

JUDICIAL COUNCIL
OF THE FIRST CIRCUIT

IN RE
COMPLAINT NO. 01-10-90030

BEFORE
Lynch, Chief Circuit Judge

ORDER

ENTERED: FEBRUARY 11, 2011

Complainant, an attorney, filed a complaint against a district judge alleging a violation of the Judicial Conduct and Disability Act, 28 U.S.C. § 351 (a). The complainant alleges that the judge made statements to a newspaper which were widely covered concerning the local (hereafter "Commonwealth") judiciary which are claimed to violate Canons 1 and 4 of the Code of Conduct for United States Judges (Code of Conduct), and, in addition, to constitute cognizable misconduct in violation of 28 U.S.C. § 351, *et. seq.* The complainant asserts that the judge's statements constitute improper interference by the federal judiciary into the Commonwealth court system, and undermine the independence and impartiality of the Commonwealth's court proceedings. Complainant appears as criminal defense counsel in one non-federal case and claims that

proceeding has been affected by the judge's statements. A description of the judge's statements is set forth in the section below.

As part of a limited inquiry undertaken pursuant to Rule 11(b) of the Rules for Judicial-Conduct and Judicial-Disability Proceedings (Rules of Judicial-Conduct), my staff and I have reviewed the complaint, the public statements made by the judge and by others, and the context in which the statements were made, in light of the governing ethical principles. We have gathered other relevant publicly available information.

I have concluded that the judge's statements do not provide a basis for a claim of cognizable misconduct within the meaning of the statute, see 28 U.S.C. § 352(b)(1)(A)(i), nor do they establish any violation of the Code of Conduct. The complaint is dismissed.

I.

Judges of the United States Courts are encouraged to engage in extrajudicial activities which contribute to the law, the legal system, and the administration of justice.¹ See Code of Conduct, Canon 4.

Several issues of concern to both the federal and Commonwealth judicial systems were highlighted in media coverage of the outcome of criminal proceedings in a 2010 Commonwealth court case against six of fifteen gunmen charged by prosecutors with murders the previous year. The Commonwealth trial court judge dismissed the charges

¹In keeping with Canon 4 and before the statements at issue were made, this judge, together with the Chief Justice of the Commonwealth courts, worked cooperatively together on a joint task force, commonly known as a federal/Commonwealth task force, to address issues of common concern to both judicial systems. That task force continues to work on such issues.

against the individual defendants. Several of these defendants were promptly charged by the U.S. Attorney with federal crimes. The complained of federal judge was randomly assigned to two of the cases. The dismissal in the Commonwealth of the charges had been subject to criticism in the media months before the judge made the statements at issue. Further, it was reported that both the Commonwealth court and Commonwealth justice department authorities investigated the dismissal by the Commonwealth judge, and that he was reassigned to hear only civil cases.

Some 10 days before the statements at issue, the U.S. Attorney for this jurisdiction issued comments to the media, which were widely covered, and were critical of the administration of aspects of the Commonwealth criminal justice system. Among these comments was an assertion that the U.S. Attorney and others had "known" that the Commonwealth trial judge would acquit the six defendants even before the Commonwealth court judge dismissed the charges. The U.S. Attorney said one of the six had been unsuccessfully prosecuted seven times in prior Commonwealth charges, that "there are many prosecutors and judges in the Commonwealth system who are honest but there are many things that must change. The system deserves to go through a reform." These comments were widely reported, as were the responses of several Commonwealth officials who said the comments must be taken seriously. The former Attorney General of the Commonwealth, for example, recommended that the Chief Justice of the Commonwealth courts meet with the U.S. Attorney to address the "shadow" on the local

judiciary.

Within days, the Chief Justice of the Commonwealth courts met with the U.S. Attorney to discuss the problems identified. The federal judge complained about in the present matter was also invited to and attended this meeting. The Chief Justice thereafter publicly announced the initiation of a process of evaluation and research to improve the system and the administration of justice. The Chief Justice said that "we are all responsible to ensure that . . . quality . . . justice prevails. . . whether at the state or federal jurisdiction." The Chief Justice said that, as a result, he is "answering the call that has been made" for actors in the criminal justice system to "come together to improve the processing and management relating to individual cases." The U.S. Attorney noted that the Chief Justice had proposed "very good ideas," and it was agreed that the local police departments would engage in further discussions with the U.S. Department of Justice. Additional proposals as to the Commonwealth's criminal justice system were made, as well, including the improvement of research skills for both Commonwealth prosecutors and police, improved education, the modification of certain rules and regulations, and the appointment of experienced judges to complex criminal cases.

The media then sought comments from the federal judge complained about in this matter, who presided over the federal criminal prosecutions of two of the six defendants acquitted in the multi-defendant Commonwealth murder trial. Before the statements at issue and after the defendants had entered guilty pleas, the judge had remarked in the

course of the federal proceedings on the defendants' criminal records. The damage inflicted on society by criminal defendants whose guilt has been established is an appropriate subject for comment by federal judges. The federal judge agreed to comment but conditioned his agreement to the subsequent interview on the press interviewing the Commonwealth Chief Justice the next day.

The federal judge's statements, which were published in a local newspaper, concerned the effect on the federal court of the dismissal of certain criminal prosecutions in the Commonwealth courts which then led to federal prosecutions. The judge and the Chief of the Probation Office had examined close to 30 files of federal criminal defendants who had records of unsuccessful Commonwealth criminal charges. The judge stated that it was alarming that federal prosecutors were successful based on evidence of crimes which had not resulted in successful prosecutions in the state jurisdiction. He further commented that, from his review of the federal court records, the records showed many federal defendants had a long history of Commonwealth criminal charges for which they had never been held responsible. The newspaper independently supported the judge's observation by adding to the article its information on one federal case involving defendants with a long record of unsuccessful state charges.

The judge stressed that there was a need for people to respect the administration of justice. He stated that a high rate of failure of criminal prosecutions had a demoralizing impact on victims, witnesses and police. The judge made clear that he was not criticizing

any state judge, said that he had an excellent relationship with the state judiciary, and acknowledged that the local courts had a greater volume of work and more budgetary problems than the federal courts. He made general comments about the need for all judges to work hard, the need to avoid camaraderie with the bar which could affect judicial judgment, and the importance of public participation through jury trials. He commented that there were two rules which might bear further review by the Commonwealth courts. Some apparently misconstrued or took offense at the comments of the judge.

The day after issuance of the judge's statements, the media reported that the Chief Justice and an Associate Justice of the Commonwealth courts had met with the federal judge to discuss the issues raised affecting the Commonwealth court system which impacted on the federal system. The headline in one report was "Defends State Judiciary and Announces Change; Supreme Court Chief Justice Admits There Are Problems." It was reported that the reaction of all the judges was "a joint one with the purpose of seeking proactive steps to improve the functioning of the criminal justice system." The Commonwealth Chief Justice highlighted the need to improve "the investigative training of law enforcement agents" and the problems caused by a tendency to rush to bring charges. The Chief Justice reported that he was forming a group of judges specially trained to preside over complex criminal cases as they arise state-wide. The Chief Justice added that he would evaluate managerial practices including the availability of technology, and issues pertaining to the state judicial nomination process.

II.

The Code of Conduct for United States Judges provides the applicable initial standards in judicial misconduct proceedings.² It is important to note that not every violation of the Code of Conduct constitutes misconduct, much less warrants disciplinary action under the Judicial Conduct and Disability Act, 28 U.S.C. § 351, *et. seq.* See Code of Conduct, Commentary on Canon 1. Further, "the Code is in many potential applications aspirational rather than a set of disciplinary rules. Ultimately, the responsibility for determining what constitutes misconduct under the statute is . . . subject to such review and limitations as are ordained by the statute and by these Rules." Rules of Judicial-Conduct, Commentary on Rule 3.

Canon 1 provides that a "judge should uphold the integrity and independence of the judiciary." The complainant's contentions that the judge violated Canon 1 of the Code of Conduct depends upon the complainant's assertion that the judge's comments impermissibly undermined public confidence in the independence, honor and integrity of the Commonwealth's judiciary.

Canon 4 specifically authorizes and encourages judges to engage in extrajudicial

²The complainant also references the American Bar Association Model Code of Judicial Conduct. The appropriate analysis is under the Code of Conduct for United States Judges which the Judicial Conference of the United States has promulgated and adopted for application to the federal judiciary.

activities which are consistent with the obligations of judicial office. See Code of Conduct, Canon 4. Judges are "encouraged" to engage in extrajudicial activities that "contribute to the law, the legal system, and the administration of justice . . . ," Code of Conduct, Commentary on Canon 4. The contention that the judge violated Canon 4 is based on an assertion that the judge's statements constituted extrajudicial activities which fail to "contribute to the law, the legal system, and the administration of justice" Code of Conduct, Commentary on Canon 4.

The complainant also contends that, in contravention of Canons 1 and 4, the judge's remarks undermined the independence of the Commonwealth judiciary, and raised federalism concerns. The further assertion is that this constituted misconduct under Rules 3(h)(1) and (2) of the Rules of Judicial-Conduct. Rule 3(h)(1) identifies behaviors that may constitute misconduct, while Rule 3(h)(2) applies to "conduct occurring outside the performance of official duties [that] . . . might 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." Rules of Judicial-Conduct, Rules 3(h)(1) and (2).

It is true that the scope of permissible activities under Canon 4 may be limited by the operation of the other Canons³, including the need to preserve judicial independence

³Public comments on the merits of a pending case, see Code of Conduct, Canon 3(A)(6), as well as speeches affiliated with partisan political activities are explicitly prohibited. See Code of Conduct, Canon 5(A)(2), and Guide to Judiciary Policy, Vol. 2, Pt. B, Ch. 3, Compendium of Selected Opinions, §5.1(e).

which is at the heart of Canon 1. See e.g., Committee on Codes of Conduct, Advisory Opinion No. 93 ("A judge's extrajudicial activity related to the law will often implicate other canons aside from Canon 4 [including] . . . Canon 1's mandate that a judge uphold the independence of the judiciary."). Accordingly, I address first whether the judge's statements constituted permissible activity related to the law under Canon 4, and, if so, whether the acceptability of these statements was limited by Canon 1 concerns. See id.

With regard to Canon 4, the complainant argues that the judge's comments did not "contribute to the law [or to] the legal system," but, in fact, impeded the "administration of justice, . . . detract[ed] from the dignity of the judge's office, and reflect[ed] adversely on [the judge's] impartiality." Whether a law-related activity is permissible under Canon 4 concerns, first, whether the judge, by virtue of his or her judicial experience, is especially qualified to address the matter at issue, and, second, whether the "beneficiary of the activity is the law or legal system itself, rather than the interests of any specific constituency. . . ." Advisory Opinion No. 93, *supra*.

In the pending matter, the judge, by virtue of his position as a federal judicial officer, was especially qualified to discuss the impact of failed Commonwealth prosecutions in that criminal judicial system on the federal courts. The judge's statements did exactly that: they addressed the fact that failed Commonwealth criminal prosecutions had resulted in defendants who had been repeatedly charged and released being charged by the federal prosecutors in federal court, where they were often convicted on related

charges. Complainant does not claim to dispute the accuracy of that factual statement. The judge's statements were part of an ongoing public dialogue concerning certain aspects of the functioning of the local criminal justice system which had directly impacted the federal court on which the judge sits.

It certainly cannot be said that the statements failed to contribute to the law, to the legal system or to the administration of justice. To the contrary, the judge's remarks were directed toward the improvement of the legal system as a whole. The context in which the statements were made corroborates this conclusion. The judge's statements were made after comments on such issues were made by other federal and Commonwealth officials. For months prior to the judge's statements, there had been widespread acknowledgment in the media by Commonwealth officials of complaints about issues in that court system. The federal judge spoke to the impact of those issues on the federal judiciary, and offered general insights into the sources and potential solutions to some of the concerns raised with the administration of the criminal justice system. Furthermore, he did so after the Commonwealth Chief Justice had acknowledged the need to address certain issues. He also conditioned his statements on a commitment from the press that the Chief Justice would be promptly offered the opportunity to make his own comments through the press. Thus, after the judge made his remarks, there was continued dialogue and further statements offered by Commonwealth and federal officials alike.

"Contributing" to the administration of justice, as contemplated by Canon 4,

necessitates acknowledging the existence of potential issues of concern that need to be remedied. The federal judge's comments did not violate Canon 4. Indeed, the actions of the Commonwealth's Chief Justice -- the Chief Justice not only acknowledged the existence of certain problems, but also analyzed the nature of the problems and announced specific measures to address them -- themselves clearly contributed to the administration of justice.

With regard to the claims of violation of Canon 1, I examine whether the judge's statements, although consistent with Canon 4, nevertheless, undermined the integrity and independence of the judiciary.⁴ With regard to the Commonwealth's judicial system, the complainant's concern appears to focus on an assertion that the judge's comments must be understood to cast disrespect on the Commonwealth's judiciary. The complainant appropriately concedes that the judge did not refer to specific pending Commonwealth cases or judges. Moreover, the context in which the statements were made demonstrates that the judge's statements were not intended to disparage the Commonwealth courts, but to provide constructive observations and suggestions concerning the inevitable interplay of the Commonwealth and federal court criminal justice systems. The judge's statements did

⁴ This requires that the federal judge does not enmesh himself or herself in or become subordinate to the local jurisdiction, and that the federal judge not undercut the independence or integrity of the federal judiciary. See Advisory Opinion No. 93, *supra*. Neither of those interests was offended by the statements. The statements did not entangle the federal judge in specific state court matters, or place the judge or the federal court in a subordinate relation to the local courts. Id. The judge's comments did not undermine the integrity or independence of the federal judiciary.

not impugn the independence or integrity of either the federal or Commonwealth court systems. See Code of Conduct, Canon 1. There was no violation of Canon 1, let alone of the judicial misconduct statute.

The complainant makes an assertion that her client's defense -- the complainant represents in a Commonwealth court prosecution another of the defendants charged in connection with the multiple murders -- was compromised by the judge's remarks. But the complainant offers no evidence to support this assertion. The complainant apparently contends that the judge's remarks may have somehow tainted the jury in the complainant's case. This completely ignores the publicity and investigation prompted by the Commonwealth judge's dismissal of the six original defendants, and the many comments by the Chief Justice of the Commonwealth courts and others. In fact, the judge made no comments concerning the Commonwealth system of selecting juries or the functioning of Commonwealth juries but, on the contrary, discussed whether the large number of waivers of jury trials warrant reconsideration by the Commonwealth system. Nor does the complainant allege that, in her pending case, she has either claimed in the Commonwealth prosecution that the jury pool has been rendered unable to hear the case impartially or sought any related remedy from that court. Any claim that the judge's statements impinged upon the independence of the complainant's Commonwealth court proceeding is unfounded.

Finally, Canon 2 of the Code of Conduct, which requires judges to avoid

impropriety and the appearance of impropriety, may also be relevant as to the appropriateness of a judge's participation in extrajudicial activities. See Advisory Opinion No. 93, *supra*. However, Canon 2 does not undermine the propriety of the judge's statements in this matter. The requirement of Canon 2(A) -- that a judge act at all times to promote confidence in the impartiality of the judiciary -- does not prevent acknowledgment of problems which have emerged over time from the operation of a criminal justice system; nor could it and be consistent with Canon 4's admonition that judges work to improve the administration of justice.

The judge's statements were consistent with the provisions of the Code of Conduct. Further, they did not violate the judicial misconduct statute, 28 U.S.C. § 351, *et. seq.* The judge's remarks were not among the behaviors identified in Rule 3(h)(1) of the Rules of Judicial-Conduct. Moreover, Rule 3(h)(2) of the Rules of Judicial-Conduct (which proscribes "conduct occurring outside the performance of official duties [that] . . . might 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") cannot be read to prohibit a federal judge from making statements, in accordance with the Code of Conduct, to further an effort, with Commonwealth and federal officials, to identify and address publicly acknowledged problems with the administration of a criminal justice system which have an impact on the administration of justice in the federal courts.

For the reasons stated, Complaint No. 01-10-90030 is dismissed, pursuant to 28 U.S.C. § 352(b)(1)(A)(i). See also Rules of Judicial Misconduct, Rule 11(c)(1)(A).

Feb 11, 2011
Date

Sandra L. Lynch
Chief Judge Lynch