JUDICIAL COUNCIL OF THE EIGHTH CIRCUIT

JCP No. 08-21-90065

In re Complaint of John Doe[1]

On October 29, 2021, a judicial complaint was filed against a United States district judge. The judicial complaint alleges that the district judge disparaged an attorney ("complainant") during a status conference "unfairly and without [the complainant] present, and then asked a . . . defendant, who was in court, to file a frivolous complaint against [the complainant] after [the complainant] had withdrawn as CJA (Criminal Justice Act) counsel at the defendant's request." According to the complainant, the district judge's "treatment of attorneys and others in such a demonstrably egregious and hostile manner has a degrading effect on the image of the judiciary" and "will further exert, a negative impact on attorney participation in the Criminal Justice Act (CJA) representation of indigent clients in [the district], which will be prejudicial to the fair administration of justice." *See* Judicial-Conduct and Judicial-Disability Proceedings of the Judicial Conference of the United States (J.C.U.S.) Rule 4(a)(2)(B) ("Cognizable misconduct includes . . . treating . . . attorneys . . . in a demonstrably egregious and hostile manner.")

I requested a response from the district judge. *See* J.C.U.S. Rule 11(b). The district judge provided a detailed procedural history of the case with record citations and denied any wrongdoing in the district judge's conversation with a defendant. The discussion included comments about the complainant's representation of the

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[1]Under Rule 4(f)(1) of the Rules Governing Complaints of Judicial Misconduct and Disability of the Eighth Circuit, the names of the complainant and the judicial officer complained against are to remain confidential, except in special circumstances not here present.

defendant and concerns for the complainant's compliance with an attorney's ethical obligations.

Pursuant to my limited inquiry, I also reviewed the case record. *See id.* The procedural history of the case reflects the following, undisputed facts. A criminal defendant was indicted on May 8, 2019. The complainant was appointed as CJA counsel to represent the criminal defendant on May 17, 2019. The complainant filed five separate motions to continue trial. All of the motions contained identical language: "[The criminal defendant] acknowledges that all time which elapses from the date of the order granting continuance until trial shall be excluded from any Speedy Trial Calculation." The criminal defendant did not file a signed waiver of speedy trial or informed consent to the continuance requests, nor did the complainant file an informed consent or waiver of speedy trial advising the court that the criminal defendant agreed to the requested continuances.

The complained-of district judge was assigned to the case on February 27, 2020. After the assignment, the district judge granted two continuance motions, relying, in part, on the complainant's representations to the court. The final continuance was entered on March 12, 2021, and trial was set for May 25, 2021.

On April 16, 2021—one month prior to trial—the complainant moved to withdraw as counsel for the criminal defendant. On April 21, 2021, the magistrate judge held an *ex parte* hearing to discuss the request. At the hearing—at which the complainant was present—the criminal defendant advised the magistrate judge:

> And in this case, since I've been indicted, I've been trying to get a speedy trial on this case and I haven't been able to file any motion. I haven't heard of any motions being filed in this case on my behalf. I don't know if any have been filed on my behalf because I haven't been notified.

After the magistrate judge informed the criminal defendant that the complainant had filed a motion for continuance, the criminal defendant responded:

> Your Honor, I have a question. There was a motion filed for leave for a continuance—I filed a motion for continuance on my behalf? Well, I—that's—we've been in communications but I think that the communication that some sort of breakdown as far as remains, that I've been told, and I think he just checking in and saying hey and I wasn't.

At the end of the hearing, the magistrate judge granted the complainant's motion to withdraw as counsel for the criminal defendant. Following the complainant's withdrawal, on April 22, 2021, the magistrate judge appointed another attorney to represent the criminal defendant. On May 7, 2021, the district judge held a status conference with new counsel and the government to discuss preparation for the upcoming trial scheduled for May 25, 2021. The district judge had been informed that the criminal defendant did not want a continuance, despite the recent appointment of new counsel. New counsel advised that the criminal defendant had "a large concern with the amount of continuances that ha[d] been previously requested and was highly disappointed with that and there was some conflict that ensued after that." New counsel said he would discuss the matter with the criminal defendant and file a continuance motion if the criminal defendant agreed.

On May 11, 2021, new counsel filed a continuance motion based on being newly appointed to the case. In it, counsel represented:

> The trial in this matter has been continued multiple times by prior counsel and because of the emergency order pursuant to COVID. *The Defendant wants Undersigned to inform the Court that he has not consented to prior continuances and indicates he was unwitting to the reason why his case has been delayed thus far*. However, he is agreeable to this 60-day continuance to allow new counsel to review discovery and prepare for trial. Defendant has been informed and understands that the

> delay occasioned by this motion is excluded from counting under the Speedy Trial Act.

(Emphasis added.) The district judge granted the continuance motion and rescheduled the trial for August 17, 2021.

On June 18, 2021, new counsel filed a motion seeking permission to permit the criminal defendant to proceed pro se. Citing Rule 1.6 of the North Dakota Rules of Professional Conduct regarding the confidentiality of information, counsel indicated that the criminal defendant expressed his desire to represent himself in the case. The government responded by asking the district judge to properly advise the criminal defendant regarding his desire for self-representation and requesting a *Faretta* hearing. The district judge referred the motion to the magistrate judge.

On July 21, 2021, the magistrate judge held a *Faretta* hearing. That same day, the magistrate judge issued a report and recommendation (R&R), recommending that the district judge permit the criminal defendant to represent himself and appoint new counsel as standby counsel. The district judge adopted the R&R on August 2, 2022. The district judge scheduled a status conference for August 12, 2022.

At the status conference, the district judge reviewed with the criminal defendant the substantial prison time he faced if convicted of the pending charges. The district court also reviewed scheduling to confirm availability to try the criminal defendant's case during the week of August 23, 2021, as a conflict occurred with the previously scheduled trial date of August 17, 2021. The criminal defendant again expressed concern that the complainant had failed to consult with him before submitting the multiple continuance requests; he stated, "And I've been kind of blindsided in this case, if you will. Like, there were proceedings in this case where I didn't attend as far as postponing this trial. My defense attorneys appeared on my

behalf without my knowing, and this case was deferred and deferred and deferred . . . ."[2]

Also at the status conference, the criminal defendant expressed surprise at the government's prior plea offer. The following exchange occurred:

> [THE GOVERNMENT]: [The criminal defendant] has cooperated, Your Honor, and that was part of the plea offer that went to [the complainant] long ago that would avoid mandatory minimum sentences.
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> THE COURT: Did you ever get a plea offer?
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> THE DEFENDANT: No, sir. No, sir. Not one plea offer in this case in two years, sir.

The criminal defendant eventually agreed to a short continuance to permit himself time to review discovery materials and engage in plea negotiations with stand-by counsel's assistance. The district judge granted the criminal defendant's continuance request, and stated, in relevant part, to the criminal defendant:

> I would like you to consider is that you write a letter to the Office of Disciplinary Counsel for the State of North Dakota regarding your experience concerning [the complainant], and then they will take action with regard to [the complainant]. Because lawyers that don't do their job should not be lawyers. You understand what I'm saying?

After the criminal defendant indicated that he understood and confirmed he had access to a computer, the district judge further stated:

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[2]The criminal defendant made clear that his concern was with the *complainant's* representation, not his new counsel's representation.

> On the [State] Supreme Court website there's a number—there's an address for the Office of Disciplinary Counsel. I would encourage you to write just a short note and say—you can even say, "[The district judge] encouraged me to ask that you investigate [the complainant] for his representation of me in this case," and then just sign it. And I wouldn't provide any other details about you or your defense or what you're facing because you've got a lot to lose . . . .

After the criminal defendant again indicated that he understood, the district judge continued:

> You're not being a bad guy to [the complainant]; he was not a good guy to you because he didn't do what he needed to do to represent you. And like I said, you've got a lot to lose. You've got a family and a job and I think a business, don't you?

The district judge then advised the criminal defendant how the complaint process works:

> [T]he Office of Disciplinary Counsel will get a hold of the information and they'll ask you, "Have you ever seen this; did he contact you before he filed this continuance request; did he ever take this plea offer to you." And if the answer to all of that is "no," those are things that they should consider in determining whether or not he should continue to be a lawyer in the State . . . . Because I suspect that you are not the only one that has had this experience with [the complainant].

The district judge asked that the criminal defendant copy the district judge's office on any letter written to the Office of Disciplinary Counsel "[b]ecause then we'll be able to provide them with some additional information that might assist in their investigation to prevent this from happening to somebody else." After the criminal defendant indicated that he would, the district judge responded:

> You're doing all of us a favor by doing that, sir. I want you to know that. And there's not going to be any repercussions. There's nothing that [the complainant] can do to you in response to that, but it's something that you can do to benefit other people in your similar situation.

Based on the aforementioned undisputed facts set forth in the record, I conclude that the complainant has failed to prove the allegations set forth in the judicial complaint. The judicial complaint's allegation that the district judge "unfairly" asked a criminal defendant to file a "frivolous complaint" against the complainant "lack[s] sufficient evidence to raise an inference that misconduct has occurred or that a disability exists." J.C.U.S. Rule 11(c)(1)(D). Indeed, the district judge was likely *required* to take some "appropriate action" based upon the record providing uncontradicted allegations of a violation of state rules of professional conduct. *See* Canon 3B(6) of the Code of Conduct for United States Judges (requiring a federal "judge [to] take appropriate action upon receipt of reliable information indicating the likelihood that . . . a lawyer violated applicable rules of professional conduct"). At no point did the district judge evaluate whether the criminal defendant's claims against the criminal defendant were true; instead, based on the criminal defendant's serious allegations of misconduct by the complainant, the district judge encouraged the criminal defendant to file a complaint with state disciplinary authorities to permit a proper investigation.

Additionally, as to the judicial complaint's allegation that the district judge treated the complainant in a demonstrably egregious and hostile manner, sufficient evidence is also lacking. *See* J.C.U.S. Rule 11(c)(1)(D). The record shows that the district judge did make comments critical of the complainant's actions in the criminal defendant's case; however, these comments were not disparaging, hostile, or egregious. Instead, these comments were based on information contained in the record; specifically, the hearings before the magistrate judge and the district judge.

The judicial complaint is dismissed.

November 1, 2022

Lavenski R. Smith, Chief Judge
United States Court of Appeals
for the Eighth Circuit