "directed at the saving of expense and wise expenditure of funds rather than to the maximization of income"). Second, as explained above, there is no plausible allegation that the Judge's service on a condominium board has had, or is likely to have, "a prejudicial effect on the administration of the business of the courts," or that such service—occurring, as it does, at a seasonal residence more than one thousand miles away from the district in which the Judge presides—would result in "substantial and widespread lowering of public confidence in the courts among reasonable people." Finally, the Judge has pledged to no longer serve as a board member after the expiration of his current term.

Practice of law: The final allegation is that the Judge engaged in the unauthorized practice of law. The prohibition on the practice of law is one of the few statutory constraints on judges' conduct. *See* 28 U.S.C. § 454 ("Any justice or

judge appointed under the authority of the United States who engages in the practice of law is guilty of a high misdemeanor."); *see also* Canon 4(A)(5) ("A judge should not practice law and should not serve as a family member's lawyer in any forum.").

The outer contours of the "practice of law" are not clearly defined, but the allegation is dismissed because, whatever they are, no reasonable observer could conclude that the Judge engaged in the unauthorized practice of law. The Judge did not hold himself out as a lawyer; did not solicit clients; did not appear in court; and did not purport to represent either unit owners or the association in the legal sense of the term. As a board member, he undertook duties that any board member, lawyer or not, would have been obligated to perform. The allegation is accordingly dismissed.

The Clerk is directed to transmit copies of this order to the Complainant and to the Judge.